Judgment 3/2008 **Glass v Administrator of Income Tax – Royal Court (Civil Action File 1101) – 21.01.08**

Income Tax (Guernsey) Law, 1975 (s.80) – appeal by way of Case Stated from decision of the Guernsey Tax Tribunal – whether transaction was in the nature of capital or income – definition of ″business″ - held that payment received by the Appellant constituted ″an adventure in the nature of trade″ - appeal dismissed

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1101

The 21st day of January 2008 before Richard John Collas Esquire, Deputy Bailiff; sitting alone

IAN KEITH GLASS

Appellant

v

THE ADMINISTRATOR OF INCOME TAX

Respondent

The Court having on the 13h December considered an Appeal brought under Section 80 of the Income Tax (Guernsey) law 1975, as amended by way of a Case Stated from a decision of the Guernsey Tax tribunal and having heard thereon Advocates St J Robilliard and W P T Nicol-Gent counsel for the Appellant and Respondent respectively, this day gave judgment in the terms attached hereto and DISMISSED the said appeal

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text
21.01.08

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

On Appeal by way of Case Stated from the Guernsey Tax Tribunal

Between

IAN KEITH GLASS **Appellant**

- and -

THE ADMINISTRATOR OF INCOME TAX **Respondent**

Date of hearing: 13th December 2007

Judgment handed down: 21st January 2008

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Appellant: *St J A Robilliard*
Advocates for Respondent: W P T Nicol-Gent

Cases, texts & statutes referred to:

1) Income Tax (Guernsey) Law 1975
2) Gold v Income Tax Administrator (Guernsey Court of Appeal) [27.GLJ.144]
3) Edwards (Inspector of Taxes) v. Bairstow & Another (1956) AC 14
4) Marson v Morton [1986] BTC 377
5) Ransom v Higgs (1971 – 1977) 50 TC1
6) McLellan, Rawson & Co Ltd v Newall (1953-1956) 36 TC 117
7) Leeming v Jones (1928-1931) 15 TC 333
8) Nethersole v Withers(1942-1948) 28 TC 501

Introduction

1. This Appeal is brought under Section 80 of the Income Tax (Guernsey) Law 1975, as amended, by way of a Case Stated ("the Case") from the decision of the Guernsey Tax Tribunal whereby the Tribunal: dismissed an appeal by the

Appellant; confirmed the Administrator's Notice of Assessment dated the 6th July 2006; and also confirmed the sum of tax charged therein of £17,029.00.

2. In the Case, four questions were set out for determination by the Court but, prior to the hearing, the first of those questions was withdrawn, leaving the following three questions for determination:

> *"2. Whether the Tribunal erred in law by regarding as income a payment to the Appellant of a sum of £100,000 to enter a joint business venture that envisaged the generation of future profits;*
>
> *3. Whether the Tribunal erred in law by determining that the payment for shares in the Company (D Ltd) constituted an adventure in the nature of trade;*
>
> *4. Whether the Tribunal erred in law in concluding from the evidence before it that the transaction before the Tribunal constituted an adventure in the nature of trade and/or part of a business carried on by the Appellant."*

Advocate Robilliard, on behalf of the Appellant, acknowledged that the three questions are all a variation on a theme.

Appeal on a Point of Law Only

3. There can only be an appeal from the Tax Tribunal to the Royal Court on a point of law. I have directed myself to the Guernsey Court of Appeal's judgment in *Gold v Income Tax Administrator (Guernsey Court of Appeal) [27.GLJ.144]* delivered by Beloff J.A. The *Gold* judgment was not cited to me but the decision in *Edwards* which the Court of Appeal approved, and from which the Hon Mr Beloff quoted, was referred to by both counsel:

> *"Errors of law could embrace:-*
>
> *(1) Misconstruction of the fiscal legislation or other material in general law;*
> *(2) Material departure from the prescribed procedure or the doctrines of fairness;*
> *(3) Perversity in the sense used in Edwards (Inspector of Taxes) v. Bairstow & Another (1956) AC 14, a decision of the House of Lords.*
>
> *That classic statement of principle by Lord Radcliffe, at p. 35, which I now cite, asserts the limits of the appellate jurisdiction and also provides a warning against seeking to convert what is in truth a point of fact into a point of law:-*
>
> > *"I think the true position of the Court in all these cases can be shortly stated. If a party to a hearing before commissioners expresses dissatisfaction with their determination as being*

erroneous in point of law, it is for them to state a Case, and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the Case comes before the court, it is its duty to examine the determination having regard to its knowledge of the law. If the Case contains anything ex facie which is bad law and which bears on the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law, and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination, or as one in which the evidence is inconsistent with, and contradictory of, the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when, in cases such as these, many of the facts are likely to be neutral in themselves and only to take their colour from the combination of circumstances in which they are found to occur."

4. The facts of the transaction giving rise to the charge to tax are not disputed. What is in issue is that the Appellant argues the transaction was of a capital nature, in that it can not in law be considered an adventure in trade; whilst the Administrator argues it was in the nature of income.

The Transaction

5. As normal the Tribunal sought to protect the identity of the taxpayer and so it adopted the following definitions:

> *"a. ITL means the Income Tax (Guernsey) Law 1975, as amended.*
> *b. D Ltd means the Company formed by the Taxpayer under the law of that part of the United Kingdom where the development was planned for use in connection with the development;*
> *c. TLO means the Landowners of the proposed development site;*

d. V Ltd means the Company that was selected to enter into a joint venture project with D Ltd; and

e. TLA means the local authority within whose jurisdiction the development was to take place."

6. Using those definitions, the Tribunal set out in paragraph 10 of the Case the facts which it found either admitted or proved:-

"*i) The Taxpayer was ordinarily resident in Guernsey in the Year of Charge 2002;*

ii) The business of the Taxpayer was property development. He had been engaged in this business since 1983, and in residential development since 1995;

iii) Early in 2001 he procured the formation of D Ltd and was its sole shareholder, holding 2 shares, until 03 May 2002;

iv) Early in 2001 he also approached TLO with a view to developing their land;

v) He entered into negotiations with them and an Option Agreement on that land was concluded between D Ltd and TLO on 10 December 2001.

vi) He also initiated negotiations, again in his own name, with V Ltd with a view to forming a joint venture company to develop the land in question;

vii) As a result of those negotiations, on 03 May 2002, the Taxpayer as sole shareholder of D Ltd procured an alteration of its share capital and then bought from it 98 ordinary shares and 50 A ordinary shares for £148;

viii) At the same time D Ltd entered into a joint venture agreement with V Ltd;

ix) The Taxpayer then sold 50 of his newly acquired ordinary shares to V Ltd for £100,000;

x) The development did not proceed and D Ltd was subsequently dissolved."

7. The facts are further explained in paragraphs 16 to 18 of the Case (references are to documents in the bundle prepared for the Tribunal):

"16. The Taxpayer was a property developer. He had been principally resident in Guernsey since 1995 and therefore taxable on his worldwide income. In early 2001, two events took place. The Taxpayer was instrumental in the formation of D Limited that was incorporated on 15 February 2001. Secondly, as result of an introduction he was placed in contact with TLO and on 21 March 2001 wrote to them including with his letter, draft Heads of Agreement (APP/1-4). What was afoot was a large residential development on land owned by TLO. It contemplated the construction of a community of 3,500 homes. The letter, like those that follow, was in his own name, on private notepaper. All displayed business sophistication, as

does the draft that names D Limited as one party and TLO as the other. The sophistication continues in ensuing correspondence. By June 2001, the taxpayer was in discussion with V Ltd and putting proposals for a Joint Venture. Writing again in his own name he said 'My proposal to you is quite simple. I would like to participate in the project long-term.' (APP/5,6). A month later, on 17 July 2001 he wrote to V Ltd in a letter headed 'Subject to Formal Contract'. That letter set out proposals for a joint venture project. (APP/8,9). Part of these proposals involved a payment of £100,000 by V Ltd to secure a 50% share in the project. V Ltd wrote on 20 July affirming their willingness to make the proposed payment. This resulted in further correspondence concerning details (APP/10 – 13). The next correspondence before the Tribunal (APP/ 14 – 18) covering the period November 2001 to early March 2002 is a continuation of this. V Ltd confirmed its interest at a meeting of its directors on 06 March 2006, (APP/102). The Tribunal also notes that an Option Agreement between TLO and D Ltd (APP/25 – 53) was concluded on 10 December 2001 and that the Taxpayer signed this on behalf on D Ltd, along with his co-director.

17. *It appears that things were now moving fast. The Taxpayer's UK accountants became involved, (APP/19 – 22). The Tribunal notes that these advised him:*

> *"As you are not resident in the UK you will not be liable to Capital gains tax on the disposal of either class of shares. As you are aware Guernsey does not tax capital gains".*

18. *On 03 May 2002, an agreement (APP/54 – 81) was drawn up between the Taxpayer, D Ltd, and V Ltd. In its preamble (APP/55) it is stated that '(The Taxpayer and V Ltd) have agreed to enter into this Agreement for the purposes of regulating their relationship with each other ….'. On the same day D Ltd acquired new Articles of Association (APP/82-91), the Taxpayer applied for and shortly after was issued at par 98 Ordinary Shares and 50 A Ordinary shares of £1 each. The Taxpayer as sole shareholder passed a written resolution concerning the shareholding in D Ltd. The Taxpayer held a telephone meeting with his co-director to give notice of that resolution and to authorise the allotment of shares and held a further such meeting later that day to confirm the transfer of 50 ordinary shares to V Ltd. (APP/92 – 101 & 103 et seq.)."*

The Law

8. The Tribunal correctly directed themselves to the relevant provisions of the Income Tax (Guernsey) Law, including the definition of 'business' in section 209(1):

> *""Business" includes any profession, trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture."*

9. In seeking guidance as to the interpretation of the definition, the Tribunal looked, as it was entitled to do, at United Kingdom authorities, including the judgment of Sir Nicolas Browne-Wilkinson V.C. in *Marson v Morton [1986] BTC 377* on page 385:

> *"I have been treated to an extensive survey of the authorities. But as far as I can see there is only one point which as a matter of law is clear, namely that a single, one-off transaction can be an adventure in the nature of trade. Beyond that I found it impossible to find any single statement of law which is applicable to all cases in all circumstances. I have been taken through the cases and invited to compare the facts in some cases with the facts in the case here before me. I fear that the General Commissioners may have become as confused by that process as I did. The purpose of authority is to find principle, not to seek analogies on the facts.*
>
> *It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case".*

The Tribunal noted that, after enumerating matters which, he said, are apparently treated as badges of trading, the Vice-Chancellor went on to say, at page 386:

> *"I emphasise again that the matters I have mentioned are not a comprehensive list and no item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad thing to go back to the words of the statute – was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?"*

10. Paragraph 21 of the Case indicates that the Tribunal sought to ask themselves the question the Vice –Chancellor had posed in that passage. In my judgment they were right to do so.

11. Both before the Tribunal and before me, Advocate Robilliard relied upon the English Court of Appeal's decision in *Ransom v Higgs (1971-1977) 50 TC 1*. The Tribunal said they found the case to be of little assistance to them as the circumstances of the case do not apply. The Tribunal was correct as the facts are very different. However, it appears that the Tribunal only had the benefit of the head note of the reported case whereas I had the full text. Advocate Robilliard referred me in detail to their Lordships' guidance on what is meant by an adventure in the nature of trade. Lord Reid said (at page 78I) *"the trader provides to customers for reward some kind of goods or services".* Lord Morris of Borth-y-Gest said (at page 85C) that he looked for *"the indicia which are common to so many forms of trading activity".* Lord Wilberforce held (at page 88G) that *"there must be something which the trader offers to provide by way of business".* Lord Cross held (at page 99D) that *"A man cannot be trading… unless there is some one with whom he is trading – some one to whom he supplies something such as goods or services for some return".* I do not find anything in such guidance which is inconsistent with the test laid down by Sir Nicholas Browne-Wilkinson quoted above. Indeed I note that the *Ransom* case was cited to him and is mentioned in his judgment.

12. Advocate Robilliard also argued that capital payments arising from a trading activity need to be distinguished from profits arising in that activity. He relied upon *McLellan, Rawson & Co Ltd v Newall (1953-1956) 36 TC 117* in which the High Court overturned a decision of the General Commissioners concerning the sale of areas of woodland, by a company whose trade was timber merchants, on the ground that it was an isolated transaction and there was no evidence it formed part of their trade.

13. *Leeming v Jones (1928-1931) 15 TC 333* concerned the sale of options to acquire rubber estates in the Federated Malay States. The Commissioners had concluded that the transaction was not a concern in the nature of trade. Lord Buckmaster said (at page 355) that the taxpayer, along with other members of his syndicate, appears to have intended *"to acquire the rights for the purpose of resale to a company for public flotation"*. He concluded this was an isolated transaction, for the sale or resale of property, which was not an adventure in the nature of trade. Viscount Dunedin said the case involved no new question of law, *"merely the application of old principles to the particular facts"* (at page 358). Lord Warrington of Clyffe held (at page 362) that he could *"find nothing but a profit arising from an accretion in value of the item of property in question and the realisation of such enhanced value. There is nothing in the nature of revenue or income."* Lord Thankerton agreed the profit was in the nature of capital accretion and was not profits or gains chargeable to Income Tax. Lord Macmillan was of a similar opinion. I respectfully agree with Viscount Dunedin that the case does not lay down any new principle of law.

14. Another case relied upon by Advocate Robilliard was *Nethersole v Withers(1942-1948) 28 TC 501,* involving the rights to dramatise Rudyard Kipling's novel "The Light That Failed". The House of Lords held that the grant or assignment, for a period of ten years, of the film rights to the book, and the film rights to the play based on the book, gave rise to a capital receipt,

not an income receipt. Lord Uthwatt held (at page 520) that, as the owner of the dramatised rights was not engaged in any trade or business, the sale by her was not in the way of trade, so the proceeds of the sale were not "*annual profits or gains*" and therefore were not assessable to Income Tax. Again, in my view, the case does not establish any new principle of law.

15. In my view, paragraph 21 of the Case shows that the Tribunal correctly directed themselves as to the legal test they had to apply. I must decide whether they correctly applied that test.

Advocate Robilliard's Submissions

16. Advocate Robilliard submitted that the disposal by his client of shares in the company that owned the option over the proposed development land could not, in law, be an adventure in the nature of trade. His client was a property developer who developed land, not in his own name but through limited companies, and he was not a trader in options or shares. He argued the sale of the shares was a one-off transaction. The payment received for the shares was a payment to participate in a joint venture, analogous to the sale by a professional person of an equity share in a partnership to an incoming partner; which is treated as a capital payment and is not assessable for Income Tax purposes.

17. I believe the most significant difference between the respective approaches of the Tribunal and Advocate Robilliard is that the latter views the sale of the shares as an isolated transaction whereas the Tribunal looked at it in a broader context. In my view, it is appropriate to look at all the facts, in order to view the transaction in its true context.

The reasoning of the Tribunal

18. The Tribunal observed that the Appellant was a property developer and displayed a level of business sophistication in his negotiations and in his correspondence; specifically in the first draft of Heads of Agreement dated 21 March 2001 and in the letter he wrote to V Ltd dated 17 July 2001 marked "*Subject to Contract*" setting out his proposals for a joint venture project. In that letter he proposed that V Ltd pay £100,000 to secure a 50% share in the project. That proposal was accepted by letter of 20th July.

19. The Tribunal noted that the correspondence was on the Appellant's personal headed note paper, even though D Limited existed at the material times, having been incorporated on the 15th February 2001.

20. In paragraph 22 of the Case, the Tribunal explained why they concluded the payment received by the Appellant from D Limited was income received during the course of an adventure in the nature of trade, rather than a payment of a capital nature. The Tribunal summarised what he had done in the following terms:-

> *"He identified an opportunity, immediately set about negotiations with the landowners, actively sought out a trading partner and, with professional assistance, arranged a joint venture."*

21. Such finding was based upon, and supported by, the correspondence, documents and evidence produced to the Tribunal.

22. The Tribunal went on to say that they regarded what the Appellant had done as part of his usual business. I understand them to mean as part of his business as an experienced Property Developer.

23. The Tribunal then said:

> *"The way in which the deal was constructed, does not detract from this. As a result of arms length negotiations, he invited a Company, V Limited to join D Limited, which the Tribunal infers was created as a vehicle for development, it was 'clean' from the time of its incorporation until 03 May 2002. To participate in this joint venture V Limited paid the [Appellant] for 50 (fifty) shares in D Limited a sum of some two thousand times that which the taxpayer had, on the same day, paid for them. The Tribunal cannot accept that this was a capital matter, or the proceeds of the sale of an investment, or indeed anything other than income received by the (Appellant) during the course of an adventure in the nature of trade*".
> (Paragraph 22 of the Case).

24. I understand the Tribunal in this passage to be saying that, in the way the deal was constructed, the payment of £100,000 may look like the receipt of a capital sum. However, in substance, it is a payment received by the Appellant in the course of his business as a property developer and so is to be treated as income received during the course of an adventure in the nature of trade. The Tribunal's reasons for that decision are that the Appellant was a property developer, he had identified an opportunity for development, he negotiated with the landlords and he sought a trading partner. Those activities were, or were part of, an adventure in the nature of trade.

Conclusion

25. In my view the Tribunal was justified in law in reaching that conclusion. They identified the relevant facts. They correctly directed themselves as to the law. They applied the law to the facts and reached a conclusion that was reasonable. I do not believe it could be said that the true and only reasonable conclusion that could be reached contradicts their determination – to quote the words of Lord Radcliffe in *Edwards*.

26. Having reviewed the whole history of the Appellant's contribution to the proposed development, the Tribunal was entitled to conclude that the proceeds of sale of the shares sold by the Appellant arose from a "*deal"* rather than an *"investment"*. They were in the nature of income rather than capital.

27. It did not matter that this may have been the first time the Appellant had sold shares of this nature. A one-off transaction is capable of being assessable to Income Tax if it was connected with an adventure in the nature of trade, in this case the Appellant's trade as a property developer.

28. I therefore dismiss this Appeal.