TC07681

Whether crediting a directors' loan account which was freely available for the directors/members to draw upon constituted a distribution for the purposes of s.*1020 of the CTA 2010. Held: No.*
Valuation of goodwill for purposes of section 272 (1) of the TCGA 1992. Findlay's Trustees v Inland Revenue Commissioners [1938] SVC applied.
Experts: whether an expert can act as an advocate in the proceedings? Held: no.

FIRST-TIER TRIBUNAL **Appeal number: TC/2018/02425**
TAX CHAMBER **TC/2018/02427**

BETWEEN

NEIL PICKLES
SHARON PICKLES **Appellants**

-and-

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

TRIBUNAL: JUDGE ASIF MALEK
MRS RAYNA DEAN

Sitting in public at City Exchange, 11 Albion Street, Leeds LS1 5ES on 2 March 2020

Mr. Davison, Chartered Certified Accountant, for the Appellant

Mr. Priestley, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

References in this judgment in square brackets are references to the page numbers in the bundle

We have been unable to reach a unanimous view. The following decision represents the opinion of Judge Malek. In line with article 8 of the First-tier Tribunal and Upper Tribunal (Composition of Tribunal) Order 2008 Judge Malek, as the presiding member, has a casting vote and accordingly this is the decision of this Tribunal. For this reason, the decision refers to "we" or the "Tribunal" and not "I" or "Judge Malek's judgment". However, the dissenting view of Mrs. Dean is set out in the appendix.

DECISION

INTRODUCTION

1. This is an appeal against amendments made by notice under s28A Taxes Management Act1970 ("TMA 1970") ("the Closure Notices") to the Appellants' self assessment Tax Returns for the tax year ended 5 April 2012.

2. The resulting adjustments to Mr Pickles' tax return charged him to additional tax of £145,100.02, made up of:

(1) £123,660.02 additional Income Tax ("IT") (after dividend tax credits); and

(2) £21,440.00 Capital Gains Tax ("CGT").

3. The resulting adjustments to Mr Pickles' tax return charged her to additional tax of £145,099.40, made up of:

(1) £123,659.40 additional IT (after dividend tax credits); and

(2) £21,440.00 CGT.

BRIEF BACKGROUND

4. In around 2000 Mrs. Pickles joined her husband as a partner in the business known as Holmes Farm Produce. The business graded and processed potatoes.

5. By agreement dated 27 March 2011 (the "Sale Agreement") the business and all its assets were sold by Mr and Mrs Pickles to a related party, Holme Farm Produce Ltd ("HFPL"), with effect from 1 May 2011. It is not disputed that the HFPL was a company established for the purpose of incorporating the partnership and neither is it disputed that the incorporation was driven by commercial considerations. Following the sale Mr. Pickles acted as the managing director of HFPL and Mrs. Pickles oversaw the accounting function.

6. The value attributed to goodwill on sale, which was credited to the directors' loan account, was £1,199,043. This was based upon a calculation carried out by Forrest Burlinson, the former agents of the Appellants, and is set out at G27 of the bundle. The calculation is based upon two years of actual sales, gross profits and net profits and two years of projections. It does not set out the underlying assumptions or basis upon which the calculation was made.

7. Mr and Mrs Pickles duly filed their self-assessment returns on 30 January 2013, but omitted to declare, on the face of the return, their capital gain on the sale of the goodwill. This led to the Respondents opening enquiries into the Appellant's self assessment returns on 13 December 2013 and eventually to the Closure Notices on 16 and 20 September 2016. The Closure Notices were based upon agreement having been reached between the Respondents and the Appellant's former agents, Forrest Burlinson, that as of 1 May 2011, the goodwill transferred should be valued at £450,000.

8. The difference between the originally attributed goodwill figure of £1,199,043 and the agreed value of goodwill of £450,000 was assessed to income tax as a distribution.

9. On 21 July 2014 HFPL was placed into administration, before being dissolved on 23 October 2015. None of the balance owing on the directors' loan account of £427,180 at the date of the administration was repaid.

THE ISSUES

10. The issues that we were required to determine in this appeal are as follows:

(1) By way of preliminary issue, the status of Mr. Davison and his report;

(2) The capital gain on the sale of the goodwill by the Appellants to HFPL on 1 May 2011; and

(3) The amount of the distribution, if any, made by HFPL to Mr. and Mrs. Pickles pursuant to section 1020 of the CTA 2010.

PRELIMINARY ISSUE

2. This issue arose because Mr. Davison appeared before us on the day of the hearing as an advocate and at the same time had submitted a valuation report to the Tribunal as an expert pursuant to its directions dated 22 February 2019. Those directions provided that:

> "The parties are each granted permission to rely on the evidence of the expert witness on the issue of the valuation of goodwill provided any such expert is instructed in accordance with Part 35 and Practice Direction of the Civil Procedure Rules and whose evidence contains a statements [sic] to the effect that the expert has been so instructed"

3. We decided on the day that it was incompatible for Mr. Davison to act both as an advocate for the Appellants and as a Civil Procedure Rules part 35 expert, with reasons for our decision to be given later in writing. Mr. Davison elected to continue as an advocate and not an expert, but even if he had not done so we would have, for the reasons given below, concluded that we should treat his report as written representations made on behalf of the Appellants (giving it weight accordingly).

4. Rule 2 of the First-tier Tribunal (Tax Chamber) (the "Rules") provides:

> "(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;
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> (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;
>
> ……; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

5. In addition, Rule 5 gives the Tribunal wide case management powers in relation to the conduct and disposal of proceedings, including the ability to decide the form of any hearing.

6. The distinction between an advocate and a witness is crucial to the just disposal of any hearing. This is even more so where the witness is an expert upon whom there are additional duties. In *R v Pabon [2018] EWCA Crim 420* it was held that it was of paramount importance that an expert is familiar with the duties and responsibilities imposed on them at common law and under the applicable procedural rules.

7. Creswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The "Ikarian Reefer") [1993] 2 Lloyd's Rep. 68 (Comm Ct)* considered the authorities on the duties and responsibilities of experts in relation to the courts and concluded as follows:

> (1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (*Whitehouse v Jordan [1981] 1 W.L.R. 246, at 256*).
>
> (2) An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within their expertise (*Polliviitte Ltd v Commercial Union Assurance Company PLC [1987] 1 Lloyd's Rep, 379 at 386*). An expert witness in the High Court should never assume the role of an advocate.

8. Further CPR PD35 para 2.2 expressly provides that:

> "Experts should assist the court by providing objective, unbiased opinions ….and should not assume the role of an advocate"

9. The above authorities are binding upon us and, in our view, present an absolute bar on an advocate in proceedings before this chamber acting both in this primary capacity as well as that of an expert witness. Whilst recognising our duty to avoid unnecessary formality and to seek flexibility in proceedings under the overriding objective; the distinctions between advocate and expert witness is of such fundamental importance to the just disposal of proceedings that it must be maintained – even at the cost of some formality and inflexibility.

10. If we are wrong to regard the authorities that we have considered as providing an absolute bar then we would have little hesitation in concluding, in any event, that the report provided by Mr. Davison was tainted by his apparent lack of knowledge of the duties owed by an expert to the tribunal and deficient in key aspects. These deficiencies include a failure to:

> (1) Provide a statement of truth (CPR PD35, 3.3), and
>
> (2) Include a statement that he understands and has complied with his duty to the Tribunal (s35.10(2) CPR 1998 and PD35, 3.2(9) and 3.3).

11. As such, and given what we say above, we place little weight on the report produced by Mr. Davison and treat it akin to written submissions made by an advocate for his client.

THE EVIDENCE

12. The factual evidence on the key issues was provided by Mr. Pickles (it being explained to us that Mrs. Pickles could not attend), on behalf of the Appellants and Ms. Mallender, on behalf of the Respondents.

13. Expert evidence was provided by Mr. Sofola on behalf of the Respondents. For the reasons set out above we did not consider Mr. Davison able to provide expert evidence, but of course allowed him to act as an advocate on behalf of the Appellants.

14. All the witnesses adopted their witness statements. There was an opportunity to cross examine each witness and we had the opportunity to ask questions. In particular, Mr. Davison was able to cross examine Mr. Sofola on his expert report.

15. For ease of reference we will deal with our findings of fact when discussing each separate issue.

DISCUSSION

16. As we have already set out there were two substantive issues in this appeal.

Capital gain on the sale of goodwill

17. It is not in dispute that the assessments against the Appellants were validly raised under s.28A TMA 1970 and accordingly, it is for the Appellants to demonstrate on the balance of probabilities that the assessments are incorrect.

18. It is, further, not in dispute that goodwill was disposed of by the Appellants to a "connected party" and, accordingly, otherwise than by a way of a bargain at arm's length. As such the disposal is to be treated as being made at market value [section 17 & 18 of the TCGA 1992].

19. Section 272 (1) of the TCGA 1992 provides:

> "In this Act "market value" in relation to any assets means the price which those assets might reasonably be expected to fetch on a sale in the open market"

20. In *Findlay's Trustees v Inland Revenue Commissioners [1938] SVC 155* Lord Flemming, giving the leading judgment, made the following observations:

> "In estimating the price which might be fetched in the open market for the goodwill of the business it must be assumed that the transaction takes place between a willing seller and a willing purchaser; and that the purchaser is a person of reasonable prudence, who has informed himself with regard to all the relevant facts such as the history of the business, its present position, its future prospects and the general conditions of the industry; and also that he has access to the accounts of the business for a number of years… [3]
> It is to be presumed that the hypothetical purchaser having obtained all the relevant information would consider in the first place the risks which are involved in carrying on the business, and would fix the return which he considered he ought to receive on the purchase price at a rate per cent. The only other factor which he would then require to determine would be the annual profits which he would derive from the carrying on of the business. [5]"

21. The above principles were not in dispute.

22. Expert evidence was given on behalf of the Respondent by Mr. Sofola. He is a qualified valuer and an Associate Member of the Business Valuation Faculty of the Royal Institute of Chartered Surveyors ("RICS"). We accept that he has the necessary experience to carry out the required valuation and we were satisfied, on his evidence, that he fully appreciated his duties to the court.

23. To the extent that it was argued by Mr. Davison that it was objectionable for Mr. Sofola to give expert evidence when he was employed by the Respondents, we found this argument to be without merit. As was held by May LJ in *Field and Anor v Leeds City Council [1999] EWCA Civ 3013* "there *is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect its weight, but that is another matter".*

24. Mr Sofola's report initially proposed a value range of £221,400 to £295,200, with a recommended value of £287,000 [9.07, C22].

25. In an addendum dated 28 January 2020, Mr Sofola addressed an error that led to the wrong figures being used in his original calculation [para 2, C60]. In the same addendum, he adjusted for factors and information provided in Mr Davison's report, including amortisation of goodwill in the partnership accounts [para 3.4, C60], and deductions in 2011 for incorporation costs [para 3.2, C60] and bad debts [para 3.3, C60].

26. Mr Sofola proposed a revised valuation range of £208,440 to £277,920, with a recommended value of £270,200 [5, C61].

27. It was accepted on behalf of the Appellants' that applying, as Mr. Sofola did, a multiple to the maintainable profits of the business for the purposes of the valuation is the most appropriate method of valuation and that it is appropriate to adjust the maintainable profit used in the calculation for the cost of employing staff to perform the roles previously performed by the Appellants.

28. However, Mr. Sofola's evidence was attacked on two grounds. Firstly, it was argued that the adjustment that he had made for additional management costs to take account of the fact that new staff would have to be employed to perform the roles previously performed by the Appellants was excessive. Mr. Sofola estimated the cost of an experienced managing director to be £90,000 and those of a finance director to be £67,000 [7.14, C16]. In his report he cites the source for these figures as Croner Directors rewards earning survey 2011-12 [C70-71], before proposing a lower cumulative adjustment of £150,000.

29. It was argued by Mr. Davison that little or no adjustment should be made in relation to Mrs. Pickering's contribution to the business because she had little financial skill, that her role was administrative in nature and that during the period in question she had a young family to look after. In support of this contention it was argued that instead the partnership business paid for a member of accountancy staff from Forrest Burlinson to attend the offices of the business for around 5 days a month to prepare cash flow statements, budgets and management accounts. This was in line with the unchallenged evidence given by Mr. Pickles. However, it was notable that Mrs. Pickles did not attend to give evidence herself in relation to her role and there was no statement from her. In addition, during Mr. Pickles' cross-examination it became clear that the amount paid for accountancy services, as revealed by the accounts for the year ending 2010, was £7,413. Mr. Priestley submits that it was simply not feasible that a firm of accountants could provide the services as claimed and audited accounts for this modest sum. We tend to agree. It is clear to us that a business turning over around £9.6m (as estimated by Mr. Pickles) at around the time of sale would need both a managing director and a finance director. We reject the contention that the role of finance director was being provided by Forest Burlinson for the fee outlined earlier. It seems to us, therefore, that someone purchasing the business at arm's length would need to hire both a managing director and a finance director in order to fill any gaps in the management team left by the loss of Mr. and Mrs. Pickles. Accordingly, Mr. Sofola was right to make the adjustment that he did.

30. The second ground that Mr. Sofola was attacked upon was that his recommended profits multiple of 3.5 was too low. Mr. Sofola sets out his reasoning as to how he comes to that multiple in his report [C17-18]. During the course of his examination in chief Mr. Sofola candidly accepted that, for a private company, he would "not necessarily disagree with a multiple of four", that it is "within the range for the sector" and that "a multiple of four would not be unreasonable". However Mr Sofola went on to say that this business, which is so dependent on weather and commodity prices wholly outside its control, and contracts, which include a fixed price element and are with a small number of buyers, would need to have these

factored in to arrive at a multiple. Mr. Davison did his best to cross-examine Mr. Sofola and sought to put to him that he had not considered other methodologies of valuation, that he had used too low a profit multiple, that the BDO Private Company Price Index report indicated an average profit multiple of 9 and that he had failed to properly consider the history of the business and the experience of the management team. In truth Mr. Davison was working, proverbially speaking, with one hand tied behind his back. He was attempting to give expert evidence whilst trying to cross-examine Mr. Sofola. This was hopeless. In the end the only expert evidence that we could place any reliance upon was provided by Mr. Sofola and the conclusions that he had drawn in his report remained, wholly intact.

31. Accordingly, we find that the open market value of the goodwill, as of the date of sale, was £270,200.

32. Mr Pickles, when giving oral evidence, stated that the partnership had paid £115,000 to his father when he retired from the partnership in 2003 for the goodwill of the business. This was not set out in his witness statement. In addition, Mr. Pickles read from and referred to a loan agreement which provided for the loan of £109,000 repayable over seven years at a rate of £1,700 for the first 36 months and then £1,000 for the remaining 48 months. There were no other documents signed and the goodwill was not independently valued. Mr. Pickles was unable to provide an explanation as to why this had not been referred to earlier or why there was a difference of £6,000 between the loan amount and the amount that he said the goodwill was sold for. Neither did know why his former accountants had failed to mention the cost of the goodwill in their calculation submitted to the Respondents on 5 March 2014 [E36] when this would clearly have been of benefit to him.

33. All that Mr. Davison could say, on behalf of the Appellants, is that the cost of acquisition of the goodwill was reflected in the accounts of the partnership. However, that can also be said for the goodwill acquired by HFPL. The Respondents are not required to take at face value the value attributed to goodwill in a set of accounts. Indeed, that is why we are here today.

34. It was for Mr. and Mrs. Pickles to show that the goodwill was acquired for £115,000 and should have been used by the Respondents as the base cost when calculating the gain on the goodwill sold to HFPL. Mr. Pickles sought to do this by mentioning it for the first time in oral evidence and reading from a loan agreement (which was not in the bundle). This is a highly unsatisfactory way of proceeding. The Respondents had no notice that this was a point in issue and were prevented from adducing expert evidence in response on the value of the goodwill transferred by Mr. Pickles (senior) to the partnership. We cannot place any weight on evidence produced in the circumstances and manner that we set out above. Mr. Pickles has failed to satisfy us that the goodwill purchased by HFPL from him (and his wife) had a base cost of £115,000.

Distribution

35. The undisputed facts are that following the sale on 1 May 2011 the Appellants' received cash from HFPL in the sum of £771,863 in relation to the sale of goodwill. This exceeds the market value of £270,200 by £501,663.

36. The Respondents contend that in so far as the Appellants received consideration for goodwill from HFPL in excess of its market value, there is an Income Tax liability under s1020 CTA 2010. They claim that (1) the consideration for goodwill was £1,199,043, being the amount credited to the Directors Loan Account ("DLA") with respect to goodwill [G30]; (2)

This credit had an explicit monetary value at the time it was credited, and was repayable on demand, in accordance with section 3.2 of the Sale Agreement [G7]; (3) The DLA records [G28-30] demonstrate that this is how the DLA was treated in practice by the directors; and (4) HFPL's audited accounts record "Payments to acquire intangible assets" of £1,199,043 [D124] and used this for HFPL's amortisation calculations [G31].

37. The Appellants seek to argue that on a proper reading of the Sale Agreement the goodwill was not sold for £1,199,043. It was sold for "value" – whatever that was - and the amount credited in the loan account was an estimate made by the accountants.

38. With respect to both parties, neither has sought to address the proper question and both have adopted erroneous frameworks within which to analyse the transaction.

39. It is, on the evidence, clear that the amount agreed to be paid as consideration by HFPL to the Appellants for the goodwill was the sum of £1,199,043. It is further clear that this sum or part of it was to be left outstanding and was to be credited to the DLA. To argue that there was no value agreed for the goodwill at the time of sale and that it was left up in the air is nonsense. The parties attributed a value and this is the basis upon which they moved forward. However, it does not follow that because the parties fixed or agreed the sum payable (i.e. agreed the consideration) for the goodwill that any difference between this sum and the market value of the goodwill falls to be taxed under s1020 CTA 2010.

40. As a rough rule of thumb taxation is usually based around relationships or transactions. In the case of transfers (whether of cash or other assets) out of companies the tax consequence is, usually, governed by the relationship that the transferee has with the company. These relationships can be split into five main categories: suppliers, customers, officers, employees and shareholders/members. The tax code is, of course, full of esoteric bye-ways and the above categorisation is by no means comprehensive. However, it helps to have it in mind when analysing any given transaction relating to companies. It also helps to have in mind the presumption that a transaction is not taxable unless there is a statutory provision to make it so.

41. In the current case the Respondents rely upon s 1020 of the CTA 2010 to argue that there was a distribution in the sum of £1,199,043. Section 1000(1) provides:

> "In the Corporation Tax Acts "distribution", in relation to any company, means….
> (G) Any amount treated as a distribution by section 1020 (transfer of assets and liabilities)".

42. Section 1020 provides:

> "(1) This section applies if on a transfer of assets or liabilities-
>
> (a) By a company to its members, or
>
> (b) To a company by its members,
>
> The amount or value of the benefit received by a member exceeds the amount or value of any new consideration given by the member".

43. We were not referred to any cases to help us with analysing section 1020; but it is readily apparent that a "distribution" in this context is the value of benefit received by a member which exceeds the value of consideration given by the member on a transfer of assets.

44. In the present case this calls for the analysis of the following matters:

(1) What is the value of the consideration given by the members (Mr. and Mrs. Pickles)? We have determined that this was £270,200 represented by the transfer of goodwill from them to HFPL.

(2) What were the assets transferred by HFPL to the members in return? It is clear that cash is an asset. However, the creation of a liability in the form of a debt owed by a company to its members requires careful thought. In our judgment the proper legal analysis of a "debt" is that it is a binding legal obligation to pay a sum of money. It is not, by itself, an asset. It is merely the obligation to transfer (or pay over) an asset (cash). It is in fact a liability in so far as the company is concerned. This is borne out by the accounting treatment: the debt is treated by the company as a liability in its balance sheet. The position would be different if HFPL was owed an amount by, say a customer, and it transferred that debt to Mr. and/or Mrs. Pickles.

(3) Can it then be argued that this was a transfer of a liability by HFPL to Mr and Mrs. Pickles? Whilst the wording of section 1020 is wide enough to catch both a transfer of assets and liabilities from a company to its members, it does not catch this transaction. For one thing, at the time of the transaction, the company does not have the liability (or asset for that matter) to transfer. The liability is only created by the transaction itself. For another the value of the benefit of a liability transferred to member must be zero (or more precisely a negative number).

(4) If we are wrong and the transaction created a debt such that it was an asset in the hands of HFPL and this transferred to Mr. and Mrs. Pickles as members then we must consider the value of the benefit received by Mr. and Mrs. Pickles. As of 1 May 2011, Mr. and Mrs. Pickles were entitled to receive the benefit of £1,199,043 in return for the goodwill that they had sold to HFPL. Instead they received part only of that sum and accordingly the benefit was restricted or reduced accordingly. Put another way the benefit of a right to receive a sum is not crystallised until the sum is received. So, whilst a member when entitled to call for a sum owed to him by a company will have his claim rank in line with other creditor of the company on a winding up, the 'benefit' of this right or entitlement does not enure to him for the purposes of s.1002 until he is in receipt of the money representing the debt.

(5) Additionally, if there was some value to the benefit received then this would need to be quantified. Any asset that was transferred, other than perhaps cash, would need to have a "market value" ascribed to it for the purposes of s.1020 [see s.1020(3)]. In the case of debts which are assets there would need to be a valuation. A AAA rated corporate bond is likely to have a very different market value in comparison to its face value and this will different still from a similar bond provided by a small business. We have no evidence as to the "market value" of the debt.

45. The position with regards to the "value of the benefit received" for the purposes of s. 1020 might be illustrated by the use of a simple example. If, as opposed to a "debt" assume the company had in its possession another set of assets (say four matching Chippendale chairs). Further assume that there was a binding agreement on Monday that the four chairs would be sold to a member in return for nominal consideration (the proverbial peppercorn). Then assume that only two chairs are delivered to the member on Tuesday with the remainder likely to be delivered by the end of the week; but there is a fire on Wednesday which destroys the remaining two chairs and company along with it. There are, it seems to us, two assets that relate to the sale of the chairs. Firstly, there are the chairs (the existing asset) and the second is the right to

the receive the chairs (the newly created asset). Dealing with the chairs we do not think that it can be argued that the member has received the benefit of the chairs as soon as the ink is dry on the agreement. The member receives the benefit of the chairs when he takes possession and begins to enjoy them. It follows in this example that the member only ever takes possession and enjoyment of two chairs and not the originally intended four. Equally, had their been no sale of the chairs by the company to the member, but the member had simply helped himself to two of the chairs for his own use and benefit we think that this could, in the right circumstances, constitute a transfer of the chairs to the member where the member clearly received a benefit. For the reasons we have set out above the newly created asset is not the asset in question for the purposes of se. 1020.

46. In summary the argument that by crediting a director's loan account the company (HFPL) made a "distribution" for the purposes of s. 1000 and 1020 is misconceived. The transaction creates a liability on the part of the company and, therefore, there can be no transfer of assets. Alternatively, there can be benefit or value to any benefit accruing to the members from such a transaction for the reasons given above.

47. To the extent that the debt was paid by HFPL (in the sum of £771,863) and this sum exceeds the value of the goodwill (£270,200) then that sum (£501,663) was a benefit received by Mr. and Mrs Pickles, and was, accordingly, a distribution under section 1020. However, the remainder of the debt which remains outstanding cannot be so regarded. There is no basis for arguing otherwise.

48. There was some discussion about "unwinding" the distribution by reason of guidance provided by the Respondents which we deal with for the sake of completeness. The Appellants face the following unsurmountable obstacles in making good their argument:

(1) They have failed to identify a statutory or other legal basis upon which the "distribution may be unwound"; and

(2) The "guidance" referred to only applies where the member repays to the company the difference between the market value and the amount paid for the asset in full- which in the instance case was never done.

49. There is, accordingly, no basis for arguing that the transaction ought to be unwound.

CONCLUSION

50. For the reasons set out above we allow the appeal in part. The Closure Notice assessments are excessive and must be reduced in line with our decision further to section 50(6) of the TMA 1970. We have not carried out the necessary calculation, but trust that it will be clear from our decision that Mr. and Mrs. Pickles are now to pay income tax (less any dividend tax credit that might be due) on the sum of £501,663.

51. We have given careful consideration to the arguments raised by the Respondents under the heading "distribution" and, as we have noted, there appear to be no authorities that might be of assistance. Despite the careful consideration given we have been unable to agree on the interpretation of the relevant law under this section. Further, this is an important point of widespread significance upon which the Upper Tribunal should provide definitive guidance. We, therefore, give the Respondents permission to appeal on this point and encourage them to do so.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

52. 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.

ASIF MALEK

TRIBUNAL JUDGE

RELEASE DATE: 22 APRIL 2020

APPENDIX
Dissenting opinion of Mrs. Dean

1. I agree with Judge Malek that the open market value of the goodwill, as of the date of sale, was £270,200. I also agree that the amount agreed to be paid as consideration by HFPL to the Appellants for the goodwill was the sum of £1,199,043. This exceeds the open market value by £928,843.
2. As set out in the Sale Agreement, the purchase price for the assets transferred was to be satisfied in cash at such time as the Purchaser may decide and in the meantime shall remain owing as a debt payable by HFPL on demand.
3. The only evidence presented in relation to payments of this debt was a listing of all the transactions on the DLA for the year ended 31 March 2012. [G28], which included the sum of £1,199,043 as the debt due to the directors for the sale of goodwill. Repayments of round sums of £5,000 and £1,000 were made on a regular basis, often weekly. In addition the account was used to pay self assessment tax, purchase goods and pay a wage to Mr Pickles. Some entries were simply marked "personal". The directors' subscription of £95,000 for share capital was set against this account. Moreover, on a number of occasions cash was introduced into the account. By the end of the accounting year the balance on the DLA was £764,813.54.
4. The balance on the DLA at the date HFPL went into administration was £427,180.
5. The debt in this case is not a right to receive payment at a later date, as it is payable on demand, and that demand could be made immediately.
6. In effect the DLA was treated as a current account by the directors. There was no attempt to allocate any payment to the directors to the debt due for the goodwill. In view of the number and variety of transactions in the account it is not possible to identify any of the payments as distributions for the purposes of S1000 CTA 2010. Nor is it correct to calculate the difference between the value used for the goodwill of £1,199,043, and the closing balance of £427,180 as being the total of the agreed value of £270,200 of goodwill plus distributions.
7. The only way in which a fixed amount and date for the distribution can be ascertained is to treat it as happening on 27th April 2011 when the debt for £1,199,043 was established in exchange for the transfer of the goodwill. At that date the directors could have demanded repayment in full. The fact that they chose not to do so does not alter the value of the distribution. Payments to the directors after that date were in satisfaction of the debt due to them. The non-payment of £427,180 at the date of administration gives rise to a capital loss under the provisions for irrecoverable loans to a company in S253 TCGA1992.
8. While cash is indeed an asset, it differs from all other assets in that it has an intrinsic value. S1020 CTA 2010 does not apply as there is no need to value the benefit of the cash transfer.