

## **Voting rights and entrepreneurs' relief**

### **(Lecture P1118 – 14.13 minutes)**

In *George v HMRC (2018)*, the First-Tier Tribunal held that, following a sale of shares, a key equitable maxim did not apply to allow voting rights to operate: from the date:

- of an agreement to confer those rights; rather than
- on which they were actually conferred.

As a result, the taxpayer (Mr G) failed in his claim for entrepreneurs' relief.

Mr G worked for Thornton & Ross Ltd (TRL), a company that developed, manufactured and supplied over-the-counter medicines and healthcare products, becoming TRL's chief executive in March 2002. TRL had been owned since its incorporation in 1922 by members of the Thornton family and by Thornton family trusts. The chairman of the company was Mr Jonathan Thornton (Mr T).

In 2005, Mr G acquired a large number of 'C' and 'D' shares in TRL. These new shares represented 6.9% (by nominal value) of the ordinary share capital of TRL, but they carried no voting rights – only family members and family trusts held voting shares that were classified as 'A' and 'B' shares.

Following an unsuccessful attempt to sell TRL in 2010/11, Mr T and Mr G came to an agreement in February 2012 that TRL should again be put up for sale – this was planned to be at some point within the next two years – and that Mr G's shares should be given voting rights in order to enable these shares to attract entrepreneurs' relief. The necessary special resolution for this voting change was not, however, passed until January 2013 owing to a combination of external circumstances and the need for Mr G to indemnify the other TRL shareholders against any possible tax liability that might arise by virtue of the value shifting rules in S29 TCGA 1992. There were no minutes or other record of the February 2012 meeting between Mr T and Mr G, which was not entirely surprising given that the two of them worked closely together and their relationship was based on trust.

However, in December 2012, Mr T received an unsolicited offer to acquire TRL from a company called Stada and this led to the sale to Stada going through in August 2013.

On the face of it, Mr G's shares did not qualify for entrepreneurs' relief since he had not satisfied the 'personal company' requirement in S169S(3)(b) TCGA 1992 for at least one year prior to the sale. Mr G's shares had only received their voting rights in January 2013 and the disposal took place some seven months later.

Nevertheless, it was argued that the February 2012 agreement was legally binding and enforceable and that, as equity looks on that as done which ought to be done, the shares should be treated as having acquired their voting rights back in February 2012. It was this line of argument that led to the case.

The First-Tier Tribunal, in finding against the taxpayer, identified four conditions that would all have to be satisfied in order for entrepreneurs' relief to be available on this basis:

1. there must have been a legally binding contract concluded between Mr T and Mr G in February 2012;
2. a court of equity would make an order for specific performance of that contract;
3. the equitable maxim that 'equity looks on that as done which ought to be done' must apply; and
4. the statutory requirement in S169S(3)(b) TCGA 1992 must be met by application of the equitable maxim.

The First-Tier Tribunal decided that the February 2012 agreement between Mr T and Mr G did not represent a legally binding contract because its terms were not sufficiently certain and anyway there was no consideration.

As far as the CGT legislation was concerned, the requirement in S169S(3)(b) TCGA 1992 would not be met because the voting rights attached to Mr G's shares must be exercisable 'by virtue of that holding', whereas, if the equitable remedy applied, Mr G would obtain his voting rights from the February 2012 agreement, and not from his shareholding.

*Contributed by Robert Jamieson*