NCN: [2021] UKFTT 0237 (TC)

TC08186

Appeal number: TC/2016/04598
TC/2016/02742

INCOME TAX – relief for gifts of shares to charity – preliminary issue – market value of shares at three valuation dates

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) NEIL McARTHUR **(2) THOMAS BLOXHAM**	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public by way of video hearing using the Video Hearing Service on 25 – 29 January 2021, 1 February 2021 and 19 February 2021

Mr Michael Firth of counsel instructed by way of direct access for the Appellants

Mr James Henderson and Mr Thomas Chacko of counsel instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

shareholding in a private company is less liquid than a controlling interest in a private company and that is in addition to the DLOC itself.

277. Based on all the evidence I find that it is appropriate to apply a combined DLOC/DLOM of 29.5%.

278. Mr Firth also criticised Mr Mitchell's EBITDA calculations based on comparable transactions. However, neither party suggested in closing submissions that I should take this method into account in valuing the shares of BBG. I do not therefore need to consider Mr Mitchell's method or the criticisms of it any further.

Conclusion on EBITDA valuation

279. In my view, the hypothetical purchaser would use an EBITDA calculation for the value of shares in BBG as follows:

Maintainable EBITDA	£2,170,736
Multiple	11.6
Enterprise Value	£25,180,537
Net Debt	£11,700,000
Equity Value	£13,480,537
Number of Shares	17,336,409
Equity value per share	78p
DLOC/DLOM	29.5%
Value per share	55p

Net asset values

280. Neither party sought to rely on net asset values in their closing submissions and I shall not consider it further.

Value as at 19 February 2007 - Conclusion

281. Taking into account all the matters above, the evidence as a whole and the parties' submissions I consider that the hypothetical purchaser would give weight to the following methods in making an offer to purchase the shares in BBG on 19 February 2007:

(1) The transaction in which BBG purchased the whole share capital of BBL. That was an arm's length transaction which effectively involved a sale and purchase of the business of BBL in its then state. The transaction indicated that a relatively small minority interest in the shares of BBG at the date of the transaction was 11p per share. A combined DLOC/DLOM of 29.5% should be applied to this figure to indicate a value of 8p per share.

(2) The Acquisition Agreement in which a value of 26.04p per share was attributed to the Consideration Shares in BBG in the arm's length deal between the shareholders of BBL and BBG. Those shares were locked in and so this transaction would indicate a value for the shares in BBG without any lock-in higher than 26.04p.

(3) A valuation of the shares using EBITDA and an appropriate multiple, with adjustments for DLOC and DLOM. For the reasons given above, this method of valuation would indicate a valuation of the shares in BBG of 55p

282. The hypothetical purchaser would take into account in particular that there had been no real change in the business between November 2006 and February 2007, although there was now a plan in place to roll out the business, funding was in place for at least the initial stages of the roll out and the company was now listed on CISX with a strengthened board of directors in place. There were still considerable uncertainties as to prospects for the business and whilst an EBITDA approach indicated a price of 55p per share, the previous directors and shareholders had accepted a value of 26.04p attributed to the Consideration Shares. That was an arm's length deal involving the previous management of the business who would be expected to be in a good position to make a judgment as to its future prospects and value.

283. On balance I consider it likely that the hypothetical purchaser would take an average of the 8p and 55p which gives a value of 31.5p per share. The hypothetical purchaser would take some comfort in making such a bid because it was consistent with the value attributed to the Consideration Shares which could be taken as also reflecting the fact that the Consideration Shares were lock-in.

284. I have no knowledge as to the basis on which the respondents issued closure notices to the appellants on the basis that the market value of the shares at all material times was 31.5p. The fact I have found the market value on this valuation date to be 31.5p is undoubtedly a matter of coincidence.

285. In all the circumstances I consider that the market value of the shares in BBG gifted on 19 February 2007 was 31.5p per share.

(2) Valuation on 13 August 2008

286. Both parties agreed in closing that the most appropriate methodology to value the shares at this date is on the basis of a multiple of EBITDA.

287. Mr Mitchell considered that in addition to the information available at the previous valuation date, the following further information would also be available:

(1) Audited accounts of BBG for the year ended 30 April 2007.

(2) Audited accounts of BBL for the 17 months ended 30 April 2007.

(3) Interim unaudited results for the six months ended 31 October 2007.

288. In order to identify maintainable EBITDA for a 12-month period, Mr Mitchell took an average of the pro-rated earnings from the 17 months audited accounts of BBL. The EBITDA for the 17m period was £2,964,280 giving an annual equivalent of £2,092,433. The EBITDA for the 5 months of trading in the audited accounts of BBG ending 30 April 2007 was £637,000 which grossed up to an annual equivalent of £1,528,800. The average of these figures gave maintainable EBITDA of £1,810,000.

289. In contrast, Mr Bowes and Mr Firth invited me to simply pro-rate EBITDA from the accounts for the 17m period ending 30 April 2007, which gave a figure of £2,092,433

290. Mr Firth criticised Mr Mitchell's approach as effectively including 3 winter periods and only 1 summer period in the resulting average which he said was skewed. Annualising the 17m period included only 2 winter periods and 1 summer.

291. I can see arguments for both approaches. However, I consider that the hypothetical purchaser would have regard to comments made by the Chairman of BBG in the interim unaudited results of BBG for the period. It was noted that like for like sales had decreased and that the current trading environment remained difficult. This reflected growing consumer caution, sustained competition and the effects of the smoking ban. The board was cautious regarding the outlook for the financial year.

292. In my view and in light of all the evidence the hypothetical purchaser would adopt an approach which gave a more conservative outcome than that proposed by Mr Firth. That is the approach adopted by Mr Mitchell.

293. Mr Mitchell again used comparable listed companies to obtain a multiple, adjusted for an equity bid premium and a private company discount. He did not carry out a comparable transaction analysis because the most recent transaction he could identify was 13 November 2007 which was prior to the 2008 recession and therefore not comparable. The comparable listed company analysis gave a multiple of 8.25.

294. There was very little difference between the multiple of 8.25 adopted by Mr Mitchell, the multiple of 8.2 adopted by Mr Bowes and indeed the multiple of 8.37 adopted by Mr Firth. Based on all the evidence I consider it appropriate to use a multiple of 8.25.

295. Mr Mitchell applied a combined DLOC and DLOM of 38.4% to give a valuation of 16p. For reasons previously given, I consider it appropriate to apply a DLOC and DLOM. I am satisfied that the hypothetical purchaser would use a combined DLOC and DLOM of 38.4%.

296. In my view, the hypothetical purchaser would use an EBITDA calculation for the value of shares in BBG as follows:

Maintainable EBITDA	£1,810,000
Multiple	8.25
Enterprise Value	£14,932,500
Net Debt	£10,324,012
Equity Value	£4,608,488
Number of Shares	17,336,409
Equity value per share	27p
DLOC/DLOM	38.4%
Value per share	16.5p

Value as at 13 August 2008 - Conclusion

297. For the reasons given above, I accept Mr Mitchell's approach to valuation using EBITDA. In all the circumstances I consider that the market value of the shares in BBG gifted on 13 August 2008 was 16.5p. Mr Mitchell's calculation of the combined DLOC/DLOM gave a discounted share price of 16p, but it appears to me he has made a slight mathematical error.

(3) Valuation on 16 October 2009

298. Both parties agree that the most appropriate methodology to value the shares at this date is on the basis of a multiple of EBITDA.

299. Further, it was common ground that the level of maintainable EBITDA should be taken from the audited accounts for the year ended 30 April 2009, even though they were not signed off until 20 October 2009. There as some discussion as to how Mr Mitchell reached the conclusion that these accounts were available to the hypothetical purchaser, but given this was an area of agreement I need not explore those reasons.

300. Mr Mitchell again used comparable listed companies to obtain a multiple, adjusted for an equity bid premium and a private company discount. He did not carry out a comparable transaction analysis because he was only able to identify one comparable transaction which he considered insufficient. His comparable listed company analysis gave a multiple in the range 8 to 8.5.

301. Applying a multiple of 8 – 8.5 and a combined DLOC and DLOM of 50.8% indicated a valuation of 15 – 18p. Mr Mitchell settled on the mid-point of 16.5p.

302. Mr Bowes calculated a multiple of 8.37 but Mr Firth submitted the multiple should be 10.3. He submitted that Mr Mitchell's multiple was too low because:

(1) BBG's revenue growth and EBITDA growth for calendar year 2008 were in excess of the figures for all competitors. The decrease in EBITDA margin it suffered was the second smallest of all the comparables.

(2) The hypothetical purchaser would consider that BBG was outperforming the competition which would justify using the highest multiple for a comparable of 10.3 rather than the range of 8-8.5 used by Mr Mitchell.

303. Mr Bowes, at least initially, adopted a combined DLOC/DLOM of 50% on the basis that purchasers would know that BBG was about to become unlisted. This was approximately the same as the discount used by Mr Mitchell.

304. These are value judgments based on the evidence. In circumstances where the experts have adopted very similar multiples and very similar discounts, I consider it appropriate to reach my conclusion based on the expert evidence. In my view it is appropriate to use a multiple of 8.5 and a combined DLOC/DLOM of 50%.

305. In my view the hypothetical purchaser would use an EBITDA calculation for the value of shares in BBG as follows:

Maintainable EBITDA	£1,936,558
Multiple	8.5
Enterprise Value	£16,460,743
Net Debt	£10,169,206
Equity Value	£6,291,537
Number of Shares	17,336,409
Equity value per share	36p
DLOM/DLOC	50%
Value per share	18p

Value as at 16 October 2009 - Conclusion

306. For the reasons given above I consider that the market value of the shares in BBG gifted on 16 October 2009 was 18p.

CONCLUSION

307. For all the reasons given above I am satisfied that the market value of the appellants' shares in BBG at the three valuation dates are as follows:

19 February 2007	31.5p
13 August 2008	16.5p
16 October 2009	18p

308. I therefore determine the preliminary issues accordingly. Any issues as to valuations at any other gifting dates and the disposal of the appeals generally shall be determined at a subsequent hearing unless agreed by the parties. The parties shall seek to agree directions for that hearing and inform the tribunal as to their position within 60 days from the date of release of this decision.

309. This document contains full findings of fact and reasons for the preliminary decisions. Any party dissatisfied with the preliminary decisions has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 28 June 2021