Neutral Citation: [2024] UKFTT 00238 (TC)

Case Number: TC09112

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/01634

Income Tax – Negligible value claim – appeal dismissed

Heard on: 18 March 2024
Judgment date: 20 March 2024

Before

TRIBUNAL JUDGE HOWARD WATKINSON
LESLIE BROWN

Between

ABIGAIL TAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr. David Boyd of Silver Levene LLP

For the Respondents: Mrs. Fiona Tan, of HMRC Solicitor's Office

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video. The documents to which we were referred were in a bundle of documents running to 357 pps., a skeleton argument from the Respondents, a Statement of Case from the Appellant, and a bundle of authorities.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

EVIDENCE

3. As well as the other documents in the bundle, for the Appellant we had a witness statement and oral evidence from the Appellant herself, and a witness statement from Mr. Parimal K Patel, a Chartered Accountant who advised the Appellant whilst a consultant to Silver Levene LLP ("SL"). Mr. Patel was not required to give oral evidence.

4. We found that Ms. Tan's evidence, whilst honestly given, was not reliable. Her account is contradicted by the contemporaneous documentary evidence referred to below and approved and/or signed by her. This an example of the well-known powerful biases that the litigation process itself can produce (see the observations of Stewart, J. in *Kimathi & Ors v The Foreign And Commonwealth Office* [2018] EWHC 2066 (QB) at [95] – [96]).

5. For the Respondents we had a witness statement from Officer Daniel Oakes, who enquired into the Appellant's Self Assessment ("SA") returns, and Officer Clare Rooney, an Associate Member of the Royal Institution of Chartered Surveyors employed in the Shares and Assets Valuation team of HMRC. Neither Officer was required to give oral evidence.

FINDINGS OF FACT

6. Based on the evidence before us the Tribunal made the following findings of fact:

7. The Appellant's amended SA return for the tax year ending 5.4.17 was submitted to HMRC on 25.1.18. The return contained a claim for relief of £50,0000 for 2017-18 trade losses or certain capital losses. The form stated at box 21: "A negligible value claim is to be made for 2017/2018 in the amount of £150,000. We have carried back £50,000 of the loss to 2016/17 tax year to set against other income. This has been disclosed in Box 4 page A13. Due to an error in the software, the loss does not filter through to the tax return and we have therefore shown an entry of £20,000 in box 16 page TC2, which is £50,000 at 40". The form then claimed a repayment of £20,000 for 2017-18. The Appellant therefore claimed income tax relief of £50,000 for 2016-17 and assessed her total income tax due as £1,828.40.

8. The Appellant's 2017/18 SA return for the tax year ending 5.4.18 was submitted to HMRC on 1.8.18. The return stated at box 33 allowable costs of £150,000, at box 41 losses used against income – amount claimed against 2017 – 2018 income £50,000, at box 35 losses in this year £150,000, and at box 43 losses used against income – amount claimed against 2017 – 2018 income £50,000. The code MUL was inputted at box 36. Box 47 stated losses available to be carried forward £50,000. The form stated at box 54: "Loss on disposal of Kleos (Holdings) Limited Ordinary Shares 150000 (EIS/qualifying trading company). Relief of £50,000 claimed against current year's income. Relief of £50,000 claims against previous year's income. Asset Kleos (Holdings) Limited disposal date 30/09/2017 Negligible value claim." The Appellant therefore claimed income tax relief of £50,000 for 2017-18, SA income tax charged as £19.458.40 and income tax overpaid as £18,551.60.

9. Kleos (Holdings) Ltd ("KHL") was incorporated on 19.12.13. The Appellant and Dr. Valeria Cinaglia were KHL's directors. Two ordinary shares were allotted, one to each director.

KHL's Articles of Association broadly permitted the directors to exercise any power of the company to offer or allot, grant rights to subscribe for or to convert any security into; or otherwise deal in, or dispose of the Ordinary Shares, to any person, at any time and subject to any terms and conditions as the directors thought proper. The shares could be issued as nil, partly paid, or fully paid shares.

10. On 30.9.17 the Appellant applied for 150,000 Ordinary shares of £1.00 each in the capital of KHL on the basis if £1.00 per share writing "I hereby confirm that payment for the aforementioned shares shall be capitalisation of the director's loan account."

11. Minutes, dated 11.12.17, of a board meeting of KHL on 30.9.17, record KHL's approval of the following applications for shares together with the relevant remittances:

> "(1) 5,000 Ordinary shares of £1.00 each at par from Valeria Cinaglia. It was noted that the aforementioned shares were to be paid by £1.00 and capitalisation of directors loan account.
>
> (2) 150,000 Ordinary shares of £1.00 each at par from Abigail Hui Xian Tan. It was noted that the aforementioned shares were to be paid by £1.00 and capitalisation of directors loan account."

12. The directors were instructed to issue the relevant share certificates and file form SH01 with Companies House. The SH01 recording the allotment of 155,000 ordinary shares in KHL was received by Companies House on 12.12.17. The SH01 recorded the allotment date as 30.9.17.

13. There was no advance subscription for these shares by the Appellant, nor was there any other document showing the Appellant only agreeing to provide money to KHL in return for equity.

14. Mr. Patel also said in his witness statement that he was advised by Ms. Tan that KHL *"kept a separate equity directors loan account balances and a director's loan account balance."* Mr. Patel produced a "summary" of these accounts, but no contemporaneous documents. We find that the company did not keep these different accounts at the time. Had it done so, we would have expected their contents to have been accounted for properly in KHL's annual financial statements, and in shares being properly issued at the relevant times.

15. KHL's Annual report and Unaudited Financial Statement for FYE 31.12.17, approved on behalf of the board by the Appellant on 27.9.18 recorded: "The principal activity of the company was to be that of Licensed restaurants which was closed down in November 2017." The Notes to the Financial Statements in relation to Going Concern stated: "The company meets its day to day working capital requirements through shareholder providing the funds." The Notes recorded "Other creditors" as £265,184. The balance sheet as at 31.12.17 recorded total assets less current liabilities as (257,953). The called up share capital was stated to be £2; 2 ordinary shares of £1 each.

16. KHL's tax computation for the period 1.1.17 – 31.12.17 recorded no chargeable profits, losses brought forward of £221,731, losses arising of £34,144, and losses carried forward of £255,875.

17. KHL's amended Annual report and Unaudited Financial Statement for FYE 31.12.17, approved on behalf of the board by the Appellant on 20.2.19 again recorded: "The principal activity of the company was to be that of Licensed restaurants which was closed down in November 2017." The Notes to the Financial Statements in relation to Going Concern again stated: "The company meets its day to day working capital requirements through shareholder providing the funds." The Notes recorded "Other creditors" as £110,184 – a difference of

£155,000. The balance sheet as at 31.12.17 recorded total assets less current liabilities as (102,953) – a difference of £155,000. The called up share capital was now stated to be £155,002; 155,002 ordinary shares of £1 each.

18. On 2.7.19 Silver Levene filed a DS01 (strike off) form with Companies House for KHL. There is no evidence that KHL went through any form of insolvency procedure.

19. On 15.1.19 HMRC opened enquiries into the Appellant's SA returns for the years ended 5.4.17 and 5.4.18. The enquiry letter for 5.4.18 asked for the following information and documents:

> "Kleos (Holdings) Ltd
>
> A brief history of your shareholding in the company, including the dates of acquisition of the shares and evidence of subscription to the shares.
>
> An explanation for any reliefs claimed including how they have been calculated with relevant supporting documentation.
>
> Documentation to support the acquisition price and related costs, this should include an EIS3 to confirm EIS relief or 88(2) to show shares were subscribed for.
>
> Were the shares acquired funded by a loan conversion/directors loan account?
>
> Documentation to support disposal proceeds, negligible value claim etc.
>
> The date you believe the shares became of negligible value and why you believe the shares were of negligible value at that date.
>
> Any other relevant information."

20. In the absence of a response to that request, on 6.3.19 HMRC issued a Sch.36 Information Notice to the Appellant in the same terms.

21. On 13.3.19 SL, on behalf of the Appellant, replied to HMRC, stating the background details of the Appellant's subscription for 150,000 shares in KHL and saying:

> "2) Our client's claim is for negligible value as the company is insolvent and has ceased to trade and her holdings in the company have nil value.
>
> …
>
> 4) we can confirm that the shares were funded by a loan conversion into capital.
>
> 5) There is no disposal of the shares as the company is insolvent (see accounts attached) and the value of her shares is NIL. Therefore the claim is under a deemed disposal of the shares arising in the claim for the loss relief.
>
> 6) The date was 30th September 2017 as this is the date the company ceased to trade and the shares had no value
>
> …"

22. On 8.4.21 SL confirmed HMRC's understanding that KHL ceased trading on 30.9.17 and that at this date the Appellant's shares in it had no value. SL said that its argument was that when the capital sums were introduced the company was solvent and hence the share value would be at £1 each, and one has to look at the company's position not as at 30.9.2017 but when the capital was introduced and at that time the value was not NIL but was pound for pound.

23. The CN for the year ended 5.4.17 dated 22.7.21 disallowed the £50,000 carried back from 2017/18 and £20,000 2017/18 repayment claimed but did not otherwise amend the amount of tax due for the 2016/17 tax year. The CN stated:

> "S251(3) of TCGA 1992 limits the acquisition cost of the shares subscribed for to their market value at the time of the loan conversion. As it is agreed that the shares were worthless at the 30/09/2017 acquisition date there is no allowable loss incurred in 2017/18 so the £50,000 claimed is not available to be carried back to 2016/17"

24. The CN for year ended 5.4.18 dated 22.7.21 disallowed the £150,000 losses claimed in respect of KHL and the £50,000 losses claimed against income. The CN amended the Appellant's 2017/18 tax year SA return to show tax due of £24,600.00 instead of tax overpaid of £18,551.60. The CN stated:

> "The £150,000 shares subscribed for do not meet the conditions for a negligible value claim as they were worthless at the time of acquisition on 30/09/2017 when the loan conversion took place. S251(3) of TCGA 1992 limits the acquisition cost of the shares subscribed for to their market value at the time of the loan conversion."

25. On 5.8.21 SL on the Appellant's behalf, appealed to HMRC against the CNs saying that the action taken by the Appellant in placing her own funds in the company to carry on the business is evidence enough that this was capital intended to be used for the purpose of the trade, the subscription date was when the Appellant introduced her capital, but the conversion of the capital into shares at 30.9.17 does not mean that this was the date the capital was committed. SL said that one has to look at the company's position not at 30.9.17 but when the capital was introduced at which time the value was pound for pound because the company was solvent.

26. On 9.9.21 HMRC issued its view of the matter, saying:

> "Our view is that when you subscribed for the 150,000 Ordinary shares in Kleos Holdings Ltd on 30 September 2017 given that the shares were acquired by way of a loan conversion, S251(3) TCGA 1992 applied and this meant that the sum of any relief was restricted to the market value of the shares at the time of the loan conversion.
>
> We are both in agreement that the shares were negligible in value as at 30 September 2017 but disagree on the date of subscription. Our opinion as confirmed by the evidence submitted is that this is the 30 September 2017 when the loan conversion took place and the shares were acquired. You disagree and hold that it is an earlier date when the capital was first introduced into the company."

27. On 20.1.22 HMRC notified the Appellant that the CNs had been upheld on statutory review.

28. Save for the consideration from the Appellant and her co-director for the initial shares issued by KHL, and until the amended Annual report and Unaudited Financial Statement for FYE 31.12.17, monies put at KHL's disposal by the Appellant were recorded in KHL's financial statements approved by the Appellant for FYEs 2015, 2016 and 2017 under "other creditors", i.e. they were treated as loans. We find that the monies put at KHL's disposal by the Appellant, as above, were in fact loans. We find that the contemporaneous documentation in the form of (i) those Unaudited Financial Statements, prepared by SL and approved by the Appellant, (ii) the contents of the Appellant's application for the shares, (iii) the contents of the minutes dated 11.12.17, and (iv) SL's letter of 13.3.19 are a more reliable guide than the recollections of the Appellant that she always intended the monies to be equity in KHL. In addition, Mr. Patel's witness statement stated that, during a meeting on an unspecified date Ms. Tan advised him that *"it was her intention at all times during the running of the company that*

she will introduce equity in the initial trading period and loan capital as and when required." This also contributes to out finding that the monies were loans. The loans did not carry any right to equity in the company.

29. It is common ground, and we find, that when the Appellant acquired the 150,000 shares by allotment on 30.9.17, they were of negligible value.

THE LAW

30. The Taxation of Chargeable Gains Act 1992 ("TCGA") provides for negligible value claims.

31. Section 16 TCGA relevantly states:

> "16 Computation of losses
>
> (1) Subject to sections 261B, 261D and 263ZA and except as otherwise expressly provided, the amount of a loss accruing on a disposal of an asset shall be computed in the same way as the amount of a gain accruing on a disposal is computed.
>
> (2) Except as otherwise expressly provided, all the provisions of this Act which distinguish gains which are chargeable gains from those which are not, or which make part of a gain a chargeable gain, and part not, shall apply also to distinguish losses which are allowable losses from those which are not, and to make part of a loss an allowable loss, and part not; and references in this Act to an allowable loss shall be construed accordingly.
>
> (2A) A loss accruing to a person in a year of assessment shall not be an allowable loss for the purposes of this Act unless, in relation to that year, he gives a notice to an officer of the Board quantifying the amount of that loss; and sections 42 and 43 of the Management Act shall apply in relation to such a notice as if it were a claim for relief.
>
> …"

32. Section 21 TCGA relevantly states:

> "21 Assets and disposals
>
> (1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—
>
> (a) options, debts and incorporeal property generally, and
>
> (b) currency, with the exception (subject to express provision to the contrary) of sterling,
>
> (c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.
>
> (2) For the purposes of this Act—
>
> (a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and
>
> (b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of."

33. Section 24 TCGA relevantly states:

24 Disposals where assets lost or destroyed, or become of negligible value

(1) Subject to the provisions of this Act and, in particular to [sections 140A(1D), 140E(7) and 144][2], the occasion of the entire loss, destruction, dissipation or extinction of an asset shall, for the purposes of this Act, constitute a disposal of the asset whether or not any capital sum by way of compensation or otherwise is received in respect of the destruction, dissipation or extinction of the asset.

(1A) A negligible value claim may be made by the owner of an asset ("P") if condition A or B is met.

(1B) Condition A is that the asset has become of negligible value while owned by P.

(1C) Condition B is that—

(a) the disposal by which P acquired the asset was a no gain/no loss disposal,

(b) at the time of that disposal the asset was of negligible value, and

(c) between the time when the asset became of negligible value and the disposal by which P acquired it, each other disposal (if any) of the asset was a no gain/no loss disposal.

(2) Where a negligible value claim is made:

(a) this Act shall apply as if the claimant had sold, and immediately reacquired, the asset at the time of the claim or (subject to paragraphs (b) and (c) below) at any earlier time specified in the claim, for a consideration of an amount equal to the value specified in the claim.

(b) An earlier time may be specified in the claim if:

(i) the claimant owned the asset at the earlier time; and

(ii) the asset had become of negligible value at the earlier time; and either

(iii) for capital gains tax purposes the earlier time is not more than two years before the beginning of the year of assessment in which the claim is made; or

(iv) for corporation tax purposes the earlier time is on or after the first day of the earliest accounting period ending not more than two years before the time of the claim.

(c) Section 93 of and Schedule 12 to the Finance Act 1994 (indexation losses and transitional relief) shall have effect in relation to an asset to which this section applies as if the sale and reacquisition occurred at the time of the claim and not at any earlier time.

…"

34. Section 251 TCGA states:

"General provisions

(1) Where a person incurs a debt to another, whether in sterling or in some other currency, no chargeable gain shall accrue to that (that is the original) creditor or his personal representative or legatee on a disposal of the debt, except in the case of the debt on a security (as defined in section 132).

(2) Subject to the provisions of sections 132, 135 and 136 and subject to subsection (1) above, the satisfaction of a debt or part of it (including a debt on a security as defined in section 132) shall be treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied.

(3) Where property is acquired by a creditor in satisfaction of his debt or part of it, then subject to the provisions of sections 132, 135 and 136 the property shall not be treated as disposed of by the debtor or acquired by the creditor for a consideration greater than its market value at the time of the creditor's acquisition of it; but if under subsection (1) above (and in a case not falling within section 132, 135 or 136 no chargeable gain is to accrue on a disposal of the debt by the creditor (that is the original creditor), and a chargeable gain accrues to him on a disposal by him of the property, the amount of the chargeable gain shall (where necessary) be reduced so as not to exceed the chargeable gain which would have accrued if he had acquired the property for a consideration equal to the amount of the debt or that part of it.

…"

35. Section 273 TCGA states:

"273.— Unquoted shares and securities.

(1) The provisions of subsection (3) below shall have effect in any case where, in relation to an asset to which this section applies, there falls to be determined by virtue of section 272(1) the price which the asset might reasonably be expected to fetch on a sale in the open market.

(2) The assets to which this section applies are shares and securities which are not listed on a recognised stock exchange at the time as at which their market value for the purposes of tax on chargeable gains falls to be determined.

(3) For the purposes of a determination falling within subsection (1) above, it shall be assumed that, in the open market which is postulated for the purposes of that determination, there is available to any prospective purchaser of the asset in question all the information which a prudent prospective purchaser of the asset might reasonably require if he were proposing to purchase it from a willing vendor by private treaty and at arm's length."

36. In accordance with s.50 of the Taxes Management Act 1970 the burden of proof lies with the Appellant to demonstrate that the conclusions stated in the CNs issued in relation to the tax years 2016/17 and 2017/18 are incorrect, otherwise they stand good. The standard of proof is the ordinary civil standard, this being on the balance of probabilities.

37. In *Dyer v HMRC* [2016] UKUT 381 (TCC) (to which neither party referred us) the Upper Tribunal considered a not dissimilar case, in that one issue was whether the shares were worthless on the date they were acquired. At [45] the UT referred to *"the principle that the asset, in this case the shares, must be valued as it is on the relevant date, and not as it might be if certain steps were taken."*

DISCUSSION

38. There was no dispute, and we find, that both enquiries were validly opened and closed.

39. It is common ground that the value of the 150,000 shares, as at the time of their acquisition by the Appellant by allotment dated 30.9.17, and as accepted by SL in their letter of 13.3.19, was negligible.

40. Section 24 TCGA requires that the relevant "asset" which has been lost, destroyed, dissipated or become extinct be identified. The "asset" identified in the Appellant's negligible value claim in her SA return for the tax year ending 5.4.18 was the 150,000 shares in KHL with a disposal date of 30.9.17, not any other asset. Mr. Boyd, however, submitted that the "asset" which then became of negligible value was instead a right to acquire shares in KHL. We have found that monies put at KHL's disposal by the Appellant were loans which did not carry with them any right to equity in the company. There was therefore, as a matter of fact, no other asset that we needed to consider for the Appellant's primary case than the shares themselves.

41. Section 24(1B) TCGA requires the following condition to be met for a negligible value claim to be met "Condition A is that the asset has become of negligible value while owned by P."

42. The earliest date at which the Appellant could have owned the asset, the 150,000 shares in KHL, was 30.9.17, when KHL resolved to allot them. As at that date the shares were already of negligible value, and therefore could not "become" of negligible value whilst owned by the Appellant.

43. The Appellant therefore did not meet Condition A in s.24(1B) TCGA, and therefore she had no basis for a negligible value claim.

44. The Appellant was therefore not eligible for share loss relief under s.131 ITA07 because there was no qualifying disposal under s.131(3)(d), that requires an allowable loss under s.24(2) TCGA.

45. The Appellant did not make a claim in her SA returns based on any other asset. In particular, the Appellant did not make a claim based on the director's loan that she had made to KHL. However, in the Appellant's Statement of Case, recorded as prepared on 12.3.24, the Appellant put forward an alternative analysis that the sums were in fact debt which should crystallise a capital loss and that relief should be available under s.253 TCGA instead (relief for loans to traders). Mrs. Man objected to this on the basis that this was a new ground of appeal. We explored some of the issues that could arise with relief claimed on the s.253 TCGA basis during the hearing in an attempt to gauge the strength of the argument such as how any amount of the principal loan could be said to be outstanding when there had been a debt-to-equity swap, whether the loans had "become" irrecoverable or may have been irrecoverable when made, and whether, in the absence of any insolvency procedure the loans could be said to be irrecoverable. We express no particular view on these issues save to say that did not find the point, overall, to be a strong one. We came to the view that the issue was fact sensitive because it would require evidence as to whether there was any outstanding amount of the principal of a loan for which a claim was made, and, if so, whether it had "become irrecoverable." This was not, therefore, solely a point of law and the evidence had not been prepared by either party with a view to dealing with it.

46. The Tribunal concluded that the s.253 TCGA point falls squarely within the "very late amendment" type considered by Mrs. Justice Carr DBE (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [38]. Applying that guidance we concluded that: having explored the s.253 TCGA argument this was a very late amendment that would require further evidence that could not be produced without an adjournment, that there was no good explanation for the point being taken so late (indeed Mr. Boyd remarked that it was unclear to him why the relief had not been claimed on this basis at the time), and that the Appellant could not show why the strength of the point, and justice to her, the Respondents and other Tribunal users required her to be permitted to pursue it. We therefore agree with Mrs. Man's objection, and we do not permit the Appellant to pursue the alternative argument on s.253 TCGA.

47. The appeal is therefore dismissed and the CNs are upheld.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

48. 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.

HOWARD WATKINSON
TRIBUNAL JUDGE

Release date: 20th March 2024