

## Amortisation of goodwill

### (Lecture B1218 – 11.47 minutes)

The First Tier Tribunal decision in *Armstrong & Haire Ltd v HMRC* (2020) is of interest in that it deals with the important matter of the corporation tax treatment for the amortisation of goodwill derived from a professional business.

Armstrong & Haire Ltd (AHL), a company based in Yorkshire, acquired the assets of a couple of dentistry businesses on 1 December 2010 and began trading as a dental practice on that date. The preceding businesses had been carried on separately since December 1996 by two self-employed dentists who worked from the same premises and shared various overhead costs. Each of the two unincorporated businesses came to an end on 30 November 2010 as a result of the merger.

The two dentists had equal shareholdings in AHL and each was a director of the company. AHL's accounts for the year ended 30 November 2011 recognised goodwill as an intangible fixed asset with a value of £1,400,000. The directors intended to write this asset off over a five-year period on a straight-line basis. Amortisation of £280,000 was therefore charged in AHL's profit and loss account for that first accounting period, with a deduction being claimed against the company's corporation tax. An identical amount was charged in each of the next two accounting periods.

It was at this stage that HMRC decided to investigate. Interestingly, they did not try and challenge the calculation of AHL's goodwill figure or the validity of the transfer, which they might well have done in the light of their attitude in recent cases such as:

- *Villar v HMRC* (2018); and
- *Dyer v HMRC* (2020).

Instead, they focused on the more straightforward argument that the dental goodwill had been created prior to 1 April 2002 and that a deduction under the intangible fixed assets regime for acquisitions from a related party in such circumstances was prohibited by what is now CTA 2009.

The company's tax advisers, in return, had initially argued that the two businesses acquired by AHL had only been created in 2006 'as a result of changes in NHS contracts' (to quote from the case report) so that the company was not subject to the general rule in S880(a) CTA 2009 limiting the application of Part 8 of CTA 2009 to assets created or acquired on or after 1 April 2002.

They noted the provisions of S884 CTA 2009 as determining the date when goodwill is deemed to have been created and they contended that the 'business in question' referred to in S884 CTA 2009 must be the business making use of the asset, i.e. the company. They further submitted that the present business was a different business to the separate businesses previously carried on by the shareholders. They accepted that these previous businesses were similar to AHL's business, but stated that these were separate businesses compared to the company's single business. The decision in *George Humphries & Co v Cook* (1934) was cited where the High Court judge considered that a partnership formed between a film processing business and a film development and

printing business constituted a new business rather than the continuation of an existing business.

The same principle was noted, in reverse, in *C Connelly & Co v Wilbey* (1992) where an accounting partnership with two offices was dissolved and the two partners each carried on as sole traders from a single office. The High Court's conclusion was that the division of the business meant that neither sole trader carried on the previous trade.

Based on these precedents, the advisers maintained that, where two businesses of approximately equal size merge, it cannot be said that either business has continued.

Judge Anne Fairpo in the First Tier Tribunal summed up their position as follows:

'(AHL) submitted that the "business in question" in S884 CTA 2009 is that carried on by the appellant company and that that business commenced on 1 December 2010 following the acquisition of the separate preceding businesses of the two shareholders. (AHL) submits that the provisions of S884(b) CTA 2009 therefore apply to treat the goodwill as created on or after 1 April 2002. (AHL) further submitted that the provisions of S715(4) CTA 2009 supported this position, as that section deemed the goodwill to have been created in the course of carrying on the business in question. In addition, it was submitted that the amendment to S884 CTA 2009 to remove references to "internally generated" goodwill showed that it must be possible for acquired goodwill to be regarded as created on or after 1 April 2002.

(AHL) explained that arguments which had been raised previously as to whether a new business had commenced as a result of changes to NHS contracts in 2006 were no longer being pursued.'

In other words, the company's advisers obviously felt that their later line of defence was a stronger one than the position which they had initially adopted in correspondence with HMRC.

The crux of HMRC's contrasting argument was that S884 CTA 2009 could not be interpreted to mean that the goodwill in this case was created on or after 1 April 2002. They said that the relevant test is not whether the company carries on a different business from the previous business but rather whether the business to which the goodwill relates had been carried on by the company *or a related party* (the speaker's emphasis) before 1 April 2002. HMRC also stated that, if the 'business in question' in S884 CTA 2009 was intended to be the business carried on by the company making the claim, the section would not need to make mention of the business being carried on by a related party. This seems like a strong point.

Judge Anne Fairpo pointed out that AHL 'had not argued that, and had not provided any evidence to indicate that, the preceding businesses had changed in any sudden or dramatic manner that could indicate that the original businesses had ceased and new businesses had commenced'. Any evolutionary or organic change, as might be expected to occur over time, would not, it was said, 'change the nature of the businesses between their acquisition in 1996 and their disposal to (AHL) in 2010'. Put simply, the goodwill amortised by the company represented, in HMRC's view, the goodwill of a business which was carried on by a related party before 1 April 2002 and so could not fall within the intangible fixed assets regime and qualify for tax relief.

HMRC's reasoning found favour with Judge Anne Fairpo. Two quotations from the conclusion of her judgment should be highlighted:

'Goodwill cannot be acquired independently from the business in which it was created.'

This statement had previously been confirmed in the Upper Tribunal case of *Greenbank Holidays Ltd v HMRC* (2011).

'As I consider that the "business in question" refers to each of the acquired businesses and not the business carried on by the company (if that is different), it follows that the goodwill is that of a business which was carried on by a related party before 1 April 2002 and is therefore outside the scope of the corporate intangibles . . . regime.'

As a result, no amortisation deduction was available in respect of AHL's goodwill for the accounting periods in question. AHL lost the case, but it should be noted that, if the company had acquired the goodwill from the unincorporated businesses on or after 1 July 2020, relief would indeed have been available by virtue of S31 FA 2020.

*Contributed by Robert Jamieson*