CAPITAL GAINS TAX – Error or mistake - Sale of restaurant – Consideration partly in cash and partly in shares – Whether some of the shares were worthless – Whether the Appellant's claim to relief was made out of time – Section 33 Taxes Management Act 1970

THE SPECIAL COMMISSIONERS

JONATHAN MARSDEN Appellant

- and -

W H GUSTAR

(HM INSPECTOR OF TAXES) Respondent

Special Commissioner: MR T H K EVERETT

Sitting in London on 23 June 2000

The Appellant in person

The Respondent in person

DECISION

Mr Jonathan Marsden ("Mr Marsden") appeals against the refusal dated 19 August 1999 of his claim to be entitled to Error or Mistake relief pursuant to section 33 Taxes Management Act 1970.

The assessment which gave rise to Mr Marsden's claim was an estimated capital gains tax assessment for the year 1989/90 issued on 22 May 1991 in the sum of £75,000.

Section 33 Taxes Management Act 1970 provided, at the relevant time, where relevant, as follows:

"33.-(1) If any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a

return, he may by notice in writing at any time not later than six years after the end of the year of assessment ... in which the assessment was made, make a claim to the Board for relief."

I heard oral evidence both from Mr Marsden and from the Respondent Inspector although neither party cross-examined the other. In addition, each party produced some documents.

From the evidence before me I find the following facts:

1. By contract dated 29 September 1989 Mr Marsden and his wife sold a property known as De Veres Restaurant and Flacks Hotel and Wine Bar, High Street Earls Colne to an unconnected party, Coggeshall Holdings Ltd. The consideration for the sale was partly cash and partly shares. One of the parcels of shares comprised 45 ordinary shares of £1 each in Flacks Hotels Ltd. The value attributed to those shares in the sale contract and agreed between the parties was £77,590.

2. On 22 May 1991 Mr Marsden was assessed to capital gains tax for the year 1989/90 in the estimated sum of £75,000.

3. The estimated assessment was appealed against on 18 May 1991 by Mr Marsden's then agents, the William Philip Partnership who described themselves as "accountants". The appeal notice claims that the gain would be rolled over and that no tax would be payable.

4. On 4 March 1993 the William Philip Partnership submitted a capital gains tax computation to the Sudbury Income Tax District showing a chargeable gain of £72,851. On 9 March 1993 the Inspector wrote to the William Philip Partnership agreeing their computation and determining the assessment in the sum of £72,851 pursuant to section 54 Taxes Management Act 1970.

5. Mr Marsden subsequently consulted new agents, Messrs A W Beckinsale & Co, chartered accountants, of Braintree, Essex. On 29 March 1995 that firm wrote to H M Inspector of Taxes Sudbury District a letter which was received by the Inspector on 5 April 1995, in the following terms:

"Dear Sir

J Marsden 696/72100/FE

Thank you for your letter dated 24 March 1995.

In respect of the last paragraph our client purchased, on 29 September 1989, 45 ordinary shares in Flack's Hotels Ltd for £77,590 and during the year ended 5 April 1990 these shares became worthless. Mr Marsden therefore wishes to claim a capital loss.

Yours faithfully"

I received no evidence to show how the contents of that letter were viewed or treated by the Inspector of Taxes.

6. On 14 June 1995 Messrs A W Beckinsale & Co wrote again to the Inspector at Sudbury District enclosing an amended capital gains tax computation for 1989/90. The Inspector received that letter and its enclosure on 18 June 1995 and on the evidence of Mr Gustar, the Inland Revenue accepted that letter as a valid error or mistake claim. The relevant parts of the letter stated as follows:

"We have now had the opportunity to show Mr Marsden the computation enclosed with your letter of 24 March 1995 and to discuss with Mr Marsden the calculation of the capital gain in 1989/90.

We now enclose a copy of the agreement regarding the shares of Coggeshall Holdings Ltd, Flack's Hotels Ltd, Tigersuper Ltd and Hadmead Properties Ltd. We are also enclosing an amended capital gains computation for 1989/90 and in view of the omissions by the previous agent we request that you accept our amended computation."

The computation enclosed with that letter omitted any reference to the sum of £77,590 attributed in the sale contract to the value of the Flack shares. The amended computation showed the chargeable gain as £53,617.

7. Another document which, it seems, was enclosed with Messrs A W Beckinsale & Co's letter of 14 June 1995 claimed roll over relief pursuant to section 152 Taxation of Chargeable Gains Act 1992 and loss relief pursuant to section 24(2) Taxation of Chargeable Gains Act 1992 in respect of the £77,590 stated to have been paid by Mr Marsden for the 45 ordinary shares in Flacks Hotels Ltd.

8. On 20 July 1995 the Inspector of Taxes wrote to Messrs A W Beckinsale & Co in the following terms, where relevant:

"J MARSDEN

Thank you for your letter 14 June 1995.

As the appeal against the assessment had already been determined any reduction in the chargeable gain arising from the revision of the computation will be under the error or mistake provisions of section 33 TMA 70. This provides for relief by repayment.

FLACKS HOTELS LTD

A claim to roll-over relief under section 152 TCGA 1992 is not competent as the shares are not qualifying assets within section 155.

As advised previously the claim under section 24(2) TCGA 1992 is well out of time and not accepted."

9. There followed an interval of some 18 months during which nothing happened and for which I was given no explanation by Mr Gustar. It appears that the Inspector wrote to Mr Marsden direct early in 1997, for he replied at the end of that month referring the Inspector to his accountants and stating in answer to questions put to Mr Marsden by the Inspector as follows:

"1. Neither my wife or myself had any interest in Coggeshall Holdings Ltd.

2. Flacks Hotel Ltd was wound up, thus losing the value. The company has not traded since April 1990.

3. My former accountants were negligent in dealing with this matter. I was not aware that the tax was finalised until enforcement proceedings were started by the collectors.

4. Mr Beckinsale pointed out errors in the computation to me when he was dealing with other matters on our behalf.

5. Mr Beckinsale will shortly be in touch with you if he has not been already."

10. On 20 March 1997 the Inspector wrote to Messrs A W Beckinsale & Co in the following terms:

"J MARSDEN

I thank you for your letter of 31 January 1997 and I am sorry for the delay in my reply.

DRAPERS HOUSE RESTAURANT

As the disposal was not to a connected person I can agree your revised computation showing a chargeable gains of £53,617. The reduction in tax due to be given by way of Error or Mistake Relief is £19,234 at 40% = £7,693.60.

FLACKS HOTELS

Your client also wrote to me on 31 January 1997 with, I believe, a copy to yourselves. As mentioned in my letter of 15 January the request for an extension of the time limit for a section 24(2) claim will be referred to the Board of Inland Revenue for consideration. Are there any further representations your client wishes to be considered in this respect? I am, of course, quite happy to have a meeting with your client and yourselves but you may feel that it would be of very limited assistance in that I can only refer on any information provided.

I will leave the referral to the Board for four weeks to give you an opportunity to submit any further details you may wish."

11. On 1 April 1997 Mr Marsden’s accountants wrote to the Inspector again in the following terms:

"Thank you for your letter of 20 March 1997 and we are pleased to note your agreement to our revised 1989/90 Capital Gains Tax Computation and the Error or Mistake Relief is £7,693.60 (i.e. £19,234 x 40%).

Regarding our request for the extension for the time limit for a section 24(2) claim we note that the case will be referred to the Board of Inland Revenue on 18 April 1997 approximately and we confirm that we have recently asked Mr Marsden is there any further information of details that he would like to be considered."

12. On 5 September 1997 the Inspector wrote again to Mr Marsden's accountants in the following terms:

"With reference to previous correspondence concerning the Section 24(2) TCGA 1992 claim the request for an extension of the time limit has been considered by the Board's Technical Division.

Following the decision in Williams v Bullivant 56 TC 159 the date of the deemed disposal is the date of the claim. There is therefore no time limit or claim under section 24(2) and thus there can be no question of a late claim.

Exra-Statutory Concession D28 allows certain retrospection the maximum amount allowed is to years of assessment ending not more than two years before the date of the claim. In your client's case the ECS could carry him back to 1992/93 but no earlier. If the taxpayer does not satisfy the wording of the concession then it is of no application. It cannot be extended in a particular circumstance and therefore no relief can be given."

13. More than a year later on 17 December 1998 Mr Marsden's accountants wrote to the Inspector in the following terms:

"We have been advised by our client that the Collector of Taxes is pursuing the collection of the 1989/90 Capital Gains Tax of £17,523.05.

However Mr Marsden maintains that there was an error in the original computation in so far as the shares in Flacks Hotels Ltd were worthless (not £77,590) when they were acquired.

At Mr Marsden's request we are therefore enclosing an amended Capital Gains Tax computation for 1989/90 and you will note the proceeds under clause 23 have been reduced to nil as this in fact was the value at that date. Mr Marsden wishes to claim error or mistake relief."

The enclosed computation showed the chargeable gain reduced to the sum of £7,116 but it omitted not only the value of £77,590 attributed to the Flacks shares in the contract but also the sum of £77,500 paid to Mr and Mrs Marsden for the property.

14. Mr Marsden's tax affairs were transferred from the Sudbury District to the Witham District which replied to Messrs A W Beckinsale & Co on 21 January 1999 in the following terms:

"J MARSDEN

Your letter of 17 December 1998 addressed to HM Inspector of Taxes, Sudbury has been passed to me as your client is now dealt with at HMIT Witham, reference 775/J490.

I regret that your client's claim to Error or Mistake Relief is out of time. Section 33 Taxes Management Act 1970, as it applies to the pre-1996/97 assessments, says "if any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some Error or Mistake in a Return, he may by notice in writing at any time not later than 6 years after the end of the year of assessment in which the assessment was made make a claim to the Board for relief".

The 1989/90 assessment was made on 22 May 1991 and the time limit was therefore 5 April 1998.

I must add that I do not understand the basis of your claim since it is the actual proceeds that must apply unless the transaction was a connected persons transaction, in which case the market value would be substituted. Your client has already confirmed that he was not connected to Coggeshall Holdings Ltd – his letter of the 31 January 1997 enclosed with your letter of the same date."

15. On the evidence of Mr Gustar, the Inland Revenue accepted that the Flacks shares had become worthless by 1994/95.

Conclusions

It is a condition of a claim pursuant to section 33 Taxes Management Act 1970 that a claimant must have paid the tax in dispute. The section states "if any person who has paid tax charged under an assessment alleges that the assessment was excessive by reason of some error or mistake in a return ...". I have received no evidence that Mr Marsden has paid the tax due under the assessment but surprisingly the question of payment was not raised by Mr Gustar and therefore I will not pursue the matter.

Mr Gustar's contention quite simply is that Mr Marsden's accountants' letter of 14 June 1995 constituted an error or mistake claim and that was accepted by the Inland Revenue and dealt with by agreeing a revised computation in the Inspector's letter to Mr Marsden's accountants dated 20 March 1997.

Mr Gustar then submits that an entirely new error or mistake claim was submitted by Mr Marsden's accountants to the Inland Revenue in their letter dated 17 December 1998 and that claim was plainly out of time. I note however that the Inspector's letter dated 21 January 1999 notes the time limit as expiring on 5 April 1998. It is apparent therefore on that basis that a claim made on 17 December 1998 must have been out of time.

Mr Gustar has however ignored Mr Marsden's accountants' letter dated 29 March 1995 which stated that the Flacks shares became worthless during the year ended 5 April 1990. I accept that the letter claimed a capital loss but it appears to me that the letter could be viewed as initiating an error or mistake claim.

Accordingly I am prepared to accept that on the basis of Mr Marsden's accountants' letter dated 29 March 1995 Mr Marsden's claim to error or mistake relief was made in time and has not been dealt with by the Inland Revenue.

However, it is doubtful whether such success will assist Mr Marsden to reduce his tax liability. The computation submitted to the Inspector by Mr Marsden's accountants with their letter of 14 June 1995 excluded the sum of £77,590 attributed in the contract as the value of the Flacks shares. In addition, the computation submitted to the Inspector by Mr Marsden's accountants with their letter of 17 December 1998 appears to me to be inaccurate in that it omitted not only the value of the Flacks shares but also the sum of £77,500 paid for the premises.

On that basis I can find no grounds for interfering with the computation which accompanied Mr Marsden's accountants' letter dated 14 June 1995 and which was accepted by the Inland Revenue as showing a chargeable gain of £53,617.

Accordingly the appeal fails and I determine the assessment in the previously agreed figure of £53,617.

T H K EVERETT

SPECIAL COMMISSIONER

Released 6th July 2000

SC 3014/2000