

Who wants to be a millionaire? (Lecture P1173 – 14.41 minutes)

Background

The television game show known as 'Who Wants To Be A Millionaire?' was created in 1998 by David Briggs, Michael Whitehill and Steven Knight for ITV. The show took its title from a song written by Cole Porter for the 1956 film 'High Society' starring Frank Sinatra, Bing Crosby and Grace Kelly. Following the launch of the original version, several individuals made claims that they had conceived the idea behind the show and that the company producing it had breached their copyright. There were also allegations about unpaid or underpaid royalties. As a result, significant litigation followed. Since the show's debut, international variations have been aired in around 160 countries worldwide.

The sale

The three creators, together with the trustees of the Briggs Accumulation and Maintenance Trust, held all the shares in two UK-resident companies:

- Knight Whitehill Productions Ltd (KWPL); and
- River Studio Ltd (RSL).

KWPL and RSL owned the rights to the show, along with another company called Complete Communications Corporation Ltd (which was not otherwise involved). The sale of the KWPL and RSL shares in December 2006 has given rise to an intriguing First-Tier Tribunal case (Briggs v HMRC (2019)) about whether a gain can be backdated to the business asset taper era that would then allow that relief to apply.

The terms of the deal were as follows:

- The four parties sold their shares in KWPL and RSL in return for a cash sum of £106,000,000 and a right to receive a future 'pass through payment' (PTP) which was dependent on the outcome of litigation in the USA.
- The sale and purchase agreement stipulated that the vendors' entitlement to any PTP would be satisfied by the issue of guaranteed redeemable loan notes from the buyer.

As far as the taxpayers' 2006/07 returns were concerned, these disclosed gains based on the 2006 sale proceeds, in respect of which 75% business asset taper relief was deducted. It is understood that nothing was shown with regard to any PTP entitlement on the ground that relief was due under the automatic deferral rule in S138A TCGA 1992.

The deed of variation

Eventually, the USA litigation was settled and this resulted in a substantial sum being passed on to the vendors in satisfaction of the PTP. At this point, the vendors decided that they would prefer to receive their PTP in the form of cash rather than in the form of loan notes and so a deed of variation amending the sale and purchase agreement was executed in May 2013.

A few days later, the vendors received cash payments in settlement of their PTP rights. It was the tax treatment of these 2013/14 payments that brought about this case.

Following the payment, the vendors argued that the source of the PTP was the original sale and purchase agreement. They said that the subsequent changes implemented by the deed of variation had to be read back to that agreement. Therefore, in 2006/07, the vendors had sold their shares in exchange for:

- an initial cash sum; and
- a future unascertainable amount (i.e.. the value of the PTP).

Under the principle in *Marren v Ingles* (1980), the value of this future amount should have been brought into account when computing the chargeable gain which arose in 2006/07. The resulting gains would have been significantly larger, but they would have benefited from 75% business asset taper. Thus further CGT was due (plus, of course, some interest), but at a relatively modest rate.

On receipt of the cash in 2013/14, the vendors contended that there had been a second CGT disposal, based on the amount by which the cash received exceeded the valuation of the PTP right in 2006/07. Accordingly, they:

- amended their CGT computations for 2006/07 to include the value of the CGT rights; and
- submitted returns for 2013/14 showing their capital gains or losses on the disposal of those rights.

It should be emphasised that any 2013/14 gains would not qualify for entrepreneurs' relief (which had by now replaced the business asset taper relief code).

HMRC's arguments

Ignoring all this, HMRC raised CGT assessments on the vendors for the full amount of the cash sums received in 2013/14.

As HMRC's barrister pointed out, the difficulty with the vendors' approach lies in the words of S138A TCGA 1992. This provision is designed to address the situation where a right (such as we have here) is received in the form of – typically – loan notes and the *Marren v Ingles* (1980) principle would otherwise operate to charge CGT on the vendor, notwithstanding that there has been no actual cash receipt at the time.

S138A TCGA 1992 applies automatically where a right is received on a sale of shares (known as 'old securities') and that right consists of an entitlement to be issued with shares or loan notes in another entity (known as 'new securities'). It is also a requirement that, in these circumstances, it must be impossible to ascertain the value of the shares or loan notes at the time when the right is conferred.

It is open to a taxpayer to disapply the operation of S138A TCGA 1992 by making an irrevocable election under S138A(2A) TCGA 1992. In this case, none of the vendors had made a disapplication election.

As a result, under S138A TCGA 1992, the vendors were treated as having disposed of their shareholdings in 2006/07 partly for cash (on which a CGT charge immediately arose) and partly for a new asset, i.e. the future right to proceeds from the PTP arrangement. The share exchange provisions applied so that the 'new' asset (the PTP right) represented the same asset as the 'old' asset (the shares for which it was exchanged). This new asset was extinguished in 2013/14 on the execution of the deed of variation. The cash received was thus a capital sum derived from that asset and was taxable under S22 TCGA 1992.

The decision

Judge Guy Brannan was emphatic that the taxpayers' arguments were 'wrong in every respect'. They had a right to receive loan notes until May 2013 and that right was clearly an asset for CGT purposes. However, the deed of variation in May 2013 had expunged that asset and had replaced it with a right to receive a cash sum which was satisfied a few days later. CGT was chargeable by reference to that sum. The original CGT computations for 2006/07 therefore stood and additional gains arose in 2013/14. HMRC won the case.

Conclusion

If the vendors had been successful in having the value of the PTP right taxed at the time of the share disposal in 2006/07, the gains would have been subject to business asset taper relief at 75%, as has already been mentioned, which would have produced an effective 10% CGT rate. This position could have been achieved by electing to disapply S138A TCGA 1992 by the first anniversary of 31 January next following the tax year in which the earn-out right arose, i.e. by 31 January 2009. But this was not done. As the judge observed:

'It surely cannot be the case that, by executing a deed of variation in 2013 (and receiving cash in lieu of loan notes shortly thereafter), the appellants can replicate the tax position that would have prevailed if they had made an election within the time limit specified by S138A(5)(b) TCGA 1992. That would make the time limit meaningless.'

Although this case concerned business asset taper relief, similar issues arise under the entrepreneurs' relief rules. The question of whether or not to make an election under S138A(2A) TCGA 1992 always requires careful consideration.

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