ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.

Alfred Michael Dwan Amanda Dwan Malcolm Terence Hunnisett Andrew Mark John Openshaw-Blower Richard Parkinson v Revenue & Customs [2022] UKFTT 36 (TC)

First-Tier Tribunal, Tax Chamber, Brooks J, 3 February 2022

Valuation of shares gifted to charity for tax purposes.

Key words: Charity, United Kingdom, Gift, Income Tax, Company, Shares, Market Value at Gifting Date

1. Taskcatch plc (Taskcatch) was a UK company that re-registered as a public company and sought admission to the Alternative Investment Market (AIM).[1] It conducted an initial fundraising and then engaged in a number of merger and acquisition transactions of small business in the football sector. Its shares were thinly traded.

2. Five shareholders of Taskcatch made gifts of shares to various charities, including the NSPCC, MacMillan Cancer Relief, the Rainbow Family Trust, the Princes Trust, the Breast Cancer Research Trust and Cancer Research UK.

3. They claimed tax relief on the basis of the value of the gifted shares.

4. HM Revenue and Customs (HMRC) contended that the values relied upon by the shareholders in their respective gift relief claims were overstated and above the market value of the shares at that time.

5. The only matter in contention before the Tribunal was the valuation of the shares, and hence of the gift.

6. Section 587B of the Income and Corporation Taxes Act 1988 (ICTA) provides for tax relief of the gift of shares, which refers for valuation issues to Taxation of Chargeable Gains Act 1992 (TCGA) sections 272 and s273.

[1] The Alternative Investment Market (AIM) is a specialized unit of the London Stock Exchange (LSE) catering to smaller, more risky companies. The companies listed on AIM tend to be smaller and more highly speculative in nature, in part due to AIM's relaxed regulations and listing requirements.

7. The Tribunal noted that (at [13]):

   The principles to be adopted in the valuation of shares for the purposes of s 272 TCGA, which were not disputed or challenged, were helpfully summarised as follows by the Tribunal (Judge Cannan) in McArthur and Bloxham v HMRC [2021] UKFTT 237 (TC) ("McArthur") at [14]:

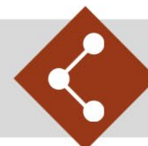
   "There are a number of authorities as to the basis on which a court or tribunal should approach the task of identifying the market value of assets including company shares pursuant to section 272. The following summary of the principles to be applied was common ground:

   i. The sale is hypothetical. It is assumed that the relevant property is sold on the relevant day (see Duke of Buccleuch v IRC [1967] AC 506 at 543 per Lord Guest).
   ii. The hypothetical vendor is anonymous and a willing vendor, in other words prepared to sell provided a fair price is obtained (see IRC v Clay [1914] 3 KB 466 at 473, 478).
   iii. It is assumed that the relevant property has been exposed for sale with such marketing as would have been reasonable (Duke of Buccleuch v IRC at 525B per Lord Reid).
   iv. All potential purchasers have an equal opportunity to make an offer (re Lynall [1972] AC 680 at 699B per Lord Morris).
   v. The hypothetical purchaser is a reasonably prudent purchaser who has informed himself as to all relevant facts such as the history of the business, its present position and its future prospects (see Findlay's Trustees v CIR (1938) ATC 437 at 440).
   vi. The hypothetical purchaser embodies whatever was actually the demand for the asset at the relevant time in the real market (IRC v Gray [1994] STC 360 at 372).
   vii. The market value is what the highest bidder would have offered for the asset in the hypothetical sale (re Lynall at 694B per Lord Reid)."

8. Several reports about the valuation method and its application were put before the Tribunal by both parties, including a joint report on differences between experts. This caused the Tribunal to remark that valuation was an 'art rather than a science' (at [39]).

9. The Tribunal preferred the HMRC expert who examined the financial background of Taskcatch in forensic detail. This is consistent with the principle that a prudent purchaser is one "… who has informed himself as to **all relevant facts** such as the history of the business, its present position and its future prospects" (emphasis added) (at [53]). It rejected settling on the mid-point of the share price difference.

10. The Tribunal preferred the lower share price as argued by HMRC. This meant that the value of the gifts to charity were lower than claimed.



The Court said (at [38]):

> In this regard I would agree with the Tribunal (Judge Gammie QC and Mr Richard Thomas) which observed in Green v HMRC [2014] UKFTT 396 (TC), at [118], that:
> "… we think that the issue of tax avoidance is irrelevant to the question we must answer. If the market value of the Gifted Shares on 4 April 2008 was £237,000 as Mr Green claims, it is of no consequence whether or not the arrangement was devised and Mr Green entered into it with the tax advantage exclusively or mainly in mind."

The problems of self-valuation of gifted property bedevil tax regimes outside Australia where taxpayers can self-assess the value of their gift. In the USA, it is known that taxpayers value their 'socks and jocks' donated in charity clothing bins for gift deduction purposes.[2] This can quickly lead to tax abusive behaviour. The US Treasury Inspector General for Tax Administration in 2012 estimated that more than 273,00 taxpayers claimed US$3.8b in erroneous noncash charitable deductions in 2010.[3]

In Australia, property gift deductions require valuation by the ATO, and the threshold means small value items such as 'socks and jocks' are not eligible. Shares or property valued by the ATO at more than $5,000 is deductible:

- Provided the property is purchased more than 12 months before donating it; and
- For the amount the ATO valued the property on the valuation certificate.

Refer to the ATO valuation program at https://www.ato.gov.au/non-profit/gifts-and-fundraising/claiming-tax-deductions/how-donors-get-valuations/

A slight relaxation is that taxpayers may be able to claim a tax deduction if they donate to a deductible gift recipient (DGR) and:

- the property is listed shares valued at $5,000 or less; and
- the shares were acquired at least 12 months before being donated.

Additionally, to meet the requirements of this gift type:

- the shares must be in a listed public company; and
- when the shares are donated, they were quoted on the Australian securities exchange (shares must not be suspended from trading or removed from the Australian securities exchange list).

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[2] "If you give used clothing to the Salvation Army, the FMV would be the price that typical buyers actually pay for clothing of this age, condition, style, and use. Usually, such items are worth far less than what you paid for them." IRS, Publication 561 (01/2022), Determining the Value of Donated Property.

[3] TIGFTA, Many Taxpayers are still not complying with noncash charitable contribution reporting requirements, Ref no 2013-40-009, December 20, 2012.

VIEW THE CASE

This case may be viewed at https://www.bailii.org/uk/cases/UKFTT/TC/2022/TC08388.pdf

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