



Appeal number: UT/2019/0135 (V)

CAPITAL GAINS TAX – taper relief- disposal of shares-periods when shares qualified consecutively as non-business assets and as business assets-how to allocate gain arising in the two periods-Taxation of Chargeable Gains Act 1992 Schedule A1 paragraphs 3 and 21

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

**(1) RICHARD LEE
(2) NIGEL BUNTER**

Appellants

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE & CUSTOMS**

Respondents

**TRIBUNAL: Mr Justice Miles
Judge Timothy Herrington**

Hearing conducted remotely by video conference deemed to be held in London on 13 October 2020

Julian Ghosh QC and Charles Bradley, Counsel, instructed by Bristows LLP, Solicitors, for the Appellants

Timothy Brennan QC and Christopher Stone, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and relevant facts

5 1. This is an appeal from the decision of the First-tier Tribunal (Tax Chamber)
(the “FTT”) (Judge Guy Brannan) released on 17 July 2019. By that decision (the
“Decision”) the FTT dismissed the appeal of the appellants, Mr Richard Lee and Mr
Nigel Bunter (together, “the appellants”) against HMRC’s determination as to the
10 Chargeable Gains Act 1992 (“TCGA”) to the gain arising on a disposal of shares
made by the appellants on 12 March 2003.

15 2. For part of the period during which the shares mentioned above were held by
the appellants, that is from 6 April 1998 to 5 April 2000, the shares were non-business
assets for taper relief purposes. In the period from 6 April 2000 to 12 March 2003 the
shares were business assets for the purposes of taper relief. In this decision, we refer
to these periods as the non-BATR and the BATR periods respectively.

20 3. The question to be determined is how the gain that arose on the disposal of the
shares on 12 March 2003 should be allocated in respect of the period when the shares
were consecutively a non-business asset and a business asset, that is the period
between 6 April 1998 and 12 March 2003. In summary, the appellants argue that most
of the gain should be allocated to the period when their shares qualified as business
assets due to the fact that there had been a dramatic increase in the value of the shares
after April 2000. They say that on a “just and reasonable” basis most of the gain
25 should be attributed to the period after April 2000. HMRC dispute this, arguing that
the gain should be time-apportioned over the relevant period of ownership. This
would have the result that the amount of the gain allocated to the period when the
shares were non-business assets is greater than would be the case on the appellants’
argument.

30 4. The FTT determined this issue in favour of HMRC. The appellants now appeal
to this Tribunal with the permission of Judge Brannan, sitting in the FTT.

35 5. HMRC contend that the legislation requires a straightforward application of a
prescriptive statutory rule to be found in paragraph 3 of Schedule A1 to the TCGA
which they say determines the precise answer to the question of how the gain on
disposal of an asset should be treated across consecutive statutory periods when for
part of those periods, the asset was a “business asset”, and for part it was not. The
appellants contend that the gain should be apportioned between the non-BATR and
BATR periods according to the amount of the gain that actually accrued during those
respective periods. They say this is required by paragraph 21(a) of Schedule A1
TCGA which provides that where any apportionment falls to be made for the
40 purposes of that Schedule, it shall be made on a “just and reasonable” basis.

The Law

6. As is well known, Capital Gains Tax (“CGT”) is payable on gains arising on the disposal of various assets, including investments such as shares. Broadly speaking, CGT is charged on the difference between the consideration received on the disposal and the acquisition cost.

7. Between tax years 1998/99 and 2007/08 inclusive a form of relief known as taper relief operated so as to reduce a chargeable gain. Taper relief operated so as to reduce the chargeable gain on the disposal of assets which, by s 2A TCGA were eligible for that relief. Pursuant to those provisions, a chargeable gain was eligible for taper relief if (i) it was a gain on the disposal of a business asset with a “qualifying holding period” of at least one year or (ii) it was a gain on the disposal of a non-business asset with a “qualifying holding period” of at least three years.

8. The relief operated by reducing the amount of the gain that was chargeable by reference to whether the gain was a gain on the disposal of a business or non-business asset and by reference to the number of whole years in the “qualifying holding period”. The relief was calculated by applying the table set out in s 2A(5) TCGA. The table provided (at the relevant time), in relation to business assets, that the gain on the disposal of a business asset that had been held for one whole year or more was reduced by 50% and by 75% where the asset had been held for two whole years or more. In relation to non-business assets, the gain started to be reduced after the asset had been held for three whole years or more, by 5% for each year that the asset was held, up to a maximum reduction of 60% after the asset had been held for 10 or more whole years. It can therefore be seen that the relief is greater for business assets than it is for non-business assets and the relief is greater the longer the period for which the asset is held.

9. The “qualifying period” was defined by s 2A(8) TCGA. In the case of a business asset, it was the period after 5 April 1998 for which the asset had been held at the time of its disposal. In the case of a non-business asset acquired before 17 March 1998, it was that period plus one year. It is therefore apparent that where an asset had been acquired before 6 April 1998 only the holding period from that date was relevant for the purposes of the application of taper relief even though gains may have accrued before that date.

10. Schedule A1 to the TCGA (“Schedule A1”) set out detailed provisions regarding the operation of taper relief.

11. As provided by paragraph 2 of Schedule A1, the rate of taper relief applicable to a gain depended both on whether the asset disposed of was a business asset or a non-business asset during the “relevant period of ownership” and on the number of whole years for which the asset had been held. Paragraph 2(2) defined the “relevant period of ownership” as being whichever is the shorter of the period after 5 April 1998 for which the asset been held at the time of its disposal and the period of 10 years ending with that time. It is apparent from that definition that the “relevant period of ownership” would not necessarily coincide with the actual period of ownership of the

asset in question. For example, the asset may have been acquired before 5 April 1998 or it may have been acquired more than 10 years before it was disposed of. Consequently, a period of ownership that fell outside the “relevant period of ownership” did not count for the purposes of taper relief.

5 12. Paragraph 3 of Schedule A1 is headed “Rules for determining whether a gain is a gain on the disposal of the business asset or non-business asset.” We set out that provision in full as follows:

10 “(1) Subject to the following provisions of this Schedule, a chargeable gain accruing to any person on the disposal of any asset is a gain on the disposal of a business asset if that asset was a business asset throughout its relevant period of ownership.

(2) Where—

(a) a chargeable gain accrues to any person on the disposal of any asset,

15 (b) that gain does not accrue on the disposal of an asset that was a business asset throughout its relevant period of ownership, and

(c) that asset has been a business asset throughout one or more periods comprising part of its relevant period of ownership,

20 a part of that gain shall be taken to be a gain on the disposal of a business asset and, in accordance with sub-paragraph (4) below, the remainder shall be taken to be a gain on the disposal of a non-business asset.

25 (3) Subject to the following provisions of this Schedule, where sub-paragraph (2) above applies, the part of the chargeable gain accruing on the disposal of the asset that shall be taken to be a gain on the disposal of a business asset is the part of it that bears the same proportion to the whole of the gain as is borne to the whole of its relevant period of ownership by the aggregate of the periods which—

(a) are comprised in its relevant period of ownership, and

(b) are periods throughout which the asset is to be taken (after applying paragraphs 8 and 9 below) to have been a business asset.

30 (4) So much of any chargeable gain accruing to any person on the disposal of any asset as is not a gain on the disposal of a business asset shall be taken to be a gain on the disposal of a non-business asset.

35 (5) Where, by virtue of sub-paragraphs (2) to (4), above, a gain on the disposal of a business asset accrues on the same disposal as a gain on the disposal of a non-business asset—

(a) the two gains shall be treated for the purposes of taper relief as separate gains accruing on separate disposals of separate assets; but

(b) the periods after 5th April 1998 for which each of the assets shall be taken to have been held at the time of their disposal shall be the same and shall be determined without reference to the length of the periods mentioned in sub-paragraph (3)(a) and (b) above.”

5 13. It is clear from paragraph 3(1) of this provision that if the asset concerned was held as a business asset throughout the relevant period of ownership then only the taper relief provisions applicable to business assets as referred to at [8] above are applied to the chargeable gain which has accrued on the disposal.

10 14. Paragraph 3(2) deals with the position where the asset concerned was, during part of the relevant period of ownership held as a non-business asset but was held as a business asset throughout one or more periods during the relevant period of ownership. In those circumstances, part of the gain is taken to be a gain on the disposal of a business asset and the remainder is to be taken to be a gain on the disposal of a non-business asset.

15 15. As Mr Ghosh QC, Counsel for the appellants, submitted, the way the provisions of paragraph 3 operate, when read together, is that for the purpose of applying the taper relief provisions to the overall chargeable gain, there are deemed to be two separate assets, namely a business asset and a non-business asset which means that there are deemed to be two separate disposals. Each of the deemed assets has a
20 qualifying holding period for the purpose of applying taper relief and then, depending on how long the qualifying holding period is, the deemed business asset attracts taper relief on the more generous basis set out in the table set out in s 2A(5) TCGA and the deemed non-business asset attracts taper relief on the less generous basis set out in the table. The effect of paragraph 3(5) is that both deemed disposals take place at the
25 same time. The overall gain, as provided in paragraph 3(3), is apportioned between the two deemed assets on a straight-line time basis.

16. Therefore, on the facts of this case, applying the provisions of paragraph 3 alone, without considering whether they need to be modified as a result of any of the other provisions of Schedule A1, the appellants each disposed of an asset in tax year
30 2002/03 which had been acquired before 17 March 1998. For the period from 6 April 2000 until 12 March 2003 the appellants were entitled to taper relief on the basis that the shares were a business asset, which meant that the percentage reduction in the chargeable gain attributed to that period was 75%. For the period from 6 April 1998 to
35 5 April 2000 the appellants were entitled to taper relief on the basis that the shares were a non-business asset, which meant that the percentage reduction in the chargeable gain attributed to that period was 15%, having taken account of the “bonus year”.

17. HMRC contend that there is no basis on which the results obtained by the application of the provisions of paragraph 3 need to be modified. By reference to the
40 opening words of paragraph 3, which provides that paragraph 3 is subject to the following provisions of Schedule A1, the appellants contend that the provisions of paragraph 21 of Schedule A1 are applicable.

18. Paragraph 21 of Schedule A1 is headed “General rule for apportionments under this Schedule.” We set out that provision in full as follows:

“Where any apportionment falls to be made for the purposes of this Schedule it shall be made—

5 (a) on a just and reasonable basis; and

(b) on the assumption that an amount falling to be apportioned by reference to any period arose or accrued at the same rate throughout the period over which it falls to be treated as having arisen or accrued.”

19. The principal question which arises on this appeal is whether the gain on the shares should be apportioned between the BATR period and the non-BATR period on a “just and reasonable basis” pursuant to paragraph 21 (a) of Schedule A1 rather than on the straight line time apportionment basis provided for by paragraph 3 because of the fact that most of the growth in value of the shares occurred in the BATR period.

The Decision

15 20. At [78] the FTT observed that paragraph 3(3) of Schedule A1 provided “a method of time apportioning a chargeable gain” where the asset was not held as a business asset for the whole of the relevant period of ownership.

21. At [79] the FTT held that “the clear words of the statute”, in this case the introductory wording of paragraph 3(3) referred to at [17] above, indicated that “Parliament intended paragraph 3(3) to be subject to, *inter-alia*, the provisions of paragraph 21.”

22. At [80] the FTT rejected HMRC’s submission that paragraph 3(3) is not a provision which requires an apportionment to be made, so that paragraph 3(3) falls outside the scope of the words “Where any apportionment falls to be made...” set out at the beginning of paragraph 21. The FTT said:

“It seems to me that the language of paragraph 3(3) does require an apportionment of the gain to be made to be made and gives an instruction as to how that apportionment is to be made. That provision states:

30 “... the part of the chargeable gain accruing on the disposal of the asset that shall be taken to be a gain on the disposal of a business asset is that part of it that bears the same *proportion* to the whole of the gain as is borne to the whole of the relevant period of ownership...” (Emphasis added)”

23. However, the FTT was not persuaded that paragraph 21 had the effect that the gains accruing to the appellants must be apportioned on the basis other than time apportionment. It said at [81]:

“It seems to me clear that paragraph 21(b) expressly envisages that the apportionment of an amount over the relevant period of ownership should be

5 done on the basis that the gain accrued at the same rate throughout the period. Effectively, this reinforces the view that, when a gain must be apportioned over a period of time, a time apportionment method is the correct method to use. From this it also follows, in my view, that a time apportionment of the gain between the BATR period and the non-BATR period cannot be regarded as being unjust or unreasonable.”

24. At [82] the FTT accepted HMRC’s submissions that paragraph 21(a) usually operates to apportion gains in circumstances other than allocation between time periods. At [83] the FTT recorded the appellants’ submission that paragraph 21 had to be applied in two stages: first, a just and reasonable apportionment under paragraph 21(a) and then, the assumption made by paragraph 21(b) was to be applied. The FTT rejected that submission on the basis that it was hard to see why it would be relevant that the gain so attributed should be deemed to accrue evenly during the period and that there was nothing in the language of the provision that suggested such a sequential approach.

25. At [84] the FTT observed that although it is a rough and ready method of apportionment, time apportionment is relatively simple and allows taxpayers to calculate their tax liabilities with certainty without having to resort to expensive valuation arguments. At [88] the FTT observed that capital gains tax has often been charged on the basis of artificially calculated gains and that whilst the statutory provision should generally be interpreted in line with business common sense, that principle must yield to the clear words of the statute. The FTT concluded at [89] as follows:

25 “In my view, the statutory provisions in this case are clear and require time apportionment even though the greater part of the gain in this case arose from the growth in value during the BATR period. I therefore consider that, in principle, the gains in relation to this appeal should be time apportioned in accordance with paragraph 3(3) and paragraph 21(b).”

30 **Grounds of Appeal and issues to be determined**

26. The FTT granted the appellants permission to appeal on the following four grounds:

(1) The Tribunal erred in holding that paragraph 21(a) “usually operates to apportion gains in circumstances other than allocation between time periods...” The appellants contend that the opening words of paragraph 21 make it clear that the “just and reasonable basis” mandated by paragraph 21(a) applies “where any apportionment falls to be made for the purposes of this Schedule...” (emphasis added).

(2) The Tribunal erred in holding that paragraph 21(b) required the apportionment of the appellants’ gains between the non-BATR and BATR periods to be made on a “straight-line” basis. The appellants contend that the assumption mentioned in paragraph 21(b) simply refers to the rate of accrual of

the relevant part of the gains within the non-BATR and BATR periods. In other words, paragraph 21(b) is applied after the gains have been apportioned between the non-BATR and BATR periods.

5 (3) Further or alternatively, the assumption in paragraph 21(b) is rebuttable. It is subject to the overriding requirement in paragraph 21(a) that the apportionment be made on a “just and reasonable basis”.

(4) On a just and reasonable apportionment, the amount of the appellants’ gains that should be apportioned to the non-BATR and BATR periods respectively is that amount of the gains that actually accrued during those periods.

10 27. In their Respondents’ Notice, HMRC contend that the FTT erred in rejecting HMRC’s submission that paragraph 21 was not relevant in the present case on the basis that the exercise required to be carried out by paragraph 3 was not apportionment. HMRC contend that an exercise of apportionment requires the exercise of judgment whereas paragraph 3(3) contains a formula or rule for
15 determining whether a gain was a gain on the disposal of a business for a non-business asset.

28. Furthermore, HMRC contend that the FTT made a finding of fact at [81] that the time apportionment of the gain between the BATR period and the non-BATR period “cannot be regarded as unjust or unreasonable”. Therefore, they contend, even
20 if the FTT was required to consider what a just and reasonable apportionment would be, that issue has already been determined and cannot be reopened on appeal.

29. What we have to determine is a short point of statutory construction. It seems to us that the appropriate way to proceed is to consider first the question as to whether HMRC are right in their contention that paragraph 21 was not relevant because the
25 rule laid down by paragraph 3(3) did not involve an apportionment which falls to be made for the purposes of Schedule A1. If that point is resolved in favour of HMRC, that is sufficient to dispose of this appeal. If we accept that the exercise to be carried out pursuant to paragraph 3(3) does involve an apportionment which is subject to the provisions of paragraph 21, it would be necessary to consider how in relation to the
30 facts of this case that apportionment must be undertaken in order to satisfy the “just and reasonable” requirement set out in paragraph 21.

Discussion

30. In his submissions, Mr Brennan QC, Counsel for HMRC, emphasised that paragraph 3 of Schedule A1 provided rules for determining whether a gain was a gain
35 on the disposal of a business asset or non-business asset, paragraph 3(1) addressing the straightforward case where an asset was a business asset throughout the relevant period of ownership, and paragraph 3(2) addressing the case where an asset was a business asset for any part of the relevant period of ownership. Mr Brennan submitted that paragraph 3 sets out a specific prescriptive formula for giving effect to taper relief
40 and there is very little scope for the application of an apportionment under paragraph 21. He said that, while not determinative, the heading to the paragraph added support to HMRC’s view.

31. Mr Brennan submitted that paragraph 21 would only apply in factual circumstances, related to particular assets, particular disposals or particular specific circumstances where more has to be done in order to do the calculations for the purposes of the Schedule. Otherwise, he said, paragraph 3 is a self-contained formula.

5 32. Mr Brennan submitted that the purpose of the rule in paragraph 3(3), which is a rule for determining how much of a gain was to be taken to be a gain on the disposal
the business asset is clear on its face. He submitted that it provides an administratively
simple arithmetical fractional division of any gain into the part that relates to a
business asset and to a non-business asset where the asset was the subject of the gain
10 was not a business asset throughout period, irrespective of the actual period of
ownership of an asset. He submitted that the application of this rule is not an
“apportionment” which “falls to be made for the purposes of this Schedule” in the
words of paragraph 21.

15 33. Mr Brennan submitted that the FTT erred at [80] in holding that the use of the
word “proportion” in paragraph 3(3) supported the contention that the provision
involves an “apportionment” falling “to be made”, so as potentially to engage
paragraph 21. Mr Brennan submitted that paragraph 3 prescribes the approach to be
taken. He gives the example of someone who is directed by another to divide an asset
into portions and is told what the relative size of those portions are to be. No
20 apportionment falls to be made by that person; he is simply doing what he was
directed to do. Likewise in this case, Mr Brennan submits, making an arithmetical
fractional apportionment of a gain where the asset was a business asset for only part
of the relevant period of ownership in accordance with the provisions of paragraph
3(3) is not an apportionment which falls to be made for the purposes of paragraph 21
25 – the legislation has directed how the gain is to be allocated.

34. Mr Ghosh, for the appellants, adopted the FTT’s conclusion that on its plain
words paragraph 3(3) was “subject to” the following provisions of Schedule A1,
which included paragraph 21. Mr Ghosh submitted that paragraphs 3(2) to (5)
required part of the actual gain made by the appellants on the disposal of their shares
30 to be attributed to a notional disposal of a “business asset” and part to be attributed to
a (separate) notional disposal of a “non-business asset”. Mr Ghosh submitted that this
exercise is clearly an “apportionment”. Accordingly, Mr Ghosh submitted, paragraph
21 applies to this “apportionment” and the natural reading that paragraph is that the
amounts of the overall gain are to be apportioned between the non-BATR periods and
35 the BATR periods on a just and reasonable basis under sub-paragraph (a), which in
this case requires that the part of the overall gain attributed to the notional disposal of
the “business asset” should be that part that in fact accrued while the shares were a
business asset. The assumption in sub-paragraph (b) is then applied to the rate of
accrual within those periods. In essence, Mr Ghosh submitted that the exercise to be
40 carried out pursuant to paragraph 3(3) is an apportionment and subject to paragraph
21, paragraph 3(3) directs how it is to be done. He characterised paragraph 3(3) as a
“default provision” which is “trumped” if there is a reason for doing so by applying
the “just and reasonable” requirements of paragraph 21(a).

35. Following the hearing of this appeal, the Court of Appeal released its judgment in *Total E & P North Sea UK Limited & another v HMRC* [2020] EWCA Civ 1419 (“*Total*”). That case concerned a statutory regime providing for a time-based method of apportionment and an alternative “just and reasonable” basis. At the request of the appellants we agreed to receive written submissions on that judgment. The appellants contend that the reasoning of the Court of Appeal in that case supports the submissions they made at the hearing of this appeal, as summarised above. At [36] to [43] below we gratefully adopt in large part Mr Ghosh’s summary of the background to the Court of Appeal’s judgment and its reasoning.

36. In *Total*, the taxpayers were subject to corporation tax on their “ring-fence profits” (in essence, profits from North Sea oil extraction) and to a “supplementary charge” on their “adjusted ring fence profits” (in essence, ring-fence profits leaving out finance costs). On 23 March 2011, the Government announced that the rate of the supplementary charge would increase from 20% to 32% with immediate effect.

37. The implementing legislation, s 7 of the Finance Act 2011 (“FA 2011”), made provision for cases “where a company has an accounting period beginning before 24 March 2011 and ending on or after that date (“the straddling period”)”. In such cases sub-sections (4)-(6) provided as follows:

“(4) For the purpose of calculating the amount of the supplementary charge on the company for the straddling period—

(a) so much of that period as falls before 24 March 2011, and so much of that period as falls on or after that date, are treated as separate accounting periods, and

(b) the company’s adjusted ring fence profits for the straddling period are apportioned to the two separate accounting periods in proportion to the number of days in those periods.

(5) But if the basis of apportionment in subsection (4)(b) would work unjustly or unreasonably in the company’s case, the company may elect for its profits to be apportioned on another basis that is just and reasonable and specified in the election.

(6) The amount of the supplementary charge on the company for the straddling period is the sum of the amounts of supplementary charge that would, in accordance with subsections (4) and (5), be chargeable on the company for those separate accounting periods.”

38. Consequently, the tax payable by the company for its actual accounting period was computed by deeming the company to have had two separate accounting periods and apportioning the profit of the actual accounting period between the deemed accounting periods. That apportionment was to be carried out by time, subject to the right of the taxpayer to elect for apportionment “on another basis that is just and reasonable”.

39. The taxpayer companies, each of which had an accounting year end of 31 December, made an election under s 7(5) FA 2011 and apportioned the profits of their actual accounting periods by calculating the profits of the periods 1 January to 23 March (“the Earlier Period”) and 24 March to 31 December (“the Later Period”) as if
5 they were separate accounting periods. The result was that 100% of the profits were apportioned to the Earlier Period. This was because the companies had each incurred substantial capital expenditure in the Later Period that qualified for 100% capital allowances and so reduced the profits of the Later Period, viewed in isolation, to nil.

40. The dispute between the parties was over the scope of s 7(5) FA 2011.
10 HMRC’s argument was that s 7(5) permitted a departure from time-apportionment only in the case of exceptional circumstances unique to the company (and only to the extent necessary to accommodate those exceptional circumstances) and not merely because of factors producing the sort of variations in profits over time generally experienced by all companies.

15 41. The Upper Tribunal agreed with HMRC. The Upper Tribunal had said that time-apportionment was intended to be the default method and therefore that “factors which affect companies generally...would not be expected to make time apportionment unjust or unreasonable”. The Upper Tribunal identified the intention behind the statutory regime as being that “in the ordinary course time apportionment
20 is just and reasonable even where profits are not smooth”.

42. The Court of Appeal, reversing the Upper Tribunal, rejected this analysis. Newey LJ (with whom Andrews and King LJ agreed) said at [33]:

25 “I do not see...that the fact that time apportionment represented the default position says anything important about when a company could elect for a different basis of apportionment. At most, it might be inferred that something of more than minimal significance was needed to justify departure from time apportionment.”

43. Newey LJ went on to say at [38]:

30 “I do not think the application of section 7(4) could be said to work "unjustly or unreasonably" unless time apportionment would prejudice the company in question to a more than minimal extent. It seems to me, however, that any company which earned profits at a significantly faster rate in the Earlier Period than the Later Period, and so stands to be materially prejudiced by time apportionment, can avail itself of section 7(5). It matters not, in my view,
35 whether the differential profitability arose from the exceptional or the routine. The FTT thought that section 7(5) applies to all companies "whose profits are not smoothly spread throughout the year, but whose profits differ greatly from one part of the year to the other, and who could be disadvantaged by ... a change of tax rate part way through an accounting period". I agree.”

40 44. Mr Ghosh submits that the analysis rejected by the Court of Appeal in *Total* is the same as that advanced by HMRC in the present case. He submits that the dispute between the parties in the present case, like the dispute in *Total*, is not whether

paragraph 21 ever applies in place of paragraph 3 (3) (HMRC concede that sometimes it does) but in what circumstances Parliament intended it to do so.

45. Mr Ghosh submits that HMRC's submission that the default rule in paragraph 3 (3) prescribes how the apportionment is to be made cannot be right in view of the Court of Appeal's judgment in *Total*. He submits that the following propositions are clear from that decision:

(1) There was no suggestion that the default rule in s 7(4)(b) FA 2011, which required the profits to be apportioned to the deemed accounting periods "in proportion to the number of days in those periods" was somehow not an "apportionment", despite the rule requiring no exercise of judgment.

(2) The fact that time-apportionment is the default says nothing important about when time-apportionment will be unjust or unreasonable. In particular, that time-apportionment is the default does not imply that time apportionment is ordinarily just and reasonable even where the accrual of the sum to be apportioned is not "smooth".

(3) Time-apportionment will not be just and reasonable where it is prejudicial to a "significant", or "more than minimal" extent. In the present case time-apportionment would on any view prejudice the appellants to a very significant extent given the great difference in the accrual of the gain in the non-BATR and BATR Periods.

46. Mr Ghosh submits that the Court of Appeal plainly did not see any problem in the alternative just and reasonable basis being very widely applicable and likewise in the present case, there is no reason to suppose it inherently likely that Parliament intended paragraph 21 (a) to be restricted solely to the limited situations identified by HMRC. Furthermore, he submits, the Court of Appeal saw no difficulty at all in applying a just and reasonable apportionment by reference to the facts and circumstances surrounding the different rates at which the profits arose in the Earlier Period and the Later Period. Under both s 7 FA 2011 and Schedule A1 TCGA 1992, the taxpayer is to consider whether there is evidence suggesting that time-apportionment would not be just and reasonable and, in the default of such evidence, time apportionment will apply.

47. We accept HMRC's analysis of how the relevant provisions operate in this case. Although, as a matter of language, Mr Ghosh is right in his submission that the exercise required to be undertaken by paragraph 3 could be described as an "an apportionment" in our view the paragraph provides a complete answer as to what the necessary apportionment will be. In our view the exercise would be more aptly described as the application of a formula, that is in essence a rule (as the heading to the provision indicates) for determining whether a particular gain was a gain on the disposal of a business asset or a non-business asset. It does so by reference to the period of time during the relevant ownership period that the asset was a business asset and the period during which it was a non-business asset. The rule leaves no scope for the application of any judgment in making the determination. If it is an

apportionment, it is not one that calls for the exercise of any judgment on the part of the person applying the statutory provisions. By way of contrast, the application of paragraph 21, requiring as it does any apportionment that falls within its scope to be made on a “just and reasonable” basis does require the exercise of judgment.

5 48. Therefore, in our view, the application of paragraph 3 leaves no scope, except in
the limited circumstances that we refer to below, for a further apportionment to be
undertaken by the application of provisions of paragraph 21. Where the amount of the
gain to be attributed to the business asset and the amount of the gain to be attributed
10 to the non-business asset has been determined by carrying out the exercise required by
paragraph 3, no apportionment “falls to be made for the purposes of [Schedule A1]”.

49. As Mr Brennan submitted, it may nonetheless be necessary or expedient in
some cases to apply paragraph 21 in order to complete the calculations required to be
made by paragraph 3. That will be the case, for example, where an asset was in partial
15 use for business purposes during any year during the relevant ownership period that
was not used at all the rest of the year, because the business concerned is seasonal. In
those circumstances, it would not be just and reasonable to deprive the taxpayer of all
of the business asset taper relief to which he would have been entitled had the asset
been used for business purposes for the whole of the year in question. The application
of the apportionment required in those circumstances would require the exercise of
20 some judgment by reference to the underlying facts and circumstances.

50. In our view, any other interpretation leads inevitably either to the conclusion, on
the one hand, that paragraph 21 in effect overrides paragraph 3 in its entirety or, on
the other hand, leads to the same result as would be obtained by the application of
paragraph 3. We think that it is unlikely that Parliament either, on the one hand, went
25 to the trouble of setting out a specific rule for the calculation of taper relief for
business assets in paragraph 3 but allowed that rule to be overridden in its entirety
when it was “just and reasonable” to do so, without any further guidance as to the
criteria to be applied in deciding whether it was necessary or expedient to do so or, on
the other hand, had in effect decided that the application of the formula prescribed by
30 paragraph 3 was “just and reasonable”. The first of those interpretations gives no
substance to the provisions of paragraph 3 and the second adds nothing extra to what
has already been legislated for by paragraph 3.

51. In our view, Mr Ghosh’s submissions lead inevitably to the first of those two
conclusions. He says that the application of paragraph 21 is required to create a “just
35 and reasonable” result in circumstances when the chargeable gain on the assets
concerned occurred almost entirely within the period during which the asset
concerned was a business asset. He says that is consistent with the purpose of the
legislation, which is to reward entrepreneurship by giving much more generous taper
relief to business assets than to non-business assets. However, despite stating that the
40 provision could also operate in HMRC’s favour, he had no satisfactory answer to the
question as to whether in circumstances where all of the gain occurred during the
period when the asset concerned was a non-business asset it would be just and
reasonable for there to be no taper relief at all to be given in respect of the business

asset. His submissions appeared to be based purely upon what would suit the circumstances of the appellants' particular case.

52. There is nothing in the legislation to suggest that Parliament intended that the level of taper relief should be determined by reference to the period in which the gain is concerned arose. Instead, it provided a formula based purely upon the time during the "relevant period of ownership" that the asset concerned was a business asset. As the FTT recognised in the Decision, it is often the case that capital gains tax reliefs operate on a "rough and ready" basis and that the tax has been charged on the basis of artificially calculated gains.

53. As Mr Brennan submitted, the eligibility for business taper relief had nothing to do with when, in time, the gain accrued. Nor did it have anything to do with whether, at any particular time, the relevant asset was a business asset or a non-business asset. For example, there could have been an asset where the entirety of the gain had occurred before the start of the relevant period of ownership and at a time when it was held as a non-business asset. That gain would benefit from the more generous taper relief applicable to business assets if the asset was held as a business asset for the relevant qualifying period during the relevant period of ownership, notwithstanding the fact that no gains were made whilst it was so held. In our view, that kind of result clearly indicates that as Mr Brennan submitted, the intention of the relief was to reward the taxpayer with greater relief the longer the asset was held.

54. Mr Ghosh's characterisation of the formula in paragraph 3(3) as being a "default method" would lead to a very odd result. On the basis of his submission that a "just and reasonable" apportionment requires an apportionment based on when the gains occurred, the "default method" would apply only if the gain happens to have occurred on an exact straight-line basis, which is statistically highly improbable. We do not believe that Parliament set out a detailed method in paragraph 3 (3) which will almost never apply.

55. The second of the possible alternative conclusions described at [50] above was effectively reached by the FTT in the Decision. The FTT's reasoning in effect amounts to saying that application of paragraph 3(3) leads to a "just and reasonable result" without more and gives no practical effect to paragraph 21 (b). As Mr Ghosh submitted, the consequence of the FTT's interpretation is that, where a gain has to be apportioned between different periods of time, the default straight-line apportionment in paragraph 3(3) is "subject to" paragraph 21 and paragraph 21 (b) then mandates exactly the same straight-line apportionment.

56. Whilst Mr Ghosh relies on that submission in support of the appellants' contention that paragraph 21 can substantively alter the operation of the formula in paragraph 3(3), in our view it reinforces the conclusion that paragraph 21 was not intended to have that effect. It follows that we also reject Mr Ghosh's submission that the assumption in paragraph 21(b) is rebuttable. There is simply nothing in the language of the provision to suggest that to be the case.

57. In our view, *Total* does not assist the appellants. As HMRC submit, the statutory provisions relevant in that case address a different tax altogether in its own, different, statutory structure and there is no overlap with the taper relief provisions of the TCGA. Section 7 FA 2011 was enacted many years after the provisions in issue in the present appeal were repealed. There are no principles of general application to be found in that legislation. As HMRC correctly submit, the structure of s 7 FA 2011 is quite different from that of the taper relief provisions with which we are concerned in this case.

58. As we have found in relation to paragraph 3 of Schedule A1, the initial exercise of time-apportionment referred to in s 7(4)(b) FA 2011 did not require any exercise of judgment, because the proportions were fixed by the legislation. Section 7(5)(b) FA 2011 then gave the taxpayer a right of election for its profits to be apportioned on another basis if time apportionment would work unjustly or unreasonably. There is therefore a right for the taxpayer to elect for a different basis of apportionment if the relevant conditions were met.

59. As HMRC submit, that is in marked contrast with the provisions of the TCGA in this case, which make no provision for any election, or choice, on behalf of the taxpayer, as to how taper relief should apply. As we have said, the way in which taper relief applies is definitively determined by the provisions of paragraph 3(3) of Schedule A1. The construction of the relevant provisions of the TCGA seen in context have led us to the conclusion that where the amount of the gain to be attributed to the business asset and the amount of the gain to be attributed to the non-business asset has been determined by carrying out the exercise required by paragraph 3, no apportionment “falls to be made for the purposes of [Schedule A1]”. There is nothing in s 7 FA 2011 or the reasoning of the Court of Appeal in *Total* which casts doubt on that analysis. It is important to stress that whilst time apportionment under s 7 FA 2011 is clearly a default provision, as we have found, there is nothing in the wording of paragraph 3 of Schedule A1 TCGA which suggests that it was intended to operate as a default provision and, as we have said, a very odd result would follow were that found to be the case.

60. We therefore conclude, for reasons different to those given by the FTT, that in this case paragraph 3 of Schedule A1 is to be applied without the need to make any adjustment to the resulting calculation of taper relief for the BATR and the non-BATR periods on a “just and reasonable basis” pursuant to the provisions of paragraph 21.

61. In reaching that conclusion, we have not found it necessary to deal with HMRC’s alternative case that the FTT had in any event decided, as a matter of fact, that it was “just and reasonable” to make a time apportionment of the gain. That case was not pursued with any vigour before us, and we would simply observe that the passage relied on in the Decision at the end of [81] does not in our view amount to a finding of fact. Rather, it appears to be simply a statement to the effect that the application of time apportionment was the correct approach to arrive at a “just and reasonable” result.

Disposition

62. The appeal is dismissed.

Signed on original

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MR JUSTICE MILES

JUDGE TIMOTHY HERRINGTON

UPPER TRIBUNAL JUDGES

RELEASE DATE: 21 December 2020

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