



Appeal number: TC/2018/00222

TYPE OF TAX – Capital Gains Tax -

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AMIT PATEL

Appellant

- and -

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

TRIBUNAL: JUDGE PETER HINCHLIFFE

Sitting in public at Taylor House, London EC1 on 15th July 2019

Zizhen Yang for the Appellant

Iona Stevenson, Officer of HM Revenue and Customs, for the Respondents

DECISION on PRELIMINARY ISSUE

1. The Appellant applied under rule 5(3) (j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the “Rules”) for this appeal to be stayed pending the outcome of certain civil litigation against the Appellant arising out of the transaction that gave rise to the assessment to tax that is the subject of this Appeal.
2. This Appeal has been stayed on two previous occasions at the request of both parties.
3. The Respondents object to the Appellant’s application to stay these proceedings.

Background

4. The material facts that are relevant to the determination of this application are largely agreed by the parties. It is agreed that:
 - The Appellant was a director and 60% shareholder of a company, Auden McKenzie (Pharma Division) Ltd (“AM(P)”) that was sold on 29 May 2015.
 - The Appellant’s share of the proceeds of the sale of AM(P) and the first “earn-out payment” to shareholders following the sale was in excess of £200 million.
 - The Appellant declared a significant chargeable gain on the sale of his shares in AM(P) in his 2016 self-assessment tax return.
 - The Appellant claimed a sum of £14,611,800 as a deduction in computing the chargeable gain on the disposal of his shares in AM(P) (the “Shares”). This sum (the “Settlement Amount”) is the amount that the Appellant paid to the Respondents on 14 March 2016 in order to settle the tax liability that AM(P) had accrued in respect of a series of transaction that AM(P) had entered into prior to the sale of the Shares in order to extract funds from AM(P) for the ultimate benefit of the Appellant and his family.
 - Following the sale of the Shares, the purchasers of the Shares have brought civil claims against the Appellant alleging a breach of the warranties in the agreement for the sale of the shares and misrepresentation on the part of the Appellant in connection with the sale of such shares (together the “Civil Claims”).
5. The Respondents stated that they are fully defending the Civil Claims. However they submit in these proceedings that the Appellant’s potential liability in respect of the Civil Claims could exceed the amount of the chargeable gain on the sale of the Shares. The Respondents have not taken issue with the Appellant’s submissions regarding the scale of the potential liability of the Appellant in respect of the Civil Claims.
6. In March 2018 the Appellant notified the Respondent of the litigation relating to the Civil Claims. The Appellant stated that a potential consequence of the litigation was that he may make a claim under s 49 of the Taxation of Chargeable Gains Act 1992 for tax relief in relation to the chargeable gain on the sale of the Shares originally declared in the Appellant’s 2016 self-assessment tax return.

7. The parties agreed to a stay of this appeal in order to allow more information to be gathered on the likely impact on this appeal of the litigation relating to the Civil Claims. The Appellant sought a three month extension to that stay on 1st February 2019. The Respondents object to such an extension.

The Appeal

8. The Appellant submits that it is not necessary for me to understand the parties' argument in the substantive issues in this appeal in detail. The appeal has been designated as complex and the Appellant has not opted out of the costs regime. In simple terms the Appellant is saying that the total consideration that the Appellant received upon the sale of the Shares should be reduced by the amount of the Settlement Amount. This would have the effect of reducing the Appellant's tax liability in respect of his gain on the sale of the Shares.

9. The Appellant states that the Civil Claims constitute a contingent liability for the Appellant that may, if successfully established, reduce the value of the consideration received from the sale of the Shares. If the Appellant was to incur liability under the Civil Claims he would be entitled, on making a claim under s 49 Taxation of Chargeable Gains Act 1992 ("TCGA") 1992, to an adjustment of the gain he is to be treated for the purposes of calculating liability to capital gains tax as having received from the sale of the Shares. Such an adjustment, the Appellant says, could reduce the Appellant's gain to nil. In such circumstances there would be no need to proceed with this appeal as it would make no difference to the Appellant's liability to capital gains tax on the sale of the Shares, which would be nil irrespective of whether the cost of the Settlement Amount is deductible from the consideration received from the sale of the Shares or not.

10. The Appellant also argues that if the resolution of the Civil Claims does not reduce the Appellant's liability to tax on the sale of the shares to nil, then it would still be best to stay these proceedings so that they could then be considered alongside any other appeal that may be pursued as a consequence of the s 49 TCGA claim that it may submit.

11. The Respondents submit that it is their policy that where there is more than one dispute between it and a taxpayer, each dispute must be considered and resolved on its own merits and not as part of an overall package. In this case where capital gains tax falls due and at a later date relief becomes available under s 49 of TCGA 1992, a taxpayer must pay the tax due in the earlier period and can receive tax relief only at the point that the claim under s 49 is finalised. There is no prejudice to the Appellant's ability to bring a further claim under s 49 in the future if this appeal is determined now.

The Law

12. Section 49 of the Taxation of Chargeable Gains Act 1992 (set out below) provides for an allowance to be made for any contingent liability made on the disposal of property such as shares when computing the gain on such property. Section 49 (2) below sets out that this may occur when such a contingent liability has become enforceable.

“49 Contingent liabilities

(1) In the first instance no allowance shall be made in the computation of the gain—

(a),

(b),

(c) for any contingent liability in respect of a warranty or representation made on a disposal by way of sale or lease of any property other than land.

(2) If it is subsequently shown to the satisfaction of the inspector that any such contingent liability has become enforceable, and is being or has been enforced, such adjustment, whether by way of discharge or repayment of tax or otherwise, shall be made as is required in consequence.

(3) Subsection (2) above also applies where the disposal in question was before the commencement of this section.”



The Tribunal Rules

13. This Tribunal has authority under the Rule 5 (3) (j) of the Rules (set out below) to stay this appeal. In considering whether to do so the Tribunal shall have regard to the overriding objective of the Tribunal, which is set out at Rule 2 below:

2.—

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

Case management powers

5.—(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) The Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction—

(a).....

(j) stay (or, in Scotland, sist) proceedings;

The issue to be resolved in this application

14. The Appellant submits that the Tribunal should exercise its discretion to stay these proceedings in order to avoid a position where the Appellant, the Respondents and the Tribunal all incur time and cost on proceedings that turn out to have been unnecessary. The appeal would become unnecessary if the capital gains tax liability to which it relates is extinguished in its entirety due to the Appellant's liability under the Civil Claims exceeding his gains on the sale of the Shares. The Appellant states that such an outcome is straight forward and common-sense and would represent a fair and just course of action for the Tribunal to take. It would represent a proportionate and flexible approach and save costs including public funds, either because this appeal does not then proceed or because it will proceed at the same time as any other appeal that might arise out of a claim by the Appellant under section 49 **TGCA** in respect of the amount of the chargeable gain on the sale of the Shares.

15. The Appellant submits that any prejudice that the Respondents may suffer by reason of a stay can be adequately addressed by the payment of interest by the Appellant on any delay in paying tax.

16. The Respondents object to a further stay of this appeal and submit that the Tribunal should follow its overriding objective and avoid delay in so far as this is compatible with proper consideration of the issues. They have consented to two stays so far lasting seven months, but confirm that there is still no date for resolving the issues causing the delay. It would not be fair and just to delay further. The Respondents state that it would be contrary to their obligation to apply the law fairly and consistently if they were, in effect, to agree to postpone the payment of tax that is properly due from the Appellant now. In any event there is no certainty that the contingent liability will arise or that the resolution of the Civil Claims will have an impact on this appeal. **Furthermore, any claim under s 49 (2) of TGCA can only be made as and when the Civil Claims are resolved.** The Respondents also argue that interest on the sums that should have been paid by the Appellant but for this appeal being pursued may still be required, which may mean that the issues in this appeal may still need to be resolved.

17. At the hearing **the Respondents** confirmed that no claim under section 49 (2) had been submitted and that this may not happen until 2020. The Appellant continues to resist liability for the Civil Claims. However the Appellant provided a witness statement from his legal adviser confirming that they expect to make a claim under s 49 (2) in due course.

Decision

I have taken account of the extensive and helpful submissions, witness statement and supporting documentation provided by the parties. I have summarised the background

to this appeal above. This is not intended as, and does not need to be, a complete and wholly accurate summary of the Civil Claims or the issues in the appeal.

18. In order to resolve this application I need to decide whether the overriding objective of the Tribunal is best served by staying these proceedings or by letting them continue. This involves weighing up the factors set out in Rule 2, in this case this is primarily the impact in terms of delay and costs, in order to determine the fair and just way for this appeal to proceed.

19. I note that a significant part of the Appellant's justification for the stay that they seek in this application is that the outcome in relation to the Civil Claims is one that they are presently opposing in that litigation. The Appellant asks me to base my decision on this application, at least in part, on an assumption that the defence that they are pursuing in respect of the Civil Claims will not succeed. I also take into account that if the Appellant does incur liability in respect of the Civil Claims, this will not impact on this appeal unless and until; (i) the Appellant's liability in respect of the Civil Claims is for a sum that reduce their liability for tax on the sale of the Shares to zero; (ii) the Appellant elects as a consequence to submit a claim in respect of a contingent liability under s 49 (2) of TCGA; and (iii) the Respondents accept that claim in full. In all other circumstances the issue in this appeal may still need to be determined.

20. The Appellant asks me to base my decision on an assumption as to what the Appellant will do in the future. I must consider if the Appellant will make a claim under s 49 (2) of TCGA in circumstances where the Appellant has failed to take such a step to date despite the Appellant saying that enforcement action is being taken in respect of a contingent liability. A witness statement from the Appellant's legal adviser indicates that it is their current intention to take such a step, but this falls short of committing the Appellant to this course of action. The Appellant also asks me to consider if they may bring another appeal later on arising out of the s 49 (2) claim and to accept that the two appeals would be better and more efficiently considered at the same time.

21. I am not persuaded that in the particular circumstances of this application it is fair and just for the Tribunal to stay an active appeal on the basis that the party seeking such a stay may elect in the future to submit a further claim to the Respondents or may bring another appeal against the Respondents in the future. If two appeals involving consideration of similar fact were already in existence and were proceeding on different timescales, then the argument for staying the first of them could be strong. This appeal involves two well advised and financially strong parties dealing with complex issues in an appeal that may be affected by the outcome of other litigation, or by the impact of other claims under tax legislation that may be submitted in the future or by the tactical choices that the Appellant may make in this appeal or in respect of the Civil Claims. It remains quite possible that this appeal will still need to be determined when the outcome of the Civil Claims, any s 49 TCGA claim and the tactical choices of the Appellant are known. The Appellant is entitled to pursue a position in the Civil Claims whilst arguing here that it may not succeed, but this does

add to the uncertainty that any benefits in terms of cost savings will arise if the stay is extended. In the circumstances I consider that the definite benefits in terms of avoiding delay and complexity if the appeal proceeds at this time outweigh the potential benefits in terms of reduced costs that would arise in the event that this appeal were to be rendered unnecessary by subsequent events.

22. For this reason and taking account of all of the circumstance of this application and the overriding objective of the Tribunal I dismiss this application.

23. The stay of the case is lifted.

24. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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.

PETER HINCHLIFFE
TRIBUNAL JUDGE
RELEASE DATE: 02 AUGUST 2019