Neutral Citation: [2022] UKFTT 00183 (TC)

Case Number: TC08508

FIRST-TIER TRIBUNAL
TAX CHAMBER

[By remote video hearing]

Appeal reference: **TC/2019/05660**

CORPORATION TAX – goodwill – whether owned by partners – no – following dissolution of partnership was goodwill created – no – Part 8 CTA does not apply – appeal dismissed

Heard on: 20 January 2022
Judgment date: 13 June 2022

Before

TRIBUNAL JUDGE ANNE SCOTT
MEMBER JANE SHILLAKER

Between

BEADNALL COPLEY LIMITED **Appellant**
and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Representation:

For the Appellant: **Duncan Marshall of Buckle Barton**

For the Respondents: **Gary Cruddas, litigator of HM Revenue and Customs' Solicitor's Office**

DECISION

INTRODUCTION

1. This is an appeal against five Closure Notices disallowing, as a deductible expense for corporation tax in the five accounting periods up to 31 October 2017, the appellant's claim for amortisation of goodwill arising on incorporation, in 2013, of the business operated by the appellant.

2. We had a Hearing Bundle extending to 362 pages and an Authorities Bundle extending to 220 pages. We had Skeleton Arguments for both parties. We heard no evidence since the facts are not in dispute and it is a matter of agreement that the notices of enquiry were issued within the statutory time limits.

Preliminary issues

The Closure Notices

3. HMRC have identified a clerical error relating to the Closure Notices for the periods ending 30 April 2014 and 31 October 2014 as follows:

> (1) The appellant claimed an allowable deduction of £135,000 in respect of the amortisation of goodwill for the 18 month period to 31 October 2014.
>
> (2) In the Closure Notices, the amortisation in the 18 month period was apportioned as to £45,000 for the period ending 30 April 2014, and as to £90,000 for the period ending 31 October 2014.
>
> (3) The amortisation should instead have been apportioned as to 12 months (ie (£90,000) for the period ending 30 April 2014 and six months (ie £45,000) for the period ending 31 October 2014.
>
> (4) The effect of the clerical error in the period ending 30 April 2014 is that the Closure Notice incorrectly stated that amortisation relief of £45,000 in the Corporation Tax return for this period had been disallowed resulting in additional tax of £10,595.02. The amount of amortisation relief that should have been disallowed is £90,000 resulting in additional tax of £20,552.04.
>
> (5) The effect of the clerical error in the period ending 31 October 2014 is that the Closure Notice incorrectly stated that amortisation relief of £90,000 in the Corporation Tax return for this period had been disallowed, resulting in additional tax of £19,125.01. The amount of amortisation relief that should have been disallowed is £45,000 resulting in additional tax of £9,562.50.

4. HMRC requested that if the appeal were to be dismissed then the relevant Closure Notices should be varied by the Tribunal.

5. The parties were agreed that the clerical error did not invalidate the Closure Notices and that there were no procedural defects. We agreed. HMRC has discharged its onus of proof in relation to procedural issues. The Closure Notices were timeously and competently issued.

The Opinion of Michael Firth of Gray's Inn Tax Chambers

6. Mr Cruddas argued that the Opinion of Counsel that had been lodged as an annex to Mr Marshall's Skeleton Argument should be excluded since it could not be viewed in context. Mr Firth did not appear and no instructing paperwork or notes of any calls or meetings had been lodged. It may be that he was not in possession of all of the facts. For example he narrated simply that when Mr Copley retired he transferred his rights and interests to Mr Beadnall. As our findings in fact make clear that is not the whole story.

7. We allowed Mr Marshall to refer to the arguments in the Opinion on the basis that he simply adopted them as his arguments.

The Facts

8. On 4 February 1999, Mr A D Beadnall and Mr D J Copley signed a Partnership Agreement for a partnership styled Beadnall & Copley ("the Partnership") to run an estate agency business which, in fact, had been in existence since 11 November 1991. We do not have a copy of the Partnership Agreement.

9. Mr Copley retired on 31 October 2010 bringing the Partnership to an end. The parties were not agreed on the terms of that departure. Mr Beadnall continued the business as a sole trader. Eventually on 26 September 2011, they signed a Deed of Retirement which confirmed the termination of the Partnership the previous year and the relevant terms of which include:

(a) Clause 1.1.1:

"Goodwill: all goodwill in and in connection with the Business including the right to carry on the Business under the Name…

Name: 'Beadnall & Copley' or 'Beadnall and Copley' or 'Beadnall Copley'…

"Partnership Property: the Goodwill and all assets (or rights in them) which are used by the Partnership for the purposes of the Business".

(b) Clause 2.2:

"The Partnership dissolved as a result of such retirement and AGB continues to carry on the Business as a sole trader."

(c) Clause 3.1:

"In consideration for the transfer of the Partnership Property by DJC to AGB as described in clause 4 of this Deed:

3.1.1 AGB shall pay to DJC the sum of four hundred and fifty thousand pounds (£450,000)…."

(d) Clause 4.1:

"With effect from the Leaving Date, AGB shall succeed to all the interest of DJC in the Partnership Property….DJC shall transfer the legal ownership of any items of Partnership Property…".

(e) Clause 9.1:

"If any provision in the Partnership Agreement conflicts with any provision of this deed, this deed shall prevail."

10. Although the Partnership Property was described as goodwill and all of the assets, in fact, the fixed assets were purchased separately for a price of £30,111. All of the other assets and liabilities remained in Mr Beadnall's sole trader business which was responsible for collecting the remaining debtors and meeting its remaining liabilities.

11. The sum of £450,000 was described as 50% of the market value of the business. Mr Beadnall then continued to run the same business as a sole trader until 5 April 2013 when the appellant was incorporated. Mr Beadnall was the appellant's sole director and shareholder. On incorporation of the appellant, Mr Beadnall transferred the sole trader business to the appellant.

12. The appellant recognised £900,000 of goodwill in the first set of accounts. 50% of the goodwill was attributed to Mr Beadnall's original share of the partnership business and treated

as pre-2002 goodwill which is not eligible for amortisation. That treatment is a matter of agreement between the parties.

13. The other half of the goodwill has been amortised in the appellant's corporation tax self-assessment returns for the accounting periods ending 30 April 2014 and subsequent periods up to and including the accounting period ended 31 October 2017. It has been treated as an acquisition of what was described as Mr Copley's share of the goodwill.

14. It is not in dispute that

(a) Mr Beadnall was a related party *qua* the appellant in 2013 but Mr Copley was not, and

(b) Mr Beadnall and Mr Copley were not related parties after the acrimonious dissolution of the partnership in 2010.

The Law

15. The parties are agreed that the tax rules for dealing with intangible fixed assets are contained in Part 8 Corporation Tax Act 2009 ("CTA"). Section 715 of CTA provides that Part 8 applies to goodwill as it applies to an intangible fixed asset and that goodwill has the meaning it has for accounting purposes.

16. Provided that the relevant conditions are met, relief is available for the amortisation of goodwill under Section 729 CTA.

17. Section 882 CTA sets out the general timing rule to identify which assets fall within Part 8 of CTA. The relevant provisions read as follows:-

"**882 Application of this Part to assets created or acquired on or after 1 April 2002**

(1) The general rule is that this part applies only to intangible fixed assets of a company ("the company") that—

(a) are created by the company on or after 1 April 2002,

(b) are acquired by the company on or after that date from a person who at the time of the acquisition is not a related party in relation to the company, or

(c) are acquired by the company on or after that date in case A, B or C from a person who at the time of the acquisition is a related party in relation to the company.

(2) For provisions explaining when assets are treated as created or acquired, see sections 883 to 889.

(3) Case A is where the asset is acquired from a company in relation to which the asset was a chargeable intangible asset immediately before the acquisition.

(4) Case B is where the asset is acquired from a person ('the intermediary') who acquired the asset on or after 1 April 2002 from a third person—

(a) who was not at the time of the intermediary's acquisition a related party in relation—

(i) to the intermediary, or

(ii) if the intermediary was not a company, to a company in relation to which the intermediary was a related party, and

(b) who is not, at the time of the acquisition by the company, a related party in relation to the company.

(5) Case C is where the asset was created on or after 1 April 2002 by the person from whom it is acquired or any other person…..".

18. Section 884 CTA reads:-

"**884 … Goodwill: time of creation**

For the purposes of section 882 (application of this Part to assets created or acquired on or after 1 April 2002) … goodwill is treated as created —

(a) before (and not on or after) 1 April 2002 in a case in which the business in question was carried on at any time before that date by the company or a related party; and

(b) on or after 1 April 2002 in any other case.".

The issue

19. It is a matter of agreement that the only substantive issue is whether Mr Beadnall, as an intermediary within the meaning of Section 882(4) CTA ie Case B, had "acquired the asset", namely, the goodwill, "on or after 1 April 2002 from a third person", namely Mr Copley.

20. HMRC identify three sub-issues in that regard namely:-

(a) Who owned the goodwill prior to Mr Copley's retirement?

(b) What was transferred to Mr Beadnall by Mr Copley when he retired?

(c) Does Part 8 of CTA apply in the present appeal? If it does not then the appeal fails.

21. Mr Marshall agreed that those were the sub-issues.

Summary of HMRC's arguments

22. HMRC argue that:-

(a) Goodwill is inseparable from the business to which it relates. Since the business has not changed, the business and therefore the goodwill has been owned by, firstly, the Partnership, including Mr Beadnall, then Mr Beadnall as a sole trader and lastly by the appellant which is a close company controlled by him. At no point has the goodwill been acquired from an unrelated party.

(b) HMRC's central argument is that, although not a separate legal entity, the partnership owned the goodwill and not the individual partners. In particular they relied on *Byford v Oliver and Another*[1] ("Byford") for that proposition.

(c) Section 884 CTA deems the goodwill of the whole business to have been created before 1 April 2002 if any one of the related parties was carrying on that business prior to that date. Consequently the goodwill should be treated as having been wholly created prior to 1 April 2002 and acquired from a related transferor. Thus it does not satisfy any of the conditions necessary to fall within Part 8 CTA. Therefore none of the amortisation of goodwill is deductible within the tax computations.

Summary of the appellant's arguments

23. The appellant argues that:-

(a) The amortisation arises on goodwill which was purchased by Mr Beadnall from Mr Copley after 2002 and they were unrelated parties at that time so the amortisation was correctly claimed.

[1] [2003] EWHC 295 (CH)

(b) Section 882 of CTA distinguishes between intangible assets acquired (subsections (3) and (4) being Cases A and B) and intangible assets created (subsection (5) being Case C). However, Section 884 deals with the date that goodwill is deemed to be created and it therefore cannot act to turn acquired goodwill into created goodwill.

(c) *Byford* can be distinguished, and has been misinterpreted, and they rely instead on *Burchell v Wilde*[2] ("Burchell"). Mr Marshall argued that *Byford* was wrongly decided on the facts.

(d) The dissolution of the Partnership meant that Mr Copley could sell goodwill as a separate asset to Mr Beadnall.

Discussion

Who owned the goodwill prior to Mr Copley's retirement?

24. Both Mr Firth, and therefore Mr Marshall (so henceforth we refer only to the appellant when referencing argument) and HMRC quoted from Laddie J at paragraph 19 of *Byford* which reads*:*

> "19….The name and goodwill were assets of the partnership. All the partners have or had an interest in those and all other assets of the partnership, but that does not mean that they owned the assets themselves. Absent a special provision in the partnership agreement, the partners had an interest in the realised value of the partnership assets. On dissolution of the original partnership, which is what happened when Mr Dawson departed in 1985, he and all the other partners were entitled to ask for the partnership assets to be realised and divided between them in accordance with their respective partnership shares. But none of them "owned" the partnership assets. In particular, none of them owned the name SAXON or the goodwill built up under it."

25. HMRC, appropriately, quoted more extensively from that paragraph as Laddie J went on to say:

> "The position would be very different if all the members of the original group had been performing together, not as partners, but as independent traders. In such a case, each may well have acquired a discreet interest in the name and reputation… when Mr Oliver left in 1995, the then partnership dissolved. He had an interest in the realisation of that partnership's assets, but he did not own in whole or in part the partnership name and goodwill."

26. There is no dispute that in this instance, as in *Byford*, there was no special provision in the partnership agreement, and for the reasons we set out below that is an important point.

27. The appellant's argument is somewhat confusing. On the one hand the appellant accepts that *Byford* expressly states that the partners do not own partnership assets but on the other hand the appellant goes on say that because paragraph 19 accepts that partners have an interest in the net realised value upon dissolution that is merely "…to confuse the legal question of ownership with the practical question of realisability.".

28. We say confusing because the issue for us is to establish, as a matter of <u>law</u> who owned the goodwill which was an asset of the Partnership.

29. The appellant argues that HMRC's reliance on *Byford* is misconceived because HMRC confuse the legal position with the practical position and if the partners do not own the assets, it cannot be the partnership so it must be the partners.

[2] 1900 1 CH 511

30. That is certainly a circular, and in our view, a tortuous argument.

31. In support of that argument the appellant relied on Arden LJ, as she then was, at paragraph 60 in *HMRC v Anson*[3] where she said:

> "60. A partner in an English partnership has an equitable interest in the partnership assets and thus he will be able to show that he has a proprietary interest to the extent of his profit and share in the partnership."

In passing we point out that that case was concerned with a very different matter which was whether and to what extent the taxpayer had an interest in profits of a partnership. We do not argue with this statement. Indeed it is entirely consistent with the second sentence of the quotation from paragraph 19 of *Byford.*

32. It is also consistent with Lord Jauncey in *Hadlee and another v Commisioner of Inland Revenue*[4] ("Hadlee") where he approved Richardson J in the Court of Appeal of New Zealand in the following terms:

> "First of all as a matter of general law, to quote the words of Richardson J., he 'does not have title to specific partnership property but has a beneficial interest in the entirety of the partnership assets and in each and every particular asset of the partnership….This beneficial interest, expressed in terms of its realisability, is in the nature of a future interest taking effect in possession on (and not before) the determination of the partnership….The taxpayer…had no proprietary interest in any such asset.'" (Emphasis added)

33. We have added that emphasis since the question is who owned the goodwill prior to 31 October 2010 when Mr Copley retired.

34. In oral argument Mr Marshall said that *Hadlee* was not relevant because it turned on differences in the laws of New Zealand and Australia whereas Mr Firth's opinion was that *Hadlee* was supportive of the appellant's case. We take only from *Hadlee* the very persuasive fact that Lord Jauncey was quoting from, and endorsing, Lindley and Banks on Partnership which is the authoritative textbook on partnership.

35. The appellant relied upon *Lee v Jewitt*[5] for the proposition that a partner can have title to goodwill. That case was concerned with whether legal expenses had been incurred for the purposes of defending title to goodwill.

36. An issue in the underlying litigation was the nature of payments made by incoming partners to the existing partners. The partnership agreements stipulated that the payments were for goodwill but in that litigation, relating to dissolution of the partnership, the new partners argued that the payments had been a premium and should be returned. The Special Commissioner noted that the litigation was settled after the High Court Judge concerned expressed an opinion, understandably given the contractual arrangements, that it was not a premium but was for goodwill. He went on to consider the terms of correspondence relating to the litigation which made it clear that the purpose of the litigation was to argue that the payments were not a premium but had been for goodwill.

37. We do not find that that case assists us, firstly because it turns on its own facts but secondly because it did not consider whether it was payment for the equitable or beneficial interest in the partnership and thus the underlying assets.

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[3] [2013] EWCA Civ 63
[4] [1993] UKPC 8
[5] 200 STC (SCD) 517

38. HMRC relied on *Canny Gabriel Castle Jackson Advertising Pty Ltd v Volume Sales (Finance) Pty Ltd*[6] where the High Court of Australia said at paragraph 12:

> "…we think that the interest of the partner in an asset of the partnership is sui generis…It is, as we have said, recognised as a beneficial interest."

The appellant does not dispute that that is correct, but quoted selectively from paragraph 10 where the Court said "This description acknowledges that they belong to the partnership, that is to the members of the partnership". The appellant argues that that contradicts HMRC's argument that the partners do not own the assets jointly. That argument is fallacious since the description referred to is consistent with *Byford* and reads:

> "The partner's share in the partnership is not a title to specific property but a right to his proportion of the surplus after the realization of assets and the payment of debts and liabilities. However, it has always been accepted that a partner has an interest in every asset of the partnership and this interest has been universally described as a 'beneficial interest', notwithstanding its peculiar character. The assets of a partnership, individually and collectively, are described as partnership property."

39. We agree with that analysis.

Decision on sub-issue one

40. It seems clear to us that whatever the arguments might be about "realisability", the individual partners did not own the goodwill prior to the dissolution of the partnership. The legal position is that, as was stated in *Byford,* the partners did not own the underlying assets including the goodwill. They both had a beneficial interest in the goodwill but did not own it in whole or in part.

41. The appellant's argument that the partnership could not own it since the partnership was not a legal entity is a red herring. The partners had a future interest in the value of the goodwill on the dissolution of the partnership.

42. We came to our decision on this sub-issue when discussing the outcome shortly after the hearing. We are fortified in our view by the recent decision, *Thomas v LUV ONE LUV All Promotions Limited and Another*[7] ("LUV") where the court considered *Byford* and endorsed the views of Mr Justice Laddie. In particular, at paragraph 16, it found that all of the partners

> "had an interest in the partnership assets (which included the goodwill in the name Saxon), it was the partnership that owned those assets. The partner's right, when the partnership was dissolved… was to ask for the partnership assets to be realised and divided up between them."

The court explicitly referred to paragraph 19 of *Byford* which is the paragraph upon which both parties relied in this case.

43. That takes us to the second sub-issue.

What was transferred to Mr Beadnall by Mr Copley when he retired?

44. Mr Marshall's argument was that *Byford* was a very rare case because when a partnership dissolves it would be "rare" for all of the individual partners to want to retain goodwill. That is quite simply wrong. Not only are we a specialist Tribunal and therefore

[6] [1974] HCA 22
[7] [2022] EWHC 964 (IPC)

aware that there are frequently arguments about the right to goodwill but *LUV* makes that explicit.

45. In *Byford*, Laddie J did consider *Burchell* at paragraph 24 and in particular stated:

> "24. It seems tolerably clear that, absent the special circumstances in that case, the goodwill and name of the partnership would have been an asset of the partnership which, on dissolution, would have had to have been sold so that its value could be realised for distribution among the former partners. None would have owned the goodwill or name."

46. He explained that the former partners in *Burchell* were found to have owned the name and goodwill as tenants-in-common because they had an agreement to that effect. The appellant argues that the Retirement Agreement was such an agreement.

47. We disagree. The Partnership was dissolved in 2010 and the Retirement Agreement negotiated at arms-length and concluded almost a year later. At the point of dissolution of the Partnership the ownership of the goodwill did not vest in the individual partners. Mr Copley's interest remained a beneficial interest in his share of the Partnership Property. That is reflected in the terminology used, on legal advice and at arm's length, in the Deed of Retirement and in particular at Clauses 3.1 and 4.1 (see Paragraph 9 above).

Does Part 8 of CTA apply in the present appeal?

48. For all of the reasons given above, Part 8 of CTA does not apply and in particular because Mr Beadnall did not acquire goodwill from Mr Copley. The goodwill was not created after 2002, nor was it acquired from an unrelated party and nor does it fall within the provisions of Section 882 CTA.

Disposition

49. The appeal is dismissed but the Closure Notices described in paragraph 3 above are varied to the effect set out in paragraphs 3(4) and (5) above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

50. 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.

ANNE SCOTT
TRIBUNAL JUDGE

Release date: 13 JUNE 2022