CAPITAL GAINS TAX – costs of litigation – whether allowable deduction – nature of right over an asset as opposed to derived from an asset – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07208

Appeal number: TC/2018/01150

BETWEEN

NIGEL GRAY **Appellants**

-and-

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, Edinburgh on Wednesday 17 April 2019

Mr McCusker, instructed by Bannerman Johnstone Maclay, for the Appellant

Mr Mason, Officer of HMRC, for the Respondents

DECISION

INTRODUCTION

1. This is an appeal dated 9 February 2018 against a review decision dated 12 January 2018 by the respondents ("HMRC") in accordance with Section 31(1)(b) Taxes Management Act 1970 ("TMA") against the amendment made to the appellant's tax return for 2014/15. That amendment was made by a Closure Notice issued under Section 28 TMA in the amount of £257,948.64 and issued on 4 October 2017.

2. In summary, the appellant sought a deduction for Capital Gains Tax ("CGT") purposes of the costs of a litigation in the British Virgin Islands ("BVI") relating to a shareholding of his, the disposal of which triggered the gain.

3. I heard no oral evidence. Apart from the two Skeleton Arguments, I had a substantial Bundle of Documents and Authorities which included:

(a) The appellant's Statement of Case dated 8 June 2018 which was in identical terms to the appellant's Skeleton Argument dated 3 April 2019 save only that it requested costs and it did not include a paragraph relating to the case cited by HMRC, namely *Blackwell v HMRC*[1]("Blackwell").

(b) Documents which were described as Letters of Representation consisting of a letter from Mr Ritchie, the Barrister who represented the appellant in the BVI proceedings, letters from Stevenson and Company, Shipping and Commercial Solicitors in Glasgow, Mr Iain Webster, a Scottish Chartered Accountant who had previously advised the appellant and a letter from Lennox Paton, the appellant's BVI legal practitioners. Those letters were explicitly produced for this appeal and *inter alia* offered opinion evidence (see paragraph 43 below).

(c)The Amended Statement of Claim from the BVI proceedings ("the Claim").

(d) Correspondence with HMRC.

(e)Details of costs.

(f) Correspondence relating to the settlement of the litigation.

(g) HMRC's Statement of Case dated 3 May 2017.

4. As far as costs are concerned (we are in Scotland so it should be expenses), this has been categorised as a Standard Category case so I pointed to the provisions of Rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"), a copy of which is attached at Appendix 1, and declined to consider the matter at this juncture since, even if there was a basis for awarding expenses, which is hotly contested, the application did not comply with the Rules.

5. Both parties argued that the substantive appeal was a relatively straightforward matter but for completely different reasons.

6. It was not disputed that only expenditure which falls into the categories defined in section 38(1) Taxation of Capital Gains Tax Act 1992 ("TCGA") can be allowed as a deduction on calculating the amount of a gain or loss on disposal.

The Law

7. Section 38(1) TCGA reads:

[1] 2017 EWCA Civ 232

(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to—

(a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition or, if the asset was not acquired by him, any expenditure wholly and exclusively incurred by him in providing the asset,

(b) the amount of any expenditure wholly and exclusively incurred on the asset by him or on his behalf for the purpose of enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of the disposal, and any expenditure wholly and exclusively incurred by him in establishing, preserving or defending his title to, or to a right over, the asset,

(c) the incidental costs to him of making the disposal.

The appellant's core arguments

8. At paragraph 6 of the Skeleton Argument, Mr McCusker stated:

"…the appellant's claim for relief is not that expenditure represents 'enhancement expenditure' as stated in HMRC's submission, but rather that this expenditure was incurred to defend the appellant's legal rights over the shares…".

9. Mr McCusker confirmed that, notwithstanding the obvious fact that other arguments had been deployed in correspondence, the appellant was reliant only on the latter part of section 38(1)(b) TCGA. In that regard he confirmed that he was not seeking to argue that the expenditure had been incurred in order to defend the title to the shares.

10. It was stated in the Notice of Appeal that:

"Those rights were in respect of voting rights, income rights and capital rights of the shares held by our client which were all being transgressed and prejudiced by the unlawful acts of the majority shareholder….the 'rights' that attach to the ownership of shares…not only comprises the rights to dividend, votes and capital but also a right that the shareholders expect of the company being run lawfully by its directors."

11. The expenditure had been incurred wholly and exclusively to preserve and defend the appellant's rights over the shares.

HMRC's core arguments

12. The expenditure incurred in taking action in the BVI court does not come within the ambit of any of the allowable deductions provided for in section 38(1) TCGA and is not otherwise allowable as a deduction. In particular it was not wholly and exclusively incurred for any such purpose not least because the offer to settle the litigation was broken down into four categories.

13. That expenditure was incurred in the pursuit of seeking a basket of measures to ensure that the appellant was, in his view, fairly treated as a shareholder. The settlement of the court action required the appellant to sell his shares but that was not one of the measures sought in the pleadings.

14. The expenditure was not an incidental cost of the disposal (Mr McCusker conceded that that had not been included in the Notice of Appeal and that he was not relying on section 38(1)(c) TCGA).

The Facts

A. The parties' "agreed" facts

15. The appellant was a founder member of a company ("the Company") and on 21 July 2003 acquired 7,500 shares being 15% of the ordinary share capital of the Company for £24,784.80. (It is not disputed that that is the acquisition cost of the shares. In addition

HMRC concede that they have erroneously allowed a further £6,010.80 of costs which they have not withdrawn. Accordingly the uncontested allowable expenditure is £30,795.60.)

16. The company was originally registered in Singapore but moved to the BVI in July 2004.

17. In 2011 the appellant raised a legal action under Section 1841 BVI Business Companies Act 2004 ("S.1841") against the majority shareholder of the Company. The full text of S.1841 is set out at Appendix 2.

18. The basis of the legal action was set out in a document entitled "Amended Statement of Claim" ("the Claim") which also detailed the claim being made by the appellant against the majority shareholder and the Company.

19. In November 2014, the day before the court action was due to commence, the parties reached an out of court settlement.

20. A letter from the majority shareholder's agents dated 10 November 2014 headed "WITHOUT PREJUDICE SAVE AS TO COSTS" set out the total amounts, save as to costs, offered to the appellant in respect of four matters. The total amount being USD $4,668,523 (converted to £2,842,700.86).

21. On receipt of the said sum the appellant transferred his 15% holding to the majority shareholder.

22. On 31 January 2016, HMRC received the appellant's self-assessment tax return for the tax year ended 5 April 2015.

23. On 3 October 2016, an HMRC officer gave a Notice of Enquiry to the appellant advising him of their intention to open an enquiry under Section 9A Taxes Management Act 1970 ("TMA") into the appellant's self-assessment tax return for the tax year ended 5 April 2015.

24. That enquiry encompassed bank interest, employment income, pension income and capital gains.

25. On the same date a copy of the Notice was sent to the appellant's agent with a schedule of the information and documentation required.

26. On 11 November 2016, the agent provided information in response to HMRC's request advising that, in respect of the shares in the Company, the shares had been sold as a result of a lengthy legal action which settled on the morning on which the court case was due to commence. No sale agreement was produced.

27. On 23 November 2016, HMRC wrote to the agent requesting further information in relation to an amount of £925,296.63 claimed as a deduction in the capital gains tax computation and described as "enhancement expenditure".

28. Correspondence ensued covering the following issues:-

(a) A BVI court case dated 27 March 2012 which was the judgment in respect of the majority shareholder's unsuccessful application to have the proceedings struck out.

(b) An argument was advanced for the appellant that the expenditure was allowable in terms of Section 38(1)(c) TCGA on the basis that the sole purpose of the legal action was to enforce a sale of the shareholding at as high a value as possible (see paragraph 14 above).

(c) The agent confirmed that all of the costs identified were incurred wholly and exclusively for the purpose of the disposal of the shares.

(d) HMRC argued that the Claim covered numerous items and in particular the sale of the shares was not the only intended outcome. The focus of the case was on restitution of profits.

(e) HMRC requested copies of all relevant invoices and evidence.

(f) The agent then argued that the legal expenses had been incurred in preserving and defending the appellant's title and right over the shares and therefore the costs were deductible in terms of Section 38(1)(b) TCGA.

(g) The invoices were furnished.

29. On 14 September 2017, HMRC wrote to the appellant rejecting the argument on Section 38 TCGA on the basis that the expenditure was not made to establish, preserve or defend any title or rights over the asset as ownership of the shares had never been challenged. HMRC confirmed that their view of the matter, as at 20 June 2017, had not changed and gave notice of their intention to close the enquiry.

30. On 27 September 2017, the agent stated that there was no requirement for ownership of the asset to have been challenged and restated the argument that the expenditure qualified under Section 38(1)(b) TCGA.

31. On 4 October 2017, HMRC issued a Closure Notice under Section 28A(1) and (2) TMA. Specifically, and particularly, that stated that the allowable expenditure claimed against the sale of the shares in the company was restricted to £30,795.60.

32. On 25 October 2017, the agent appealed the conclusion and amendment made by the Closure Notice and requested a review of the matter in accordance with Section 49B TMA.

33. Correspondence ensued and on 12 January 2018, HMRC issued their review conclusion to the appellant and the agent upholding HMRC's decision in full.

34. On 9 February 2018, the agent notified the appeal to the Tribunal.

B. Commentary on the "agreed" Facts and further Findings in Fact.

General

35. The facts as set out above are described as "agreed" since the appellant's Skeleton Argument referred to HMRC's Statement of Case, which narrated the factual background, and stated that large tranches of that were agreed. The only alterations which I have made have been to anonymise the company involved and the majority shareholder and to correct the figure for the uncontested allowable expenditure.

36. Unfortunately on reviewing the Bundle it would appear to me to be far from clear that some of those facts should have been agreed or indeed were as stated.

37. Although it is "agreed" that the Company was incorporated in Singapore, Mr Stevenson, from Stevenson and Company, who had introduced the appellant to the firm of lawyers in BVI, stated unequivocally that the appellant was a minority shareholder in "… a company incorporated in the British Virgin Islands ("BVI") in 2004 …".

38. On the other hand, Mr Iain Webster, confirmed that the Company was originally a Singapore based company, but that "In 2005" the majority shareholder had "… transferred the business … into a BVI registered company."

39. This particular point is not material to my decision but it is highly unsatisfactory in a context where there is a paucity of relevant information and none that can be tested. It certainly raises a question mark over the accuracy of the four letters that the appellant has lodged. There

are also other areas where, in my view, either inadequate detail has been agreed (such as in relation to the terms of the settlement) or there is no relevant evidence but merely assertions.

40. I am bound by and wholly agree with the Upper Tribunal in *Edwards v HMRC*[2] where it quoted with approval the FTT's findings in *Qureshi v HMRC*[3] and the relevant paragraphs read:

> "50. In that case the FTT, correctly in our view, stated that documents on their own without a supporting witness statement may be sufficient to prove relevant facts. It said this at [8]:
>
> > "In this Tribunal witness evidence can be and normally should be adduced to prove relevant facts. Documents (if admitted or proved) are also admissible. Such documents will often contain hearsay evidence, but often from a source of unknown or unspecified provenance. Hearsay evidence is admissible, albeit that it will be a matter of judgement for the Tribunal to decide what weight and reliance can be placed upon it."
>
> 51. The FTT also made the following observations at [14] to [16] with which we would agree:
> …
>
> > "15. We also point out what should be obvious to all concerned, which is that assertions from a presenting officer or advocate that this or that "would have" or "should have" happened carries no evidential weight whatsoever. An advocate's assertions and/or submissions are not evidence, even if purportedly based upon knowledge of how any given system should operate."

41. That is particularly pertinent in this appeal since, for example, in the appellant's Skeleton Argument it is blandly stated at paragraph 12 that: "The holders of shares have income rights, capital rights and many other rights set out under Company law…" yet I have absolutely no evidence in relation to the relevant company law. I have none of the relevant company documentation.

42. I put that point to Mr McCusker who told me that I do not need to understand BVI law and that I should just look at the Claim. He is wrong. The Claim is simply the appellant's submissions in the BVI litigation. It is not evidence of the law or indeed of anything, other than the appellant's position.

Letters of Representation produced by the appellant

43. Mr McCusker referred me to the letters that had been produced (see paragraph 3 above). Those all offered opinions. I am bound by and agree with Mrs Justice Proudman in *HMRC v Sunico*[4] at paragraph 29 where she states:

> "29. Accordingly, and in the absence of any expert evidence, much in this case turns upon my assessment of the documentary evidence in the light of the parties respective analysis of it. As I have already noted, to the extent that the witnesses expressed their opinions on the documents discussed I have discounted their evidence."

That is precisely the approach that I must adopt in this matter.

Mr Ritchie's statement

44. Mr Ritchie was the barrister representing the appellant in the BVI proceedings. He stated that he had been provided with a copy of the Skeleton Argument that he had produced for the BVI proceedings. That has not been provided to me and nor do I have the documentary evidence to which it may refer but in any event that Argument is only one part of the pleadings and, again, it is simply the appellant's submission.

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[2] [2019] UKUT 131 (TCC)
[3] [2018] UKFTT 0115 (TC)
[4] [2013] EWHC 941 (Ch)

45. Mr Ritchie fairly conceded that the majority shareholder had disputed the appellant's case and "… would, no doubt, dispute much of what I say …".

46. Mr Ritchie stated that the majority shareholder held 60% of the shares and the appellant 15%. I accept that as fact.

47. I also accept as fact, since I have encountered that argument elsewhere, his statement that "At that time there was no obligation on BVI companies to file accounts or to provide them to shareholders".

48. Mr Ritchie's opinion, although it might amount to hearsay evidence, was to state that the majority shareholder's actions had reduced the appellant's shareholding to "…something of no value whatsoever…". The remaining 25% of the shares "… were held in small numbers by others, who … were subservient to him". The allegation was that the majority shareholder controlled the company and no one would challenge him. I have no evidence of the value of a minority shareholding in any BVI company, let alone this one.

49. He records an allegation that one of the directors had acted "… in breach of the articles …" in approving the majority shareholder's bonuses. Of course that is hearsay evidence. Those Articles have not been produced.

50. He stated that the action was "… not simply to recover dividends but to preserve and ultimately realise the value…".

51. Mr Ritchie's conclusion was that the purpose of the legal proceedings was to protect the shareholding and to realise its value by obtaining an order that the appellant be bought out at a fair value.

Mr Stevenson's letter

52. Mr Stevenson confirmed that "There was no shareholders' agreement … regulating the rights of the various shareholders." That appears to be the case and I therefore find that as fact. Since I do not have the Memorandum and Articles of Association even the basic rights of the shareholders are totally unknown.

53. Mr Stevenson offered an opinion as to what the BVI court might have decided had the case been litigated to a conclusion. Clearly that is an opinion.

54. The only other quasi factual matter addressed by Mr Stevenson, that is relevant in this matter, was his statement that "The court proceedings were certainly not solely concerned with recovery of dividends."

Mr Webster's letter

55. Again much of Mr Webster's letter is an expression of his opinion on the protagonists in the litigation and the history.

56. I accept, and find as fact, his confirmation that both he and the appellant's lawyers had advised the appellant to sell his shares and that when he attempted to do so the majority shareholder made an offer of £52,000 which was not acceptable. Throughout the legal process the appellant attempted on many occasions to try and get the majority shareholder to offer to buy the shares but the majority shareholder refused to enter into any negotiations until the legal action was dropped. Mediation was unsuccessful.

57. Mr Webster argued that the eventual sale of the shares had required "…multiple legal actions to be taken both in the UK and most unusually in the BVI".

58. I am well aware of the fact, but Mr Webster confirmed that: "As mentioned the BVI is particularly lacking in transparency for minority shareholders in companies …".

Lennox Patton

59. Lennox Patton confirmed that the terms of the settlement had been described as confidential. The appellant was at liberty to make the following statement:-

> "Mr Gray and Mr … have reached an amicable settlement in relation to their differences in connection with … whereby … agreed amongst other things to purchase Mr Gray's shares in … for an undisclosed sum."

60. Pertinently in recording the history they stated:

> "Cases such as these are very often referred to as corporate divorce cases, and for obvious reasons. Your case was no exception. At the commencement of the action, you were understandably hopeful (and contrary to our view) that dividends and bonuses would be paid to you and relations with … would improve. It was for that reason that you did not initially seek an order for a buy out of your shares. However, and as matters progressed, it became apparent that that was the only real remedy available".

The Claim

61. Whilst the Claim was lodged in process and set out the nature of the appellant's position in the BVI litigation, no other pleadings have been produced.

62. It is, however, of considerable interest to see the precise details of the remedy sought in the Claim and that reads as follows:-

> "**And Nigel Gray claims:**
>
> 1. A declaration pursuant to Section 184I(1) of the BCA that the affairs of … have been, are being, or are likely to be, conducted in a manner that is oppressive, unfairly discriminatory, or unfairly prejudicial to him as a member of the ... and orders and declarations pursuant to Section 184I(2) of the BCA that:
>
> (1) There be an inquiry into what sums have been paid out and to whom by way of alleged bonus.
> (2) There be an inquiry as to what other sums or other benefits have been paid or provided by … to those who are its shareholders except for Nigel Gray, whether that capacity or otherwise.
> (3) There be an inquiry as to what sums and other benefits (including assets held in his name) have been paid or provided to … out of … assets or at its expense.
> (4) A declaration that to the extent that any assets in … name have been paid for in whole or in part by … those assets are held by him on trust for … to the extent of its contribution towards the costs of acquiring or otherwise maintaining those assets.
> (5) A declaration that … is not a properly appointed director of … and an order that he cease acting as such director forthwith.
> (6) The Defendants pay Nigel Gray an amount equal to the sums that he would have received had he been included in the bonus payments (or any other benefits) provided to other shareholders or alternatively a sum to represent a reasonable dividend had the bonuses (or any other benefits) not been provided but dividends had been declared instead together with interest from the date such sums or dividends should have been paid until the date of judgment or payment at such rate as to the court seems just.
> (7) The Court seeks to regulate the future conduct of … affairs by:
>
> (i) ordering that … cease the practice of paying bonuses to shareholders except on the basis that all bonuses are paid to all shareholders and on an equal basis as though they were dividends;
> (ii) ordering that … do repay to … all sums and other benefits found on the taking of the inquiries set out in (3) above to have been received by him or applied for his benefit save to the extent that any assets in his name are held on trust for …;
> (iii) ordering … to transfer to … all assets found to be held by him on trust for …;
> (iv) ordering that … produces annual accounts each year within two months of the year end and has those accounts audited by auditors approved by Nigel Gray or in default of agreement by the court;

(v) ordering that … must provide Nigel Gray (or his personal representatives) with full copies of its audited annual financial accounts within 14 days after they have been signed off by the auditors for so long as he or his personal representatives remain shareholders in …; and

(vi) amending … articles to provide that the Board shall consist of five directors, two appointed by …, two by Nigel Gray, or his personal representatives, (each of whom they appoint himself), and one independent director to be appointed jointly by … and Nigel Gray or failing agreement by the court and where an independent director is appointed by agreement either … or Nigel Gray may terminate that appointment at any time whereupon another independent director shall be appointed in his stead.

(8) such other relief as appears to the Court to be just and appropriate; and

2. Costs."

The settlement

63. As can be seen from paragraph 20 above, the parties agreed the basics of the letter of 10 November 2014 in regard to the settlement. However, that is not the full story. I find as fact that on 5 November 2014, the appellant was given an offer of $4 million which was said to have increased the previous offer. It stated:

> " Given the imminence of the trial in the Proceedings and the costs which our client will incur during that trial, our client is prepared to increase his previous offer…The increase in our client's offer simply reflects the approximate costs he would save in the Proceedings should the offer be accepted before the deadline referred to below."

64. On 8 November 2014, the appellant's agents responded attaching Heads of Terms representing a counter proposal and endeavouring to include "…proceedings in both Scotland and the BVI".

65. That was not accepted.

66. The letter of 10 November 2014, which was the basis of the settlement, contained the following salient points, namely:-

(a) The offer of 8 November (wrongly referred to as 7 November) was taken as a rejection of the offer of 5 November 2014.

(b) The new offer was viewed as unworkable in at least two respects. Firstly, it was not an effective without prejudice offer in relation to the BVI proceedings because it sought to tie together the litigation in the BVI and Scotland. Secondly, it was not possible to make a payment by close of business on that day, as demanded. The offer was rejected.

(c) An increased offer was made on the basis that:

(i)$3,600,000 was offered in respect of the shareholding on the basis that that represented at least, if not more than, the fair value of the shares with no minority discount.

(ii)$1,026,568 represented the sum sought in respect of the appellant's share of profits.

(iii)$17,250 represented the total amount of interest that would have been payable on the interest free loans made to the majority shareholder by the Company.

(iv)$24,705 represented 15% of the net profit on a particular transaction.

67. The increase in the offer was therefore $668,523 as the total sum offered was $4,668,523 which is the undisputed amount paid to the appellant in settlement.

68. Mr McCusker argued that the whole of the consideration was for the shares and the subdivision was irrelevant on the basis that items (ii) and (iii) was accrued value in the shares. I do not accept that. This letter represents the contract which concluded the litigation between the appellant, the majority shareholder and the Company. The wording is crystal clear and there is no dubiety that only item (i) relates to the shareholding.

What rights, for the purposes of section 38 TCGA, are involved?

69. Mr McCusker repeatedly asserted that "obviously" those rights included the right to income and capital and the right to hold the directors to account in their management of the business. Specifically he argued that a shareholder, such as the appellant, would have the right to expect that directors, acting in their fiduciary capacity as directors, should fulfil their obligations to shareholders including:

(a) To be transparent and accountable to shareholders for their actions;

(b) To file accounts timeously;

(c) To fulfil the provisions of the Memorandum and Articles of Association in terms of their conduct of the company's business;

(d) To seek the approval of shareholders for matters such as the appointment of new directors, the transfer of shares, the approval of directors remuneration and expropriation of any assets.

70. I deal with these alleged rights below but my first issue is that I have difficulty with the appellant's description of a "right" in the context of Section 38(1) TCGA. At paragraph 21 of *Blackwell*, Lord Justice Briggs stated:

> "By contrast s.38 is couched in cautiously restrictive terms, plainly designed to ensure that not all forms of expenditure which a businessman might think should be taken into account in identifying his chargeable gain are in fact permitted deductions."

The rights that the appellant describes are rights that might derive <u>from</u> a shareholding. They are not <u>over</u> a shareholding.

71. At paragraph 21 of *Blackwell*, Lord Justice Briggs had also stated:

> "I consider that the 'state or nature' of Mr Blackwell's shares is to be identified for the purposes of s.38(1)(b) by reference to the rights and obligations which those shares conferred or imposed upon a shareholder pursuant to the Articles of Association of BP Holdings, and that the state or nature of the asset was unaffected by the making, or subsequent discharge of the 2003 agreement … It imposed inhibitions upon his exercise of his rights as a shareholder … as a matter of bargain between him and … but the nature and state of the asset constituted by the shares remained the same throughout."

That is the position here. At all relevant times until the sale of the shares, the rights and obligations conferred or imposed on the appellant by the Articles of Association, whatever those may have been, never changed. I agree with HMRC that that should be the beginning and end of the matter.

72. However, if I am wrong in that, the onus of proof lies with the appellant. I do know that the appellant had not sought the protection of a shareholder's agreement. I am aware that in any jurisdiction it is rare for a minority shareholder to have any right to income.

73. Furthermore, as Mr Ritchie pointed out (see paragraph 47 above) there was no obligation to file accounts and as Mr Webster pointed out (see paragraph 58 above) transparency is <u>not</u> a feature of BVI companies.

74. Since as I indicate above, it is not even known where the company was incorporated or when, there is no primary evidence on any of these alleged rights.

75. In the absence of any documentation relating to the company such as the Memorandum and Articles of Association, it is simply impossible to know what rights, if any, the appellant had beyond ownership of a minority shareholding in a company.

76. The only possible one of these "rights" on which there is evidence is that the shares had some monetary value. I certainly do not find that that value is the settlement value.

77. As I indicate above, I was wholly unpersuaded by Mr McCusker's argument that the settlement was wholly attributable to the value of the shares. It is one of the very few facts in this case on which the evidence is clear. The offer is expressed in unequivocal terms and in the context that the offer was expressly made in order to avoid the cost of litigation.

78. Furthermore, I do not accept the argument that the majority shareholder only settled the litigation at the door of the court because the appellant's case was so overwhelmingly strong. This is a specialist Tribunal. I have litigated. I have never acted for a client in respect of litigation without pointing out that the outcome of no litigation can be guaranteed regardless of how strong the case might be.

79. I have no evidence as to the strength, or not, of the appellant's case. Parties settle litigation for many reasons and in my experience, a very common reason is the ongoing cost, both financial and emotional, and the loss of management time expended in pursuing litigation.

80. The only evidence as to the reason for the settlement is to be found in the letters of 5 and 10 November 2014. I find as fact that the offer of settlement was made in order to avoid the cost of litigation.

81. Obviously, and as HMRC acknowledge, the appellant had the right to take the action under s.1841(1) in the BVI court because he believed he was not being treated fairly. Mr McCusker's argument was that it had been a tactical move to obtain an Order to force a purchase of the shares at a fair value.

82. I do not accept that. It is clear that although s.1841(2)(a) provides that the first option available to an aggrieved shareholder is to require the company or any other person to acquire the shareholder's shares, the appellant simply did not seek that in the Claim. I accept the clear evidence from Lennox Patton (see paragraphs 59 and 60 above) that he settled the litigation by accepting the offer and he sold the shares but that was not the purpose, let alone the sole purpose, of the litigation.

83. The consistent message in all of the Letters of Representation is that the appellant had had a number of purposes in raising the litigation.

84. Even if I were to find that there was qualifying expenditure for the purposes of section 38 TCGA, and I do not, the expenditure was certainly not incurred on a "wholly and exclusively" basis.

85. Lastly, and for the avoidance of doubt, whilst I have not perused the invoices vouching the alleged costs, as I pointed out in the course of the hearing there are numerous references to costs relating to litigation in Scotland. It is a matter of public record that the appellant was engaged in more than one litigation in Scotland. None of the costs thereanent could ever be relevant to the shares in the Company.

Decision

86. For all these reasons, I uphold HMRC's decision of 4 October 2017 and dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

87. 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: 18 JUNE 2019

10.— Orders for costs

(1) The Tribunal may only make an order in respect of costs (or, in Scotland, expenses)—

(a) under section 29(4) of the 2007 Act (wasted costs) [and costs incurred in applying for such costs][5]

(b) if the Tribunal considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings; […][6]

(c) if—

(i) the proceedings have been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the taxpayer (or, where more than one party is a taxpayer, one of them) has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph [; or][7]

[(d) in a MP expenses case, if—

(i) the case has been allocated as a Complex case under rule 23 (allocation of cases to categories); and

(ii) the appellant has not sent or delivered a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a Complex case, that the proceedings be excluded from potential liability for costs or expenses under this sub-paragraph.

][8]

(2) The Tribunal may make an order under paragraph (1) on an application or of its own initiative.

(3) A person making an application for an order under paragraph (1) must—

(a) send or deliver a written application to the Tribunal and to the person against whom it is proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed in sufficient detail to allow the Tribunal to undertake a summary assessment of such sots or expenses if it decides to do so.

[5] Words inserted by Tribunal Procedure (Amendment) Rules 2013/477 rule 35 (April 1, 2013)
[6] Word repealed by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(a) (November 29, 2010)
[7] Word inserted by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(b) (November 29, 2010)
[8] Added by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(4)(c) (November 29, 2010)

(4) An application for an order under paragraph (1) may be made at any time during the proceedings but may not be made later than 28 days after the date on which the Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) notice [under rule 17(2) of its receipt of a withdrawal][9] which ends the proceedings.

(5) The Tribunal may not make an order under paragraph (1) against a person (the "paying person") without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual, considering that person's financial means.

(6) The amount of costs (or, in Scotland, expenses) to be paid under an order under paragraph (1) may be ascertained by—

(a) summary assessment by the Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or expenses (the "receiving person"); or

(c) assessment of the whole or a specified part of the costs or expenses [, including the costs or expenses of the assessment,][10] incurred by the receiving person, if not agreed.

(7) Following an order for assessment under paragraph (c)(c) the paying person or the receiving person may apply—

(a) in England and Wales, to a county court, the High Court or the Costs Office of the Supreme Court (as specified in the order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the indemnity basis; and the Civil Procedure Rules 1998 shall apply, with necessary modifications, to that application and assessment as if the proceedings in the tribunal had been proceedings in a court to which the Civil Procedure Rules 1998 apply;

(b) in Scotland, to the Auditor of the Sheriff Court or the Court of Session (as specified in the order) for the taxation of the expenses according to the fees payable in that court; or

(c) in Northern Ireland, to the Taxing Office of the High Court of Northern Ireland for taxation on the standard basis or, if specified in the order, on the indemnity basis.

[9] Words substituted by Tribunal Procedure (Amendment) Rules 2013/477 rule 36 (April 1, 2013)
[10] Words inserted by Tribunal Procedure (Amendment) Rules 2013/477 rule 37 (April 1, 2013)

[(7A) Upon making an order for the assessment of costs, the Tribunal may order an amount to be paid on account before the costs or expenses are assessed.][11]

(8) In this rule "taxpayer" means a party who is liable to pay, or has paid, the tax, duty, levy or penalty to which the proceedings relate or part of such tax, duty, levy or penalty, or whose liability to do so is in issue in the proceedings.

[11] Added by Tribunal Procedure (Amendment) Rules 2013/477 rule 38 (April 1, 2013)

184I. (1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders

(a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;

(b) requiring the company or any other person to pay compensation to the member;

(c) regulating the future conduct of the company's affairs;

(d) amending the memorandum or articles of the company;

(e) appointing a receiver of the company;

(f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;

(g) directing the rectification of the records of the company;

(h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

(3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings in which the application is made.