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ROELICH: WHAT IS A 'BUSINESS' FOR CGT INCORPORATION RELIEF PURPOSES?

When an individual transfers to a company a business as a going concern, together with the whole of the assets of the business (other than cash), in exchange for shares issued by the company, TCGA 1992 s 162 applies to roll any inherent capital gains on the business assets into the shares. A key issue here is that the activity which is transferred to the company in exchange for the shares must be a business.

We know from the Upper Tribunal case of Elizabeth Moyne Ramsay v HMRC [2013] UKUT 0226 (TCC) that a business for this purpose can include the letting of property, providing it is a serious undertaking earnestly pursued with reasonable continuity on sound business principles and the activities are of a kind that are commonly undertaken by those who seek to pro!t from them.

We know from an increasing number of tribunal decisions that property letting (no matter how comprehensive the services provided) will not be regarded as a business for IHT business property relief, but clearly business has a rather di"erent meaning for capital gains tax.

Last month, the First-tier Tribunal had another opportunity to consider what is meant by a business for the purposes of s 162 in the case of Paul Roelich v HMRC [2014] UKFTT 579 (TC) (reported in 'Cases', Tax Journal, 27 June 2014). In this case, Mr Roelich carried on an activity described as a property development consultancy business. He advised on projects involving property development and how these may be undertaken or progressed advantageously.

He transferred his business to a company in exchange for shares and claimed that the provisions of s 162 applied to him on this transfer. HMRC disagreed, saying that there was no transfer of a business as a going concern. There was merely the transfer of an income stream which did not amount to a business; nor did it include the whole of the assets of the business apart from cash.

HMRC also argued that Mr Roelich's activities included the exploitation of his professional knowledge and experience, but these skills were personal to him and incapable of being transferred to the company. (This argument has a clear resonance on the approach of HMRC to the transfer of goodwill.)

The tribunal considered the three key points: whether there was a business; whether that business was capable of being transferred; and whether it was in fact transferred.

The tribunal was in no doubt that Mr Roelich carried on a business and that the business was capable of being transferred as a going concern to the company. There were one or two evidential difficulties arising from a shortage of documentation but, on the evidence of Mr Roelich and the conduct of all the relevant parties, the tribunal concluded that a transfer had taken place and that s 162 applied.

There was one point which was touch and go. The company's tax return stated that a particularly important contract 'was acquired from Mr Roelich in exchange for the further issue of shares' in the company. HMRC zeroed in on this sentence as evidence that the issue of shares was for that particular contract and not for all the assets of the business (excluding cash), and therefore it did not satisfy the terms of the section.

Fortunately for Mr Roelich, the tribunal concluded that the shares were issued in exchange for all the assets of the business, despite this unfortunate wording, and his relief was not prejudiced.

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