TC06983

Appeal number: TC/2015/02892 & TC/2015/04780

INCOME TAX – CAPITAL GAINS TAX – sale of business or exploitation of name and reputation – capital or income nature of funds – goodwill – profits of trade, profession or vocation – section 5 Income Tax (Trading and Other Income) Act 2015 – Part 13, Chapter 4, Income Tax Act 2007

FIRST-TIER TRIBUNAL
TAX CHAMBER

RICHARD VILLAR **Appellant**

- and -

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

TRIBUNAL: Judge Rachel Mainwaring-Taylor
Mrs Ruth Watts-Davies

Sitting in public at the Royal Courts of Justice, London on 13 June 2017

Keith Gordon of Counsel, instructed by Harbottle & Lewis LLP, for the Appellant

Elizabeth Wilson of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The Appellant appeals against:

(1) An amendment to his self-assessment tax return for the year 2009/10 increasing his income tax liability by £486,931.31; and

(2) An assessment to income tax made under section 29 Taxes Management Act 1970 (**TMA 1970**) dated 31 March 2015 for the tax year 2010/11 increasing his income tax liability by £316,181.75.

2. The above assessments are in the alternative and both turn on whether the Appellant is liable to income tax on a payment of £1m.

3. The Appellant is a renowned orthopaedic surgeon specialising in hip arthroscopic procedures. On 31 March 2010, the Appellant entered into an agreement (**the SPA**) with Spire Healthcare Diagnostics Limited (**Spire**), a subsidiary of Spire Healthcare Limited (**Spire Healthcare**), for the sale and purchase of the business of 'The Richard Villar Practice', for which he received a payment of £1m upon completion on 1 July 2010.

4. The Appellant submitted his 2009/10 self assessment tax return on or shortly before 4 February 2011. In it, he returned the £1m payment as capital and claimed entrepreneur's relief.

5. By a letter dated 29 February 2012 HMRC opened an enquiry into the 2009/10 tax return under section 9 TMA 1970.

6. On 25 September 2014 the Appellant's tax advisor made an application to close the enquiry and on 28 July 2015 HMRC issued a formal closure notice which amended the 2009/10 return to assess the £1m payment as income.

7. The Appellant submitted his 2010/11 self assessment tax return on 23 January 2012. The enquiry window under section 9 TMA 1970 expired on 23 January 2013. By letter dated 30 May 2013 HMRC began a discovery investigation under section 29 TMA 1970.

8. By letter dated 31 March 2015 HMRC made a protective discovery assessment in respect of the tax year 2010/11 under section 29 TMA 1970, recording the £1m payment as income and taxing it (less £45,233 expenses) accordingly, resulting in a total 2010/11 income tax liability of £558,144.67 (as opposed to the income tax liability originally returned of £80,761.17).

9. The Appellant appealed the 2010/11 discovery assessment to HMRC on 2 April 2015 and to the Tribunal on 22 April 2015, disputing the liability assessed and the validity of the assessment.

10. The Appellant appealed against the amendment to the 2009/10 return on 11 August 2015.

11. Essentially, the Appellant's position is that he received the £1m payment as consideration for the sale of a business as a going concern and therefore it should properly be assessed to capital gains tax, whereas HMRC argue that the payment was in fact income in nature, being effectively an advance for services provided and so subject to income tax.

12. The question is whether the £1m payment received by the Appellant should be subject to income tax or capital gains tax. HMRC argues primarily that the payment is revenue in nature and, in the alternative, that even if it is capital at law, it should be treated as income under the provisions of Part 13, Chapter 4 (**Chapter 4**), Income Tax Act 2007 (**ITA 2007**).

13. The Appellant argues that the payment was consideration for the sale of a business and as such is clearly capital in nature and that Chapter 4 is expressly disapplied on the sale of a business.

Relevant law

14. The Income Tax (Trading and Other Income) Act 2015 (**ITTOA 2015**) provides that:

> (1) "Income tax is charged on the profits of a trade, profession or vocation" (section 5); and
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> (2) "The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes" (section 25(1)).

15. Part 13, Chapter 4, ITA 2007) provides for the imposition of a charge to income tax in certain circumstances where an individual obtains a capital sum:

> (1) Section 773(2) states that income is to be treated as arising under Chapter 4 only if:
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> (a) "Transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation; and
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> (b) The main object or one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax".
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> (2) Section 776 provides that income tax is to be charged on income treated as arising under section 778 or 779, on the full amount of income treated as arising in the tax year, with the liability to tax falling on the person to whom income is treated as arising, subject to an exemption contained in section 784.
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> (3) Section 777 sets out the conditions for sections 778 and 779 to apply:
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> (a) "Condition A is that the individual carries on an occupation wholly or partly in the United Kingdom";

(b) "Condition B is that transactions are effected or arrangements made to exploit the individual's earning capacity in the occupation by putting another person…in a position to enjoy…all or part of the income or receipts derived from the individual's activities in the occupation; or…anything derived directly or indirectly from such income or receipts".

(c) "Condition C is that as part of, or in connection with, or in consequence of, the transactions or arrangements a capital amount is obtained by the individual for the individual or another person".

(4) Section 778 deals with income arising where a capital amount (other than property or a right derived from the individual's activities) is obtained and provides that the capital amount is treated for income tax purposes as income arising to the individual in the tax year in which the capital amount is receivable.

(5) Section 784 contains an exemption from Chapter 4 for the sale of a going concern i.e. where the "capital amount is obtained from the disposal of assets (including any goodwill) of a profession or vocation". In such cases the "individual is not liable to income tax under [Chapter 4] so far as …the value of what is disposed of at the time of disposal is attributable to the value of the profession or vocation as a going concern".

Evidence

16. We heard evidence from Mr Gary Ashford, a tax advisor, and from the Appellant.

17. HMRC suggested that Mr Ashford's witness statement should not be admissible. We decided to hear his evidence in chief and in cross-examination and concluded that it had little impact on the matter at hand. Mr Ashford was not involved at the time of the sale in 2010; he was not a qualified lawyer; and he said he was not holding himself out as an expert. (There had been no agreement between the parties as to experts.) His comments were largely anecdotal and opinion and we have not taken them into account in our decision.

18. The Appellant gave extensive evidence and we found him to be a credible witness.

19. We also examined the documents provided in the bundles and in particular the valuation of the business (**the Valuation**), the SPA and the Consultant Services Agreement (**the CSA**).

Submissions

20. There were essentially two arguments:

(1) Whether the £1m received by the Appellant was capital or income in nature; and

(2) If it was capital in nature, whether the provisions of Chapter 4 applied so that it was nonetheless taxed as income.

Capital or income

21. Mr Gordon made the Appellant's case as follows.

22. The £1m constituted capital in the Appellant's hands, being consideration for the sale of his business.

23. The Appellant had built up a practice that could be sold to a third party and this was demonstrated by (i) the Appellant's own evidence given in his witness statement and in person; (ii) the Valuation which detailed the business and its value to the third party purchaser; and (iii) the fact that an unconnected third party, Spire, did indeed purchase the business for a price consistent with the Valuation.

24. The Appellant had developed a loyal worldwide following through his private orthopaedic surgery practice, carried on under the name of the Richard Villar Practice. He ran this practice under what was then a unique business model within the UK private medical sphere, in which patients would come to the practice, of which the Appellant was the figurehead, rather than to a specific named practitioner. This made the practice a business, in contrast to the way consultant surgeons more usually worked.

25. That the practice did constitute a business capable of sale was demonstrated by the Valuation which was carried out independently when the Appellant began to contemplate retirement. The fact that the business had to date been so dependent on the Appellant and his name and reputation and the risk that represented to a purchaser were taken into account by the valuer and, to reflect these factors, he applied a conservative multiplier of two in calculating the value on the earnings basis.

26. The sale of the business involved, inter alia, the disposal by the Appellant of his right to earn any income from the practice and the transfer of all intellectual property including the database of former patients, website domain name and the business name, all of which belonged to the Appellant, in return for the sum of £1m.

27. That right to earn any income from the practice was transferred from the Appellant to Spire and the Appellant was precluded from carrying out any paid work in the UK as a consultant surgeon, except through Spire, which engaged him on an ad hoc basis through his private services company, Vineyard Press Limited (**Vineyard**). Spire had no right to require the Appellant to provide any services, through Vineyard or otherwise. Indeed Spire were aware that the Appellant wished to continue volunteering on dangerous relief missions and that this meant there was a real prospect of him not being in a position to provide surgical services after the sale. Neither the Appellant nor Vineyard had any right to require Spire to engage the Appellant's services. So the sale of the business led to Spire controlling the extent to which the Appellant was able to practise in the UK.

28. Whilst the Appellant did continue to work in the practice, through Vineyard, for Spire, after the sale:

> (1) He was paid separately for that future work at a commercial rate. The Appellant had explained that 75% of the fee seemed reasonable to him based

on his own experience of administration costs prior to the sale. It equated to what he believed his time and skill to be worth;

(2) His role for Spire was substantially different from that at the Wellington. He no longer ran the practice or took decisions on its administration and management. At the Wellington, he had received the whole fee for work carried out and had then had to pay the hospital for services they provided, to pay some 'members of staff' for services etc. He was in control of the practice. That all changed with the sale to Spire, after which they, Spire, were in control of the practice, dealing with referrals, allocating patients, managing resources, receiving all fees etc; and

(3) Whilst the CSA imposed some restrictions on where the Appellant could work, it did not prevent him from working elsewhere nor oblige him to work at Spire; he could have walked away at any point.

29. There is little authority concerning the capital nature of the sale of a business, for the simple reason that it is self-evidently a capital transaction and the paradigm example of such a transaction. Although the courts have repeatedly cautioned against rigid adherence to checklists in determining whether a payment is capital or income in nature *John Lewis Properties plc v IR Commrs* [2003] Ch 513 (***John Lewis***) does contain five indicia of a capital payment as follows:

(1) "duration. If what is disposed of is long-lasting, it is more likely to be a capital asset than if it is something which is evanescent". The sale of the business was a one-off permanent sale and accompanied by a five-year restrictive covenant to allow the purchaser to protect its capital investment;

(2) "the value of the asset assigned is also a relevant factor" and here the Appellant received £1m which was in accordance with a professional valuation and constitutes no trivial sum;

(3) "the fact that the payment causes a diminution in the value of the assignor's interest is material" and here there was more than a mere diminution of the Appellant's interest in the business – it was an outright disposal;

(4) "whether the payment is of a single lump sum…a series of recurring payments made at frequent intervals…is likely to be income in the hands of the payee. On the other hand, a single lump sum for the once and for all disposal of a particular asset is more likely to be a capital payment". The Appellant received a single lump sum for the sale of the business; and

(5) "If the disposal of the asset is accompanied by a transfer of risk in relation to it, that tends to suggest that the sum paid for the asset is capital". The Appellant transferred the risk of operating the business to Spire. Whilst Spire were undoubtedly mindful of the usefulness of the Appellant's continued involvement in the business, they bore the entire risk of his potential inability or refusal to provide any further services in it. The Appellant, on the other hand, was handed a guaranteed sum, risk free.

30. The essential consequence of the transaction was that the Appellant's previous right to earn an income from the business was extinguished. Such consideration is capital in

nature, as noted by Lord Buckmaster in *Glenboig Union Fireclay Co Ltd v IR Commrs (1922) TC 427* (***Glenboig***):

> "It appears to me to make no difference whether it be regarded as a sale of the asset out and out, or whether it be treated merely as a means of preventing the acquisition of profit that would otherwise be gained. In either case the capital asset of the Company to that extent had been sterilised and destroyed, and it is in respect of that action that the sum of £15,316 was paid".

31. Mr Gordon maintained that the principle of *Glenboig* was equally applicable to cases of compensation (as in that case) as on the sale of a business (as in this case). Following the sale, the Appellant's ability to earn any income in his profession was significantly curtailed and wholly at the discretion of Spire, who had complete control over all referrals to the practice.

32. HMRC suggested that the payment of £1m was not to purchase the business but rather consideration for the Appellant changing the way in which he carried on the business. A payment for making such a change is essentially income in nature, whether or not paid by way of a single lump sum. Thus, it is chargeable as part of the profits of the Appellant's profession under section 5 ITTOIA 2005.

33. In support of this argument, HMRC stated that:

> (1) The parties to the SPA (of which the CSA is part) agreed that virtually the whole of the £1m payment was to be allocated to the transfer of the "goodwill and undertaking" of the Appellant;
>
> (2) The Appellant did not part with any relevant property in the form of "goodwill". Insofar as he had goodwill in his professional capacity it was personal to him and could not be transferred by him as property to Spire;
>
> (3) There was no disposal by the Appellant of any other relevant property to which the £1m payment (less £4) could be properly attributed. Such assets as he did own, such as his list of contact names and addresses, he sold for the nominal sum of £4;
>
> (4) The Appellant did not cease to provide his professional services, nor to carry on his profession as a consultant surgeon; and
>
> (5) Under the SPA (of which the CSA is part), the Appellant agreed to provide certain of his professional services on a virtually exclusive basis through Vineyard.

34. Furthermore, HMRC maintained that the £1m payment should have been recognised as income for the period in which the SPA was completed (2010/11) under section 25 ITTOIA 2005 or, alternatively, for the tax year in which he entered into the agreement (2009/10) and not spread over the period of the CSA, but that if it should be so spread, HMRC has the right to raise alternative assessments for the years of assessment concerned and is so doing to protect its position.

35. The full agreement between the Appellant and Spire was the SPA and the CSA taken together. Under this combined agreement, the Appellant had received the sum of approximately £1m, purportedly in return for selling goodwill. The correct question,

following *British Dyestuffs Corporation (Blackley) Ltd v Commissioners of Inland Revenue* (1924) 12 TC 584 (***British Dyestuffs***) and *Countrywide Estate Agents FS Ltd v HMRC* [2012] STC 511 (***Countrywide***), was whether the Appellant had parted with property in return for this sum. He had not, given that he had practised as a self-employed surgeon both before and after the 'sale'. What he had done was to exploit his abilities to procure with Spire that it should have its own business.

36. In *Carson v Cheney's Executor* [1959] AC 412 (***Cheney***), Lord Keith of Avonholm considered the nature of receipts generated through a number of methods by which an author pursued his profession with a view to a profit and concluded that whatever the means, and whether payments were received before or after the author's death, those receipts, being the profit of his pursuit of his profession, were income in nature. The question, therefore, is whether the profit arises from carrying on the professional activities; if it does, it is income. It is then for the taxpayer to demonstrate that this assumption is not correct because he did in fact part with property, rendering the payment a capital receipt.

37. In *British Dyestuffs* a UK company which held various patents entered into an agreement with a US company to licence or make certain information available in return for payment. The taxpayer suggested the payment was a capital receipt; the court found that the granting of exclusive rights regarding certain transactions did not constitute parting with property, but rather exploiting one's own property i.e. simply changing the manner of trading.

38. In *Countrywide* an exclusive agreement for marketing one product in return for a payment did not give rise to a capital payment as it was exploiting its goodwill to make a profit. The fact that there was an impact on the goodwill did not alter this.

39. In *John and E Sturge Ltd v Vessel (HM Inspector of Taxes)* (1975) 51 TC 183 (***Sturge)*** it was also found that the exploitation of knowhow resulted in a receipt of trade. These cases show it is necessary to look at the reality of the situation and, unless you can show you have parted with property, the payment received is income.

40. In this case, the Appellant did not part with property. He did not part with the business he carried on as being a self-employed surgeon; he was a self-employed surgeon both before and after the purported sale.

41. Paragraph 6 of the Valuation states the Appellant's name and long list of qualifications. From 2010 to 2015 the Appellant held practising privileges at all key hospitals – not just Spire – to enable him to practise. Spire's Consultants Handbook makes it clear that a lot of obligations are imposed personally on a surgeon in his or her personal capacity and is further evidence that the Appellant was still in practice.

42. Under the SPA, the Appellant cannot practise in the UK in any way that competes with Spire's business (clause 7.1.2). This suggests that he will be doing the same at Spire as he did at the Wellington. He may not refer any patients anywhere other than to Spire (clause 7.1.3). He is not allowed to share any information such as knowhow or business methods with others (clause 7.1.4). These restrictions do not apply to Vineyard (clause 7.4.) i.e. his is allowed to provide services to Vineyard and they do not apply to undertakings other than as a surgeon e.g. lecturing and other activities

(clause 7.5). Neither to they restrict his work for the NHS in Newcastle (clause 7.6) and there is an overreaching option to ask for Spire's consent if any activity is in Spire's interests (clause 7.1). Nothing in the contract stops him from practising as a surgeon, indeed it actively ensures he is able to do so. Indeed, he can even use his own name, just not in competition with Spire and with the proviso that he may not incorporate it or besmirch it or his reputation (clause 7.7).

43. Applying *Dyestuffs*, therefore, what has the Appellant done? He has exploited an attribute of his professional expertise i.e. of himself. He is expressly allowed to go on lecturing and a list of his lectures appears in the bundle. He is not prevented from working abroad. The Appellant did not seek to sell the name of Richard Villar; it is his own name and he is a surgeon in practise and of course uses that name. The definition of goodwill in the SPA is "the right to use the 'Richard Villar' name in connection with the Business". The Appellant allowed Spire to use his name too, but he did not part with it himself in doing so. Taking the SPA and the CSA together, the intention was for the Appellant to remain in practice as a surgeon and for Spire to reap the benefit of that.

44. The Appellant is the only party to the agreement from the practise at the Wellington. He cannot bind others, only himself, and therefore only enters into the agreement with Spire on his own behalf. He cannot and does not promise to bring others with him. Essentially the business is the Appellant.

45. It is clear from the SPA and the CSA that the Appellant himself was key to the agreement with Spire. The practice was effectively him. What he had to sell was himself and his professional expertise. The Appellant's entering into the CSA was a condition of payment of the consideration under the SPA and the restrictive covenants allow him to continue his own practice as a surgeon. Clauses 11.4 to 11.7 of the SPA tie in with the CSA and are focused on the Appellant using his influence and abilities to persuade and procure that others at the Wellington move with him. This agreement was about the Appellant moving his practice to Spire, not selling an independent business.

46. Turning to the CSA, although it is framed to allow for there being additional consultant surgeons, other than the Appellant, in practice he was the only consultant surgeon envisaged and so it is he and he alone who is to develop services and cooperate to build a practise at Spire (clauses 2 and 3). In the CSA, Spire agrees to provide everything that the Wellington was already providing to enable the Appellant to practise his profession. Spire may review the level of support it provides if its intended income is not achieved (clause 3.7). Spire is able to make money out of operating the practice subject to paying the Appellant 75% of what the Appellant would otherwise have earned, had he operated the practice himself (clause 4). Spire comes out of the arrangement neutral; it makes its own profits from the operating theatre etc where the Appellant practises his profession and the Appellant profits from his own actual work as before. The overall effect of the agreement was to procure the Appellant's services for Spire for a period of five years.

47. The Appellant did not sell 'his business'. He did not cease to trade. He did not part with any property. He shared his name with Spire rather than selling it. He did not part with his team; he undertook to try to persuade them to move to Spire but they were not

his property to part with. The definitions of 'Business' and 'Practice' in the agreements bear this out. He did not sell the Wellington staff. Although he bore part or all of the cost of research fellows, they were not his to sell. The Appellant had an ability to attract other professionals and in particular the research fellows who worked with him at both the Wellington and Spire; but this ability was not something he could part with. He could persuade and influence people to come with him but that is a service or aspect of his profession. He could influence patients too inasmuch as they would follow him. It is critical in this case that the Appellant did not write to the patients to hand them over to his successor i.e. Spire. He was preserving and maintaining his personal reputation and exploiting it for the benefit of Spire as well as himself.

48. The agreements make sense as drafted to create a capital lump sum but it is for the law to decide whether they achieve that, by making sense of the agreements as a whole, not being misled by labels or colloquialisms. Practice is a dangerous label as it means different things in different contexts. The real meaning of selling or acquiring goodwill in the agreements was permitting Spire to use the Appellant's name, alongside him. Putting Spire in a position where it had the benefit of the Appellant's goodwill was effectively exploiting his goodwill for profit.

49. Mr Gordon argued that HMRC's case denied the commercial reality of the situation, namely that Spire had bought the practice. The fact that the greater part of the value of the business consisted of goodwill rather than tangible assets did not alter this fact. Goodwill was an asset that could be disposed of like any other. Undoubtedly the Appellant was part of the attraction and it was entirely rational for Spire to seek to protect its investment by preventing the Appellant from practising elsewhere in competition.

50. Mr Gordon cited *Kirby (Inspector of Taxes) v Thorn EMI plc* [1998] 1 WLR 445 (***Thorn EMI***) as authority for the reputation of an individual being a form of goodwill with a capital value that can be realised and which is over and above the mere value of the business being sold. HMRC countered that *Thorn EMI* dealt with a holding company selling shares in its trading companies so there was no doubt that it had disposed of a capital asset; the real question in that case was whether a further sum paid for non-competition was capital in nature. In that case it was, because it related to a capital asset. The case is not authority that payment for a restrictive covenant is a capital sum. In addition, in that case there was an outright disposal of everything so no question of exploiting goodwill as it was merely sold with everything else.

51. Mr Gordon cited *Allied Dunbar Ltd v Weisinger* [1988] IRLR 60 (***Weisinger***) to counter HMRC's arguments that personal goodwill cannot be transferred, noting that Millet LJ refers specifically to the legal and medical professions as examples of archetypal one person businesses made up predominantly of personal reputation in his judgment. HMRC countered that *Weisinger* was again about being paid to not do something, so there was no question of exploitation. In this case, Millet LJ was suggesting that a financial intermediary could sell his business i.e. his contacts, but this was in the context of retirement. Mr Weisinger sold his business to Allied Dunbar, promised not to compete, and was taken on by Allied Dunbar, but in a different role, as a training consultant. He wrote to his clients handing them over to his successor, explaining he would be assisting with the handover and then leaving. This amounted to a single exhaustion of goodwill, alienation and retirement.

52. Mr Gordon submitted that HMRC simply refused to acknowledge the existence of goodwill as an asset capable of sale. The legal meaning of goodwill had a long history, *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 (***Muller*)** being an early example of the House of Lords recognising it as "a summary of the rights accruing to the respondents from their purchase of the business and property employed in it" and including "whatever adds value to the business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence from competition".

53. The nature of goodwill was definitively considered by the Special Commissioner in *Balloon Promotions Ltd v Wilson (HM Inspector of Taxes)* (2006) SpC 524 (***Balloon***) who cited *Muller* as above and further noted that goodwill: "should be looked at as a whole…realises profits for the business…cannot subsist by itself but must be attached to a business…distinguishes an established business from a new business…can be sold separately from the premises in which the business is carried on". He noted that "the authorities caution against an over analytical approach to goodwill" and that "a covenant restricting the trade of the trader selling the goodwill is a means by which all the advantages that the purchaser was intended to have by taking over the goodwill of the business are secured to him [and] the existence of such a covenant is indicative that goodwill was sold by the vendor". Finally, he summarises the value of the goodwill in that case as "an amount representing the excess over and above the true and fair value of the tangible assets".

54. Applying these principles to the present case, Mr Gordon submitted that the goodwill in this case should be looked at as a whole to include whatever added value to the Appellant's business "by reason of situation, name and reputation, connection, introduction to old customers and absence from competition". Each of these qualities existed in the present case: the Appellant's name had a value, demonstrated by the renaming of the purchaser company and the acquisition of the website's domain name; the Appellant's business attracted business from a wider geographical area than would be found in a traditional orthopaedic surgeon's practice; and the practice's modus operandi was unique and so to a great extent free from competition. The goodwill ensured that the business was profitable. The business was established for a number of years and grown by a combination of honest work and investment, reinforced by the Appellant's entrepreneurial flair and revolutionary approach to his profession. The goodwill was sold separately from the premises where the business was carried on, as *Balloon* notes it may be. Further, unlike traditional orthopaedic practices, the Appellant's business was not tied to specific local GP surgeries and patients were prepared to travel, even from overseas, to benefit from its services, meaning the business could realistically be relocated on sale (as it was). The existence of the covenant Spire required the Appellant to enter into is indicative that the Appellant sold the goodwill of the business.

55. Spire paid consideration of an amount over and above the true and fair value of the tangible assets. The existence of that excess combined with the previous profitability of the business was indicative that the business had added value which is an essential characteristic of goodwill. The added value was inseparable from the business which was sold as a going concern. It was an established business, not a new one. The Appellant had made a significant contribution to the previous success of the business and he developed a customer base through the services that the business offered.

56. Mr Gordon recognised that HMRC had concerns about sole-practitioners incorporating their practice into a wholly owned company and obtaining both capital gains tax treatment on the transfer of goodwill and the corporate benefits of goodwill amortisation. However, the present case was wholly different, being an arm's length sale of the business to a third party. He noted, however, that HMRC's recent statements in its Shares and Assets Valuations Fiscal Forum acknowledged the existence of transferable goodwill in principle.

57. He went on to cite Nicholls LJ in *Thorn EMI* as authority for the possibility of an individual owning and running a business having personal goodwill which could be sold together with the business:

> "A person owning and running a business can have a personal reputation in the relevant field as much in the case where the business is conducted through a one man company as where it is unincorporated. That will be so even though, in the case of a company, it is (strictly) the company and not the vendor who is carrying on the business".

58. Mr Gordon concluded by citing *Haley & Others v Dare & Others Case 31027970/2012* (***Haley***) as authority that medical specialists specifically are able to build up a private practice which has its own intrinsic value which other providers may wish to purchase.

59. HMRC suggested that taking the heads of terms target of £870,000 per annum, Spire's 25% deduction, taken over five years, roughly equated to £1m, so that Spire expected to recoup their costs over that period.

60. Mr Gordon pointed out that the heads of terms were not binding, this figure was aspirational only, there was no guarantee it would be achieved and noted that HMRC had suggested this apparent correlation of numbers might be nothing more than coincidence.

61. Addressing the point, though, Mr Gordon cited *Glenboig*, where Lord Buckmaster considered that any correlation between the amount of the capital payment and the income that the taxpayer might have otherwise received had the disposal not taken place was irrelevant:

> "That, no doubt, is a perfectly exact and accurate way of determining the compensation, for it is now well settled that the compensation payable in such circumstances is the full value of the minerals that are to be left unworked, less the cost of working, and that is, of course, the profit that would be obtained if they were in fact worked. But there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the application of that test. I am unable to regard this sum of money as anything but capital money…"

62. HMRC countered that *Glenboig* dealt with the sterilisation of an asset. It may well be the case that there were differences in the arrangements before and after the 'sale' here, but there was no sterilisation. Changes in how the Appellant invoiced for his services or the introduction of his personal service company did not constitute a

material difference. He licensed his name to Spire exclusively but he only gave permission to use it; he also used it himself and continued to practise in his own name therefore there was no capital disposal.

63. HMRC submitted that there was simply no business to dispose of in this case, only the Appellant's profession and reputation to exploit. What accountants think of as goodwill and how they deal with it is not the same as the legal analysis. The test was not whether Spire acquired a business, but whether the Appellant parted with any property. That Spire acquired a business does not mean that the Appellant parted with one. Restrictive covenants are not of themselves evidence of the sale of a business. The test is not whether the correct terms or labels that have been used, but the reality of the situation. The treatment of such arrangements in other jurisdictions is not relevant. It is not what the Appellant hoped or intended but what actually happened. Looking at the agreements in the whole context of what happened, the Appellant exploited his goodwill rather than disposing of it and this was not a capital transaction.

64. Mr Gordon agreed that the Tribunal must focus on the substance of the transaction. He submitted that the substance of this transaction was exactly what the parties purported it to be when they entered into the SPA and CSA: the sale of a business. The Appellant did have a business to transfer here and a specialist valuation (the Valuation) confirmed this, but the proof was ultimately that an arm's length purchaser was indeed prepared to pay £1m for the practice.

65. After the sale, the Appellant no longer carried on the business. The business was Spire's to run. The Appellant gave up the right to practise his profession as he wished, his goodwill, his database, his name. He gave up what he had spent two decades building in return for a lump sum payment. Mr Gordon referred to the definitions of 'business' and 'goodwill' in the SPA:

> (1) "the Business means the business of the orthopaedic surgery clinic carried on by the Vendor under the name of the 'Richard Villar Suite' and currently being conducted from the Wellington Hospital, St Johns Wood, London"
>
> (2) "the goodwill and undertaking of the Vendor in relation to the Business and all trade names associated with the Business including the right to use the 'Richard Villar' name in connection with the Business together with the exclusive right of the Purchaser to represent itself as carrying on the Business in succession to the Vendor"

66. Under the SPA, Spire had the exclusive right to trade as 'Richard Villar'. The Appellant may not have given up his name on a personal level, but he did give up the right to trade under it. After the sale, the Appellant carried out no work in the UK outside the agreement with Spire; even where work was carried out other than at Spire's hospital in Cambridge, it was done under the auspices of Spire's business: the Richard Villar Practice.

67. He also referred to the accounts of Richard Villar Practice Limited (Spire under its new name following the purchase), which showed that the business remained a wholly owned subsidiary of Spire Healthcare and was independently audited by Ernst and Young, and in particular to the notes to the accounts which showed the purchase price

for the practice allocated to goodwill and amortised over a five year period, demonstrating that the auditors considered that the investment made by the company had a continuing value.

68. Mr Gordon submitted that whilst HMRC had sought to characterise the arrangement as akin to franchising or licensing, on the basis that the individual named Richard Villar continues to exist, is entitled to practise surgery and is personally registered and regulated by the GMC, that was not the issue. The Appellant nonetheless disposed of his business. That it was in Spire's commercial interests for the Appellant to continue working in the business, to enhance its value, and that the arrangements were structured to encourage and enable this as well as preventing the Appellant from competing directly with Spire, did not mean there was no disposal of the Richard Villar Practice.

69. An accountant or solicitor operating as a sole practitioner might sell their business towards the end of their professional life and continue to work in that business as a consultant for a period after the sale. Such a situation was on all fours with the present case. The sale was the Appellant's retirement plan.

70. Answering some of HMRC's arguments that he had not specifically addressed, Mr Gordon differentiated *Cheney* as applying specifically to the type and method of work carried out by authors and creative artists and *British Dyestuffs* as dealing with a situation where the grantor of rights continued to trade on its own account. As to *Thorn EMI*, Mr Gordon did not dispute that a payment for restrictive covenants could be income in nature, but insisted that it simply was not so on the facts of the present case. There was no material difference between the case of *Weisinger* and the present case: the Appellant sold his business as part of his retirement plan and continued to work in it, in a different way, for a period, in order to ensure a smooth handover. In *Countrywide* a mere impact on goodwill was not sufficient to make the transaction capital in nature. However, in the present case there is a transfer of goodwill, not a mere impact on it. Everything the Appellant was obliged to do under clause 11 of the SPA was intended to ensure Spire obtained what it set out to purchase: the Appellant's business.

71. Mr Gordon noted that there was no dispute between the parties as to the Valuation. This had been discussed previously and they had agreed that there was no need for expert evidence on this point. HMRC accepted that if the £1m was for the purchase of the business then it was capital in nature and in that case they did not dispute the quantum of the £1m value.

Alternative argument: Chapter 4

72. HMRC's alternative argument was that if the payment were in fact capital in nature, it should nonetheless be taxed as income under Chapter 4.

73. Under section 773(2) ITA 2007 income is to be treated as arising under Chapter 4 only if transactions are effected or arrangements made to exploit the earning capacity of an individual in an occupation and at least one of the main objects of the transactions or arrangements is the avoidance or reduction of liability to income tax.

74. HMRC submitted that in all the circumstances the Appellant intended to convert future earnings into capital gains eligible for entrepreneur's relief and did so by a mechanism, on which he sought and obtained tax advice, which required him to provide his exclusive services for five years. The Appellant acknowledged that the SPA was dated 31 March 2010 specifically in order to take advantage of entrepreneur's relief. Therefore reducing tax was a main objective of the arrangements. There was no reason to structure the arrangement other than to attempt to produce a lump sum of capital i.e. to reduce the Appellant's income tax. The main objective was thus to reduce income tax.

75. Under section 776 ITA 2007, income tax is to be charged on income treated as arising under section 778 or 779. Income is treated as arising under these provisions if the conditions set out in section 777 are met, namely: that an individual carries on an occupation wholly or partly in the UK; that transactions are effected or arrangements made to exploit the individual's earning capacity in the occupation by putting another person in a position to enjoy all or part of the income; and that as part of the arrangements a capital amount is obtained by the individual.

76. HMRC submitted that these conditions were met:

(1) The Appellant was a self-employed medical consultant working at least partly in the UK;

(2) Vineyard was able to exploit the Appellant's earning capacity through the arrangement with Spire (as indeed was Spire); and

(3) £1m was paid to the Appellant pursuant to the arrangements entered into.

77. Mr Gordon submitted that the overriding conditions of section 773(2) were not met in this case:

(1) The only transactions and arrangements were to sell a business formerly run by the Appellant. There was no arrangement to exploit earning capacity. The arrangements do not require the Appellant to provide his exclusive services for five years; they prevent him from practising elsewhere in the UK but do not oblige him to work for Spire.

(2) There was no intention to avoid or reduce income tax. The main object was to realise a capital sum on disposal of the business. The only extent to which tax advice was sought – and the reason for entering into the SPA on 31 March 2010 - was to ensure that the favourable capital gains tax treatment was not undermined by the expected change of government in 2010 and any subsequent legislative reform (which, in the event, did not occur).

78. Turning to the conditions of section 777:

(1) The Appellant's activities prior to the sale were far wider than simply exercising his profession: he was running a business to which a number of practitioners contributed professional services.

(2) The definition of 'occupation' in Chapter 4 in section 774 is: "any activities of a kind undertaken in a profession or vocation" whether the

individual is carrying on the profession or vocation on their own account or as an employee or office-holder. This makes clear it is intended to cover only 'businesses' with a single source of revenue. This interpretation is reinforced by the wording in section 773(2) which refers to exploitation of "the earning capacity of an individual in an occupation". This is not what the present case entails.

(3) The arrangements do not put another person in a position to enjoy all or part of the income or receipts derived from the Appellant's activities in the occupation. The only arrangements under which the Appellant provided his services to Spire (through Vineyard) were under the terms of the CSA and those services were fully remunerated in accordance with the CSA. No other person enjoyed the income derived from the Appellant's activities in his occupation of surgeon.

(4) The capital sum of £1m was not obtained in connection with or as part of transactions or arrangements made to exploit the Appellant's earning capacity. It was received in return for the disposal of the business. Any payments relating to the Appellant's activities, to the extent that they might have been performed, were made under the separate terms of the CSA, as income.

79. Mr Gordon submitted that if the conditions of sections 773(2) and 777 were satisfied, the Appellant would be saved by the provisions of section 784 which provides that an individual is not liable to income tax under Chapter 4 insofar as the going concern condition is met. This is that the value of what is disposed of at the time of the disposal is attributable to the value of the profession or vocation as a going concern. This exemption is restricted where the value of the going concern is derived to a material extent from prospective income or receipts derived directly or indirectly form the individual's activities in the occupation unless, ignoring all capital amounts, the individual will receive full consideration for the prospective income or receipts, which Mr Gordon submitted the Appellant would since he was to be remunerated for any work he undertook in his occupation as surgeon going forward.

80. Mr Gordon further submitted that Chapter 4 contained anti-avoidance provisions and that since this case was far from any kind of tax avoidance it would be absurd to apply these provisions to this case.

81. Following *Pepper v Hart* [1993] AC 593, if primary legislation is ambiguous or obscure the courts may in certain circumstances take account of statements made in Parliament by Ministers or other promoters of the Bill in construing that legislation. In this case, Mr Gordon argued, it was appropriate to refer to Hansard as to the purpose of this legislation.

82. Hansard makes clear that these provisions do not apply to a sale of a business. HMRC had sought to distinguish between a business with multiple workers and one that is truly a one person enterprise to support its argument that there was no business to sell. There was no justification for this distinction. *Weisinger* demonstrated that it was possible for a one person business to be sold. However, the facts of this case were that there were others in the business who transferred to Spire as a result of the sale, for

whose work the Appellant had previously been paid and made onwards payments. Therefore HMRC's argument was wrong in law and not consistent with the facts.

83. HMRC countered that it was not appropriate to refer to Hansard as there was no absurdity and the language of the primary legislation was clear. However, the passage of Hansard referred to covers concerns about the provisions going too far or being unfair and the solution Parliament reached was to make amendments. Therefore we are left with the legislation Parliament intended.

Findings of fact

84. In or around 2009 the Appellant began exploring the possibility of selling his practice. He was aware that this was slightly unusual in the UK, but had seen colleagues in other jurisdictions sell their practices and believed his own practice was capable of being sold in this way. He commissioned Bruce Sutherland & Co to value the practice.

85. The Valuation prepared by Bruce Sutherland & Co valued the practice at £1m, using an accepted basis of valuation and allowing for the fact that the value of the practice was highly dependent on the Appellant.

86. After approaching a number of potential purchasers, the Appellant negotiated the sale of the practice to Spire, entering into Heads of Terms in January 2010 and the SPA on 31 March 2010 before completing on 1 July 2010.

87. The Appellant believed he had a business to sell (as opposed to merely his own services). This consisted of the extensive patient records and system for following up and maintaining ongoing relationships (unusual in this field) and other members of the team, both administrative and medical staff including 'fellows' who were doctors, often consultants, who came to work at the practice, often from abroad and sports physicians.

88. The SPA did not directly involve the transfer of employees. The Appellant had no direct employees except his wife; some were employed by the Wellington (e.g. the practice manager), some were self-employed (e.g. the sports physicians), some fellows had no formal employment relationship. A number of individuals did move with the practice: the practice manager resigned from the Wellington and was employed by Spire first, to get everything set up before completion. The fellows also moved to Spire, as did some sports physicians. Not everyone involved with the practice at the Wellington moved to Spire.

89. The Appellant did not want to be locked into working for Spire. He intended the sale as part of his move towards retirement and planned to change the pattern of his life following it. He wanted to be free to take up other opportunities abroad, outside the auspices of Spire. However, he recognised that he had a good purchaser in Spire and understood that it was usual for a key individual to remain involved in a business after its sale to ensure a smooth transition and he was prepared to do this in order to secure the sale.

90. Following the sale to Spire:

(1) the Appellant was no longer involved in the management of the practice. He was neither a director nor shareholder of the company that owned the practice.

(2) all referrals came through Spire, even if a referral letter was addressed to 'Mr Villar', and Spire decided how to allocate them (whereas prior to the sale all referrals came through the Appellant).

(3) the Appellant was not obliged to work for Spire under the CSA, but was prohibited from working for any other practice in the UK. So whilst not under any obligation to work for Spire, he could only work for them in the UK.

(4) the Appellant did work for Spire and was paid for doing so under the terms of the CSA. Spire paid him, via Vineyard, 75% of the fee it received for patients he treated, in accordance with the CSA.

(5) Spire changed its name to The Richard Villar Practice Limited.

91. As envisaged under the SPA, in 2012 the Appellant identified and assisted in the recruitment of Mr Ali Bajwa, an orthopaedic surgeon, to be the 'First Additional Consultant'.

Discussion

92. It is common ground between the parties that the sale of a business is a capital transaction. The dispute is as to whether the arrangements the Appellant entered into with Spire amounted to the sale of a business.

93. HMRC maintain that the Appellant did not have a business to sell. There was no business or practice without him. He was the practice: his personal reputation attracted patients and colleagues alike. Therefore, regardless of his intentions, the arrangements could only amount to an agreement to use his professional skills and reputation in order to build a practice for Spire.

94. The Appellant, on the other hand, argues that through his own unique approach he built a business that was capable of sale to an unconnected party. He acknowledges that his services were key to building the business and required to ensure a smooth handover to Spire, but maintains that there was a business, independent of him, consisting of the team he had built around him, the patient lists, the surgical techniques he had developed and the particular working practices he had adopted.

95. None of the authorities cited is quite on all fours with this particular case. They can all be distinguished, either on their facts or because the particular issue at stake is not relevant here:

(1) *John Lewis* dealt with the assignment of the right to receive rents for a fixed period.

(2) *Glenboig* dealt with compensation payments rather than the sale of a business.

(3) *British Dyestuffs* dealt with an agreement between a British company and an American company to share knowhow, patents and processes during a certain period, with each company having the right to exploit this knowledge in different territories.

(4) *Countrywide* dealt with an upfront payment by an insurance company for an exclusive right to market its life assurance products to the customers of a financial intermediary.

(5) *Cheney* dealt with the nature of receipts generated by the creative output of an author and the methods of exploiting that output which are quite specific to creative occupations.

(6) *Sturge* dealt with a sale of technical knowhow to a new foreign company owned jointly by the seller in order to exploit that knowhow in a foreign market.

(7) *Thorn EMI* dealt with the treatment of a cash payment in return for a covenant, separate from the sale of a business.

(8) *Weisinger* was an employment case dealing with the validity and enforceability of restrictive covenants. Although it is cited as authority that the sale of goodwill by a sole practitioner is possible, statements such as "the idea that the personal goodwill of a professional man is not saleable has long since been exploded" are obiter dicta.

(9) *Muller* dealt with the situs of goodwill and whether there was a liability to stamp duty on its sale.

(10) *Balloon* dealt with sales of franchises, who owned the goodwill in such cases and whether there was in fact a sale of goodwill or a sale of a franchise, but does contain a helpful analysis of the nature of goodwill. It is, however, not binding on this Tribunal.

(11) *Haley* was an employment case and so not concerned with tax. Although it addressed the question of whether a particular consultant's practice constituted an 'economic entity' i.e. a business, this was for the purposes of Transfer of Undertakings (Protection of Employment) Regulations 2006. The decision is not binding on this Tribunal.

96. It is largely a question of fact as to whether the Appellant sold his business. Weighing the evidence before us, it seems to us that the Appellant had built a practice that was unlike that of many other consultant surgeons. His particular method of carrying on the business resulted in a book of customers which provided repeat business and the name 'Richard Villar' whether followed by 'Suite' or 'Practice' was capable of attracting customers notwithstanding the fact that not all medical services were provided by the Appellant himself. The fact that the Appellant did not directly employ the members of the trusted team of fellow medical professionals he had built over the years to provide the services customers required does not preclude the particular

practice he developed from being more than merely him carrying on his profession of surgeon. He performed an administrative and managerial function in the business known as The Richard Villar Suite, as well as his role of surgeon.

97. The Appellant believed he had a business capable of sale. The Valuation confirms this and puts a figure on its worth to an unconnected third party purchaser. Spire agreed to buy the business for that value. In the SPA the business is defined to include all assets of the clinic carried on under the name of the 'Richard Villar Suite'. By far the greater part of the value of the business is attributed to goodwill, but goodwill is not all that is being sold. Intellectual property, knowhow, the benefit of contracts and records are all listed separately. It is not surprising that the business of someone who is effectively a sole practitioner who rents the tools of his trade and the premises in which he conducts it should be worth more to a purchaser than the tangible assets capable of being itemised in this way. That additional value is the goodwill of the business, which is also capable of being sold.

98. The fact that much of the goodwill was connected with the name 'Richard Villar' and the Appellant continued to be known by this name does not prevent him from having parted with the goodwill. Following the sale, only the purchaser was entitled to use the name 'Richard Villar' in connection with the business. It did so, changing its name from Spire after completion. And the Appellant, in accordance with the agreement, did not carry on a business under that name.

99. HMRC's argument that the true nature of the arrangements is a joint exploitation of the Appellant's earning capacity as a surgeon between him and Spire does not persuade us. For this to be merely a sharing of goodwill or a changing of the way the Appellant practised his profession, the Appellant would have had to intend to continue to practise that profession with Spire. As a matter of fact, we find that he did not. At the time he entered into the arrangements there was a real prospect that the Appellant might decide to volunteer in a disaster relief project or pursue his profession abroad and he was under no obligation to work for Spire. The provisions of the SPA and CSA do not go beyond what we consider to be reasonable measures to preserve the value of the business for Spire by preventing the Appellant from working in competition and seeking to encourage him to work for Spire to achieve a successful transfer of the business.

100. Having found as a matter of fact that the effect of the arrangements entered into was a sale of the Appellant's business to Spire, we must conclude that the £1m consideration received was a capital payment.

101. The question then remains as to whether Chapter 4 operates to treat the £1m as income for tax purposes. Chapter 4 will only apply if the pre-conditions in section 773(2) are satisfied.

102. The first question is therefore whether the arrangements the Appellant entered into with Spire were "made to exploit the earning capacity of an individual in an occupation" meaning the earning capacity of the Appellant as an orthopaedic surgeon. We have found as a matter of fact that the parties entered into the arrangements in order that the Appellant sell his business to Spire and there was no fixed intention or obligation for the Appellant to continue to work as an orthopaedic surgeon. It is therefore difficult to conclude that this pre-condition is met.

103. However, if it were met, the next question would be whether "one of the main objects of the…arrangements [was] the avoidance or reduction of liability to income tax". We are not persuaded by HMRC's arguments on this point. We accept that the Appellant sought tax advice on the sale of his business and that the SPA was entered into earlier than it otherwise might have been in order to secure entrepreneur's relief, based on that tax advice. However, this does not demonstrate an intention or desire to avoid or reduce income tax. We see no evidence that the parties entered into the arrangements in order to avoid or reduce income tax – or that income tax was a matter they considered at all. Indeed, insofar as he continued to work as a surgeon after the sale of his business, it appears that the Appellant was remunerated and accounted for income tax on his earnings.

Conclusion

104. The appeal is allowed.

105. 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.

RACHEL MAINWARING-TAYLOR
TRIBUNAL JUDGE

RELEASE DATE: 21 MAY 2018