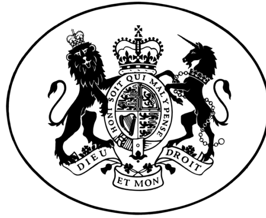
[2015] UKUT 164 (TCC)



Appeal numbers: FTC/103/2013
FTC/104/2013
FTC/105/2013

CGT – artificial scheme to create allowable loss – whether consideration given wholly or exclusively for the acquisition of asset – s. 38(1)(a) TCGA

Appeals – alternative arguments by Respondents – whether requiring permission to appeal

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

(1) STEVEN PRICE
(2) JOHN MYERS
(3) JAMES LUCAS **Appellants**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: MR JUSTICE NUGEE
JUDGE HOWARD NOWLAN

Sitting in public at the Rolls Building, London EC4A 1NL on 23-24 March 2015

David Ewart QC and Zizhen Yang (instructed by NT Advisors Ltd) for the Appellants

Timothy Brennan QC and Nicola Shaw QC (instructed by the General Counsel and Solicitor for HM Revenue and Customs) for the Respondents

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DECISION

Introduction

1. These appeals from the First-tier Tribunal (Tax Chamber) (**"FTT"**) concern a wholly artificial tax avoidance scheme which was designed to create capital losses that could be offset against taxable income. The scheme, promoted by NT Advisors, attracted a number of participants of whom the three appellants, Messrs Price, Myers and Lucas (**"the Appellants"**), are examples. The scheme was run in a number of rounds: Mr Myers participated in Round 1, and Messrs Price and Lucas in Round 2. Each claims to have made a substantial allowable loss, about £6m in the case of Mr Myers, £300,000 in the case of Mr Price, and £1.5m in the case of Mr Lucas, and to be entitled to offset the loss against his taxable income.

2. The Respondents, the Commissioners for Her Majesty's Revenue and Customs (**"HMRC"**), disallowed the claims. The Appellants appealed to the FTT. By a Decision dated 23 May 2013, the FTT (Judge Charles Hellier and Mrs Shahwar Saddeque) held that the scheme did not work and rejected the Appellants' argument that they had substantial allowable losses, deciding that they could offset allowable losses of only trivial amounts. References hereafter to numbers in square brackets without more are to paragraphs of the FTT's Decision [2013] UKFTT 297 (TC).

3. The Appellants now appeal to the Upper Tribunal (**"UT"**) with the permission of the FTT (Judge Hellier) dated 14 August 2013.

Summary of the issues

4. Before coming to the detail it is worth explaining one curious feature of this appeal which is that the Appellants are seeking to sustain their scheme on a quite different basis from that which they had advanced before the FTT. The success of the scheme depended on the participants having spent large sums on acquiring assets, and realised very small amounts on disposing of them, thereby generating a large loss for the purposes of Capital Gains Tax (**"CGT"**). To take Mr Myers' case as an example, he claimed to have spent £6,001,200 on acquiring certain shares pursuant to an option. The shares, which had a redemption value of £600, were sold a few days later on Mr Myers' behalf for £552.

5. In order for the scheme to work Mr Myers needed to establish that for CGT purposes his acquisition cost was indeed £6m (to use a rounded sum). That meant he had to avoid being caught by provisions in the Taxation of Chargeable Gains Act 1992 (**"TCGA"**) which have the effect of deeming a person's acquisition cost of an asset to be equal to its market value, in particular s. 17, which has the effect of substituting market value where an asset is acquired otherwise than by way of a bargain made at arm's length. (References hereafter to sections without more are to sections of TCGA).

6. Before the FTT, as we understood it from Mr Brennan QC, who appeared on behalf of HMRC, both parties had proceeded on the basis that the participants'

acquisition of the relevant shares was a non-arm's length bargain such that s. 17 would prima facie apply. The whole purpose of the scheme was to find a way of avoiding this. Round 1 of the scheme was designed to do so by relying on s. 144ZA which disapplies the market value rule in the case of the exercise of an option, substituting instead the exercise price. But in order to take advantage of s. 144ZA the scheme had to navigate around s. 144ZB, which reinstates the market value rule in the case of a non-commercial exercise of an option, unless the option is a certain type of employment-related option. Round 1 therefore was structured in such a way that the option should be employment-related and not taken out of s. 144ZA by s. 144ZB. That route was however (arguably) blocked by retrospective legislation, so Round 2 (and, as far as we are aware, subsequent rounds) relied on a different route, namely s. 149AA, which required the securities acquired on exercise of the options to be not only employment-related but convertible.

7. The whole thrust of the Appellants' case below was that the scheme had succeeded in coming within s. 144ZA or s. 149AA as the case may be. This raised a number of issues, which the FTT proceeded to consider. But the FTT (rather, it would seem, to the surprise of the parties) decided that the market value rule did not apply for a much simpler reason, namely that the relevant transaction was not "otherwise than by way of a bargain made at arm's length" and hence was not subject to s. 17 at all [59].

8. That had two consequences. First it meant that none of the issues argued on s. 144ZA, s. 144ZB or s. 149AA (such as whether the options qualified as employment-related, whether the retrospective legislation was effective to block the route relied on in Round 1, whether the Round 2 relevant securities were convertible and so on) arose.

9. Second, it meant that it was necessary for the FTT to decide what the acquisition cost of the shares was, since it was not market value. That required consideration of s. 38 under which the acquisition cost of an asset is the amount of consideration given "wholly and exclusively" for the acquisition of the asset. The FTT held that Mr Myers did not give the £6m wholly and exclusively for the acquisition of the shares. The most he could be said to have given for them was £600 [61]. The FTT therefore reduced his acquisition cost to £600, and his allowable loss to £48 (£600 less the £552 received on disposal) [190(3)], [191].

10. On this appeal the Appellants have embraced the FTT's decision that s. 17 did not apply (conveniently labelled **"Decision 1"** by Mr Ewart QC, who appeared for the Appellants), but have challenged the FTT's decision on the "wholly and exclusively" point in s. 38 (conveniently labelled **"Decision 2"**). The Appellants have the permission of the FTT to appeal Decision 2 and their position was that that was the only issue properly before the UT. If HMRC wished to challenge Decision 1, it needed to seek permission to appeal that aspect of the FTT's decision; HMRC did not seek permission from the FTT, and having failed to do so, the UT either could not or should not grant them permission itself. The other issues were all contingent on HMRC overturning Decision 1; and since HMRC were not able to do that, none of them arose. If therefore the Appellants succeeded on their appeal against Decision 2, the

appeal should be allowed; if they failed, the appeal should be dismissed.

11. HMRC's position however was that they did not need permission to challenge Decision 1 (or alternatively if they needed it, the UT could and should give it to them). If the Appellants failed in their appeal against Decision 2, the appeal should be dismissed; but if they succeeded, HMRC would then wish to pursue their challenge to Decision 1. If that were successful, HMRC accepted that it would open up in turn a number of other issues on s. 144ZA, s. 144ZB and s. 149AA.

12. In the event we heard argument on only two issues, as follows:

    (1) We first heard from both parties as to whether HMRC needed, and if so whether they could and should be given, permission to appeal Decision 1 (**"the Permission issue"**).

        We announced at the end of such argument our conclusion that HMRC did not need such permission.

    (2) We then heard argument from Mr Ewart on Decision 2 (**"the s. 38 issue"**).

        We announced at the end of that argument that we did not need to hear from Mr Brennan on this and would dismiss the Appellants' appeal on the s. 38 issue.

    As both counsel agreed, that made the remaining issues moot. Mr Brennan did not need to pursue his challenge to Decision 1, and in those circumstances neither he nor Mr Ewart had any interest in arguing the other issues that were contingent on Decision 1 being overturned. We therefore did not hear any further argument on them.

13. This Decision therefore contains our written reasons for our conclusions on the Permission issue and the s. 38 issue. We say nothing about any of the other issues. In particular we address the s. 38 issue on the assumption that the FTT was right to hold that s. 17 did not apply to the transactions in question (being by way of bargains made at arm's length) and hence that the market value rule did not apply. It is only if one assumes this that the s. 38 issue arises at all; and logically it might be said that the s. 17 issue should be decided first. But as explained above we have not heard argument on whether the FTT was right on s. 17, although it is apparent from Mr Brennan's written argument that HMRC would have wished to challenge the conclusion strenuously had it been a live point. The fact that we proceed to discuss the s. 38 issue should not therefore be taken as any endorsement of the FTT's decision on the s. 17 point. Equally however it should not be assumed that we would ourselves have taken a different view: we can certainly see that the point is well arguable but in the absence of actually hearing argument, we have reached no conclusion as to whether the FTT was right on s. 17 or not.

Facts

14. The FTT's Decision contains a full set of facts. It is not necessary for the two issues with which we have to deal to set them out in such detail and we will endeavour to confine this statement to the facts necessary to understand the points. We are indebted to the FTT for the clarity with which they have set out the facts and we have drawn heavily on their account in what follows.

15. We take first the facts of Mr Myers' participation in Round 1 as the paradigm case, and then draw attention to the differences with the Round 2 cases.

16. Round 1 took place in March 2006. There were 6 participants. Taking them together Round 1 required a sum of £23.6m which was provided by a bank, SG Hambros Bank (Channel Islands) Ltd (**"Hambros"**) and which, as detailed below, was sent round in a circle, ending up back with Hambros.

17. The first stage was to put all the requisite players into position as follows:

    (1) A company called Stony Heating Ltd (**"SHL"**) was incorporated in the BVI on 14 March. On 16 March SHL acquired for £1000 from a Mr Nigel Forster the only issued share in an existing UK company called Stony Heating and Bathroom Supplies Ltd which operated a plumbing shop in the Milton Keynes area. (The purpose of this was so that SHL became the parent of a trading subsidiary.) 100 class A shares in SHL were issued to Mr Forster so he remained the ultimate indirect owner of the business.

    (2) Also on 16 March SHL amended its memorandum to create 3 classes of shares. There were the class A ordinary shares held by Mr Forster, which effectively carried the value of the plumbing shop business and which played no part in the scheme, and in addition two rather unusual classes: (i) £1 class B shares, redeemable for £1 per share (by notice given at least 12 months after issue) but which could only be issued for at least £10,002 per share; and (ii) 1p preference shares which were redeemable at the option of the holder for £10,000 each. Once notice had been given, SHL was obliged to redeem the preference shares if, or as soon as, it had sufficient monies in its share premium account.

    (3) Offshore trusts were established for each participant. Mr Myers' was called the John Myers 2006-01 Life Interest Trust and it was established by declaration of trust by SG Hambros Trust Company (Channel Islands) Ltd dated 15 March. It was governed by Jersey law. Mr Myers was the Principal Beneficiary. Subject to overriding powers of appointment in favour of a class of beneficiaries that consisted of his issue, spouse, parents and siblings (with power to add other beneficiaries or charities), he was entitled to the income for life and to the capital absolutely if alive at the end of the Trust Period (initially 100 years but capable of being terminated early at any time); subject thereto the fund was held on trust for his issue, with ultimate default trusts for charity.

(4) The participants acquired options to subscribe for B shares in SHL. Mr Myers' option, which he acquired for £1 on 16 March, was to subscribe for 600 shares at £10,002 each. (The option had initially been granted by SHL to another company called Stony Heating & Plumbing Ltd; that company had offered an opportunity to acquire it to Mr Mark Jenner, one of its directors and the brother of Mr Matthew Jenner of NT Advisors; and he had directed that it instead be assigned to Mr Myers. This elaborate charade was done in an attempt to bring the options within the exception in s. 144ZB for employment-related options but the details of this are not important for present purposes).

(5) There were two other BVI companies involved: Europoint Ltd (another entity related to Hambros, in that its shares were held by Hambros nominees for the Hambros trustee company, which held them on charitable trusts); and its subsidiary Gioventura Ltd (its shares also being held by Hambros nominees, in this case for Europoint).

(6) On 16 March Europoint subscribed for 2630 of the 1p preference shares (at a cost of £26.30).

(7) On 17 March Europoint gave notice to SHL to redeem the preference shares, meaning that SHL was obliged to redeem them at £26.3m as soon as it had sufficient monies.

18. The stage was now set for the £26.3m to be sent round the circle. Since all the actors had accounts at Hambros this was not difficult to achieve and it all took place on 17 March as follows:

(1) Hambros lent £26.3m to Gioventura.

(2) Gioventura lent the same sum to the various life interest trusts of the Round 1 participants, including £6m to Mr Myers' trust. The terms on which it did so (described by the FTT at [19(3)(f)] as "remarkably uncommercial") were that although the loan was prima facie repayable on demand and carried interest at 1% over Hambros' base rate, the trustees could lend the money on to Mr Myers to enable him to acquire B shares, and if he did so, the loan would be deferred so as to be repayable in 79 years' time (ie 2085), with interest reduced to 0.001% pa.

(3) Mr Myers' trustees lent the £6m to him.

(4) Mr Myers exercised his option and paid SHL £6,001,200 (ie 600 shares at £10,002 per share).

(5) That had two effects. One was to trigger the terms in Gioventura's loan to Mr Myers' trustees under which repayment was deferred to 2085 and the interest reduced to a nominal amount.

(6) The other effect (taken with the other Round 1 participants exercising their options) was that SHL had £26.3m in its share premium account.

SHL therefore paid £26.3m to Europoint in redemption of its preference shares.

(7) Europoint used the £26.3m to subscribe for 2 $1 shares in Gioventura.

(8) Gioventura used the £26.3m to repay Hambros.

19. The FTT said that although they had not been able to incorporate a diagram of the movement of funds a reader might find drawing his or her own helpful [24]; we are very grateful to Mr Brennan who has provided us with two such diagrams, one for Round 1 and one for Round 2, which have been agreed by Mr Ewart as accurate and which we annex. They show with great clarity how the money moved in a circle, that for Round 1 showing how the £26.3m went from Hambros to Gioventura, to the trusts, to the participants ("users"), to SHL, to Europoint, to Gioventura, and then back to Hambros.

20. At the end of 17 March Mr Myers' position was as follows:

(1) He was entitled to be issued 600 B shares in SHL.

(2) He owed his trust £6m.

(3) His trust owed Gioventura a nominal sum of £6m, but on terms that made its present value a tiny fraction of that. In fact on 4 December 2006 the trustees agreed with Gioventura to pay £1,500 in settlement of this obligation.

21. On 19 March SHL issued the 600 B shares to Mr Myers. They were sold by Mr Matthew Jenner on his behalf on 20 March for £552.

22. Finally on 5 December 2006 Mr Myers' trustees waived all but £1,625 of the loan made to Mr Myers. This was not a necessary part of the scheme, and in Round 2 Mr Lucas's trust waived his loan, but Mr Price's in fact did not.

23. Round 2 was similar in its essentials. The FTT identified the following differences: (1) the amounts of money were different (the diagram for Round 2 provided by Mr Brennan refers to £14.06m for 24 participants); (2) the dates were different, Round 2 taking place from 29 March to 5 April 2006 (the diagram shows the money moving on 3 April); (3) on the day before the money moved, SHL executed a deed poll allowing the holders of B shares to convert them into £1 promissory notes (the purpose of this was to make them "convertible" so that they could qualify for s. 149AA); (4) as already mentioned Mr Price's trustees did not waive his loan to them. In fact it appears from the diagram for Round 2 that there was another difference in that in Round 2 the money was not lent by Hambros but started and ended with Gioventura; but it has not been suggested to us that this makes any difference.

24. Certain other findings of fact made by the FTT are worth briefly noting. First, it was not disputed that the sole purpose of the arrangements was to produce tax relief to set against the participants' income [26]. Second, all the transactions were preplanned, with certain minor exceptions [27]. Third, at [29] the FTT said that there could be attributed an understanding of the

arrangements as a whole (they say "to the arrangement constituted by any particular document" which is a slightly odd way of putting it but the sense is clear enough), continuing:

> "Thus for example in making payment under the option Mr Myers should be treated as knowing and intending that the making of that payment would result in the redemption of the Preference shares, the transfer of the monies to Gioventura, and the virtual extinction of his trust's liability under the loan from Gioventura."

Fourth, it is of interest that some £520m passed through SHL in the course of all the rounds of the scheme (thought by the FTT likely to be 10 to 20 [2]) which took place [25].

Decision of the FTT

25. Mr Ewart helpfully identified 8 separate decisions made by the FTT. His analysis was not in this respect disputed by Mr Brennan, and we can gratefully adopt his account. We have already referred briefly to Decisions 1 and 2 but we set them out here in Mr Ewart's words:

> **Decision 1:** the grant of the options, the acquisition of the options by the Appellants and the exercise of the options were transactions by way of a bargain at arms' length. Therefore s. 17(1)(a) and s. 144ZA do not apply [59].
>
> **Decision 2:** the amounts which the Appellants paid under the options for the shares in SHL were not given by them wholly and exclusively for those shares within s. 38(1)(a) [61], [63].

26. Mr Ewart accepted that given the FTT's decision on Decision 1, Decisions 3 to 7 did not arise. It is not necessary therefore to detail them: Decision 3 concerned whether the options were employment-related (No), Decision 4 whether the retrospective changes infringed the Appellants' rights under the European Convention on Human Rights (No), Decision 5 whether the shares in Round 2 were "convertible" (No), and Decisions 6 and 7 the operation of s. 149AA if it arose (which it did not in the light of Decision 5).

27. The FTT however did need to decide Decision 8, as follows:

> **Decision 8:** s. 574 of the Income and Corporation Taxes Act 1988 (**"ICTA"**) applied to make any capital loss available against income because:
>
> (a) SHL was a qualifying trading company [172]; and
>
> (b) the sale of the SHL shares was at arm's length [188].

HMRC initially sought to challenge the FTT's conclusion at Decision 8(a), but this was later abandoned.

28. The FTT summarised its conclusions at the end of its decision in two

paragraphs, the first headed "Summary" and the second "Conclusions" as follows:

> "**Summary**
>
> 190 We find (using Mr Myers' figures, and save as noted as appropriately modified for the other two appellants):
>
> (1) That the SHL shares were acquired in a bargain at arm's length (paras 49-59). Section 144ZA does not apply. The acquisition cost was £600 (paras 60-63).
>
> (2) But, if we are wrong, then section 144ZB applies because:
>
> > (a) The options were not available by reason of the employment of a person (paras 77-88);
> >
> > (b) The options were not securities options within section 420(8) because of the words inserted into that provision by FA 2006 (paras 89-125).
>
> (3) Thus subject to the effect of s 149AA in relation to the 2nd and 3rd appellants, the CGT loss which arose under the option provisions to Mr Myers, is limited to the difference between the base cost of £600 and £552.
>
> (4) Section 149AA takes precedence over the option rules (paras 155-159) but the SHL shares were not convertible securities (para 151) and were not employment related (para 129).
>
> (5) Section 574 applies to make any capital loss available against income because:
>
> > (a) SHL was a qualifying trading company (paras 164–171);
> >
> > (b) the sale of the SHL shares was at arm's length (paras 179-187).
>
> But such loss is limited to the difference between the CGT base cost, as determined above, and the sale price.
>
> **Conclusions**
>
> 191 We conclude that each appellant's loss available for offset against other income should be reduced to that determined in the preceding paragraph."

The Permission issue

29. With that introduction we can now turn to the Permission issue. The chronology is a little tortuous and we set it out in detail, as follows:

(1) The FTT's Decision was released either on 30 April 2013 or 23 May 2013 (for reasons not explained to us the Appellants say it was released on 30 April 2013 but the copy of the Decision we have bears a release date of 23 May 2013).

(2) On 20 June 2013 each of the Appellants applied to the FTT for permission to appeal. In each case the Appellant expressly accepted that the FTT was right on Decision 1, and applied for permission to appeal Decision 2; he also applied for permission to appeal Decisions 3 and 4 (and, in the case of the Round 2 Appellants, Decision 5) "conditional on the [UT]'s finding that the [FTT] was wrong in holding that the appellant had acquired the shares in SHL by way of bargain at arm's length" (ie reversing Decision 1). We will call these **"the contingent grounds"**.

(3) On 14 August 2013 the FTT (Judge Hellier) granted the Appellants permission to appeal Decision 2. He refused permission to appeal on the contingent grounds for the following reasons:

> "No appeal has been brought against the finding of the tribunal that the acquisitions were by way of bargain at arm's length. The Appellants support that finding. It seems to me that if at some time the Upper tribunal chooses to review that finding then the proper place and time to make this application would be before the Upper tribunal at that time."

(4) On 12 September 2013 each Appellant appealed by way of Notice to Appeal to the UT. As well as relying on his reasons for challenging Decision 2, each Appellant renewed his application for permission to appeal on the contingent grounds by way of precaution.

(5) The Notices to Appeal were served on HMRC. On 21 October 2013 Ms Kirsty Morton, a senior lawyer in HMRC's Solicitor's Office, e-mailed the tribunal service and NT Advisors (acting for the Appellants) confirming that HMRC would not be putting in a response to the Notices of Appeal.

(6) 2 days later however, Ms Morton sent another e-mail saying that after consulting counsel and on further reflection HMRC considered that it would assist the UT and the Appellants to provide a response, saying:

> "We consider a response indeed would be useful specifically to deal with the First Tier Tribunal's finding that the Appellants acquired the B shares in SHL by way of bargain at arm's length with which we do not agree."

She asked for an extension of time for 28 days to submit a response.

(7) On 1 November 2013 the Appellants submitted a response to HMRC's application for an extension of time containing extensive argument why it should be rejected. Among other things it took the point that

HMRC could not properly challenge Decision 1 by way of respondents' notice and if it wished to do so it needed to apply to the FTT for permission to appeal Decision 1 (and an extension of time for doing so).

(8) On 5 November 2013 HMRC served their Respondents' Notice. It said that while satisfied with the decision of the FTT, HMRC "seek to affirm the FTT's decision on grounds additional to those relied on by the FTT", one of those being that the FTT ought to have proceeded on the basis that the grant and exercise of the options was otherwise than by way of bargain at arm's length. It nowhere set out any alternative decision that the UT would be asked to come to. It included as an addendum an answer to the Appellants' objection to the extension of time, where among other things HMRC said that all they were seeking to do was affirm the decision of the FTT on other grounds, and that having won below, they could not apply for permission to appeal.

(9) Despite a further round of submissions from the Appellants, on 22 November 2013 HMRC's application for an extension was granted by the UT (Judge Colin Bishopp) and time was extended to 5 November 2013. He did not give any reasoned decision.

30. Before us, the parties have reiterated the positions which they adopted in their submissions on the extension. Mr Ewart has submitted that if HMRC desire to challenge Decision 1 they can only do so by way of appeal; that that requires permission to appeal; that an application for permission must first be made to the FTT, which has not been done; and, for good measure, that if the UT does have any power to grant permission, HMRC are hopelessly out of time. Mr Brennan contends that HMRC's Respondents' Notice merely seeks to affirm the decision of the FTT on alternative grounds and that as such no permission is needed.

The legal principles

31. The general principles were not disputed. The starting point is that an appeal lies against a judgment or order, not against the reasons given by the judge for his judgment or order. The classic case is *Lake v Lake* [1955] P 336 where a husband petitioned for divorce on the ground of his wife's adultery. The wife defended both on the ground that she had not committed adultery, and on the ground that in any event any adultery had been condoned. The judge held that she had committed adultery but that it had been condoned, and dismissed the petition. The wife sought leave to appeal against the finding of adultery. The Court of Appeal held that she could not appeal that finding.

32. Some of the reasoning of Lord Evershed MR turns on the fact that under the RSC the Court of Appeal might hear an appeal from "the whole or any part of any judgment or order" and that "judgment" meant the formal order drawn up by the Court not the judge's reasons for judgment (see at 343f). But the principle is not a technical one dependent on the meaning of "judgment or order", or indeed on there having been a formal order drawn up at all. As pointed out by Waller LJ in *Cie Noga d'Importation et d'Exportation SA v*

Australia and New Zealand Banking Group Ltd [2002] EWCA Civ 1142 (**"*Noga*"**) at [27], many appeals are brought before a formal document has been drawn up.

33. Rather, the basis for the principle is a broader one as to the nature of an appeal. Hodson LJ in *Lake v Lake* put it like this: "this is an attempt by a successful party to appeal against an order which she has obtained in her favour…this court cannot entertain such an appeal" (see at 345). Lord Evershed MR said that even if the Court of Appeal thought the commissioner was wrong on the facts, it would make no difference to the outcome of the proceedings (see at 343). In *Noga* Waller LJ put it like this (at [27]):

> "*Lake v Lake* [1955] P 336 properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal… That this is so is not simply by virtue of interpretation of the words 'judgment' or 'order', but as much to do with the fact that the court only has jurisdiction to entertain 'an appeal'. A loser in relation to a 'judgment' or 'order' or 'determination' has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not one [*sic* – this should no doubt be "is one"] he or she does not like."

Waller LJ in fact dissented in the result in *Noga*, but both Tuckey LJ and Hale LJ in the majority expressly said that they agreed with his analysis of the law on jurisdiction (see at [51], [52]); and this passage was cited and followed more recently by Patten LJ giving the leading judgment of the Court of Appeal in *re A (A Child)* [2014] EWCA Civ 871.

34. The same principle applies to tribunals. In *Harrod v Ministry of Defence* [1981] ICR 8, Mr Harrod complained to an industrial tribunal that he had been unfairly dismissed when his employer sought to transfer him to a new place of work. The tribunal held that Mr Harrod was a fully mobile employee and had not been dismissed. After receiving legal advice, Mr Harrod accepted that he had not been dismissed as he had waived any repudiatory conduct by his employer by accepting further salary, but wished to challenge the finding that he was fully mobile. He argued that s. 136(1) of the Employment Protection (Consolidation) Act 1978, which provided that an appeal should lie to the Employment Appeal Tribunal "on a question of law arising from any decision of, or arising in any proceedings before, an industrial tribunal", conferred a more extensive right of appeal than in the court system. The EAT disagreed. May J said (at 11B) that although the language conferring jurisdiction on the EAT was not the same as in *Lake v Lake*:

> "we have come to the conclusion that it is inherent in any appeal that the appellant must be seeking to set aside the decision, judgment or order, whatever it may have been of the tribunal below, and that it

> would need very clear words to entitle a party to any proceedings to appeal to an appellate tribunal on the basis that although the decision below was right, nevertheless the reasons for it were wrong."

35. The corollary of the fact that a party cannot appeal if the decision below is in his favour is that a respondent to an appeal who seeks to uphold the decision below, but on different grounds to those relied on by the lower court or tribunal, does not need permission to do so. The principle is clearly illustrated by *Noga*, a case which squarely raised the issue as to the circumstances in which a respondent needs permission to raise points in a respondent's notice (see per Waller LJ at [1]). Noga claimed that certain defendants (the S J Berwin defendants) had agreed to settle Noga's claims for $100m. Rix J determined this question as a preliminary issue. He found that the parties had discussed, and indeed agreed on, a settlement figure of $100m but that the agreement was conditional and no valid compromise had been made. He therefore declared that no settlement had been concluded and gave Noga permission to appeal on the conditional nature of the agreement. The S J Berwin defendants wished to challenge his factual finding that the sum of $100m had been agreed. Rix J was resistant to them being able to do that and was persuaded to insert into his declaration words stating that a sum of $100m was agreed. The S J Berwin defendants appealed his decision to insert those words, accepting that the result of them was to require them to obtain permission to challenge the $100m finding.

36. Waller LJ approached the analysis by looking first at what the position would have been had the words not been inserted (at [25]). He considered the *Lake v Lake* principle, concluding that if in such a scenario Noga had not appealed, the Court of Appeal would not have any jurisdiction to entertain an appeal on the factual issue (at [31]). But if Noga had appealed, the S J Berwin defendants would have been in a position to put in a "defensive respondent's notice" challenging the judge's factual findings, for which they would not need permission. That had certainly been the case in the pre-CPR context (at [32]) and Waller LJ had no doubt that the position had been maintained under the CPR (at [39]). That meant that the question was whether it had been a legitimate use of Rix J's discretion to insert the words referring to the $100m agreement. Waller LJ took the view that the only reason he did so was to impose a permission requirement which would not otherwise exist, and thought this illegitimate (at [41]). Tuckey and Hale LJJ thought the declaration was made for other good reasons as well, and was legitimate.

37. What therefore *Noga* confirms is that it is crucial for these purposes to identify with precision what the decision in the court or tribunal below is. If the decision below in *Noga* had simply been that no settlement had been concluded, the S J Berwin defendants could have run their factual arguments in response to Noga's appeal without having to satisfy any permission requirement, despite the fact that Noga's appeal on whether the agreement was conditional involved a point of law that would have taken 2 days to hear, whereas the S J Berwin defendants' challenge to the factual findings was a heavy factual question that was estimated to take up to 28 days. It was only because Rix J had declared not only that the settlement was not binding but

that the $100m had been agreed (and the majority upheld this as a legitimate exercise of discretion) that the S J Berwin defendants needed permission.

Application of principles

38. It is now possible to apply these principles to the present case. The right of appeal from the FTT to the UT is governed by s. 11 of the Tribunals, Courts and Enforcement Act 2007. By s. 11(2) any party to a case has a right of appeal. By s. 11(3) that right may by exercised only with permission. By s. 11(1) a right of appeal means a right to appeal to the UT "on any point of law arising from a decision made by the [FTT]" (other than certain excluded decisions which are not relevant here). Although at first glance that language might be thought to give a right of appeal even to a party successful below, *Harrod v Ministry of Defence* (where the language was indistinguishable) shows that that is not so, and establishes that no appeal lies where the would-be appellant contends that the decision below was right but the reasons for it wrong.

39. That means one must identify what decision in this sense the FTT made. The FTT does not draw up a formal order in the same way as a court. Instead, the rules applicable to the FTT (the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009/273) provide in r 35(2)(a) that the FTT must, after making a decision which finally disposes of all issues in the proceedings, provide to each party a decision notice which "states the Tribunal's decision". By r 35(3) the decision notice must (unless the parties agree it is unnecessary) include either a summary of the findings of fact and reasons for the decision, or be accompanied by full written findings of fact and reasons for the decision. In the present case, as is commonly the case in our experience, the FTT produced a single document headed "Decision" that is both the decision notice required by r 35(2)(a) and contains full findings of fact and reasons for the decision as required by r 35(3): see [192] which expressly refers both to "this decision notice" and to "this document" containing "full findings of fact and reasons for the decision."

What decision did the FTT make ?

40. Mr Ewart had two arguments why HMRC needed permission. First, he submitted that if one encapsulated the FTT's decision in a notional order it would contain declarations giving effect to each of Decisions 1, 2 and 8. It would therefore declare (in Mr Myers' case) (1) that Mr Myers acquired the SHL shares by way of a bargain made at arm's length; (2) that the amount of consideration given by Mr Myers wholly and exclusively for the SHL shares within s. 38 was £600; (3) that the allowable loss which Mr Myers suffered on the disposal of the SHL shares was £48; and (4) that the loss of £48 could be set against Mr Myers' income under s. 574 ICTA. On this formulation HMRC would need to appeal against the first declaration, and hence need permission.

41. We do not accept this submission. It seems to us that if one seeks to identify from the FTT's Decision which part of it "states the Tribunal's decision", the answer is only [191] under the heading Conclusions. The matters stated in [190] under the heading Summary are not part of the statement of "the

Tribunal's decision" under r 35(2)(a) but a summary of "the findings of fact and reasons for the decision" under r 35(3). On this basis the decision of the FTT is simply that (in Mr Myers' case) the amount of loss available to him for offset against other income was £48. This seems to us the natural reading of the FTT's Decision, and we see no reason to give it any different interpretation.

42. But we would not want it thought that this conclusion rests on simply a textual analysis of the FTT's Decision. It is apparent from *Noga* that an important consideration in identifying the decision of a court or tribunal is identifying what issue or issues were referred to it for decision. The FTT like all tribunals has a statutory jurisdiction. In the present case that jurisdiction is found in the Taxes Management Act 1970 (**"TMA"**). To identify the particular issue the FTT was deciding one must look at what was referred to the FTT under TMA.

43. Again we will take Mr Myers' case as an example. The relevant facts are as follows:

(1) On 29 January 2007 KPMG, Mr Myers' accountants, sent to HMRC Mr Myers' self assessment tax return for the year to 5 April 2006.

(2) That disclosed income from his employment by Guardian Media Group of £6,314,008.97, on which tax had been taken off of £2,527,526.00, and some comparatively modest amounts of investment income.

(3) It also included a claim for capital losses on the sale of Mr Myers' SHL shares of £6,000,648.00 (ie £6,001,200 acquisition cost less £552 disposal proceeds), and a calculation of the tax accordingly overpaid of £2,397,480.73. We note that this means that despite having an income from employment of over £6.3m, Mr Myers was attempting by participating in the scheme to avoid paying any more in income tax for the year than some £130,000, an effective tax rate of about 2%. We say nothing about the morality of such behaviour, a matter that is irrelevant to the issues we have to decide.

(4) On 3 August 2007 an HMRC officer wrote to Mr Myers informing him that she intended to enquire into his tax return.

(5) After lengthy inquiries, another officer of HMRC (Mr M Warr) sent Mr Myers a closure notice under s. 28A TMA dated 23 August 2012. Mr Warr told him that he had concluded that no loss arose on the disposal of the SHL shares, that the claimed capital loss of £6,000,648 was not allowable, and that if an allowable loss did accrue, it did not qualify to be set against Mr Myers' income under s. 574 ICTA. Mr Warr had therefore amended Mr Myers' self assessment return to show that instead of Mr Myers having overpaid £2,397,480, he had underpaid by £2,778.07, a difference of £2,400,258.80.

(6) Mr Myers appealed to the FTT by notice dated 11 September 2012. His notice specified the "decision you are appealing" as the closure

notice dated 23 August 2012, and the "amount of tax" as £2,400,258.80.

44. s. 31(1) TMA provides the taxpayer with a right of appeal against, among other things, (b) "any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act". Part V of TMA regulates procedure on appeals. It contains provisions enabling the appellant to request, or HMRC to offer, a review by HMRC when a notice of appeal is served, but in this case NT Advisors notified Mr Myers' appeal directly to the FTT (as it was entitled to do under s. 49A(2)(c) and s. 49D(2) TMA) accepting, no doubt realistically, that a review was not necessary in the circumstances.

45. That meant that s. 49D(3) and s. 50(7A) TMA applied. s. 49D(3) TMA provides:

> "If the appellant notifies the appeal to the tribunal, the tribunal is to decide the matter in question."

And s. 50(7A) TMA provides:

> "If, on an appeal notified to the tribunal, the tribunal decides that a claim or election which was the subject of a decision contained in a closure notice under section 28A of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that the tribunal decides is appropriate, but otherwise the decision in the notice shall stand good."

46. It can be seen that:

(1) Mr Myers' appeal was brought under s. 31(1)(b) TMA under which the appeal was brought against any *conclusion stated* or *amendment made* in the closure notice;

(2) the FTT was acting under s. 49D(3) TMA under which its jurisdiction was to decide *the matter in question*;

(3) the FTT's powers were found in s. 50(7A) TMA which required it to decide (i) whether Mr Myers' *claim to offset capital losses should have been allowed* and (ii) if so, the *extent of allowance that was appropriate*.

These are therefore the issues which were referred to the FTT by Mr Myers' appeal, the issues which the FTT had jurisdiction to decide under s. 49D(3) TMA and the issues they were required to decide by s. 50(7A) TMA. They were also the issues that the FTT did decide in their Conclusions at [191], namely (i) that Mr Myers' claim to offset capital losses should have been allowed, but (ii) that the appropriate allowance was limited to £48. None of the other matters considered by the FTT were matters that were or could have been themselves the subject of an appeal under s. 31(1)(b) or arose for decision under s. 50(7A) TMA; they were, rather, matters that formed part of

the reasons why it decided what it did.

47. In our view therefore the FTT's decision, as opposed to the reasons for it, was found in its Conclusions at [191], and the FTT was correct to confine its decision in this way as this reflected the issues which it was required to decide under s. 50(7A) TMA. We therefore reject Mr Ewart's first submission.

Does HMRC's notice seek to vary the FTT's decision ?

48. Mr Ewart's second submission was that even if, as we have held, the FTT's decision was confined to the decision that Mr Myers was entitled to offset £48 by way of allowable losses, nevertheless HMRC's challenge to Decision 1 was not an argument for reaching the same result as the FTT by a different route, but involved arguing for a different result. As such it was a true appeal and needed permission.

49. The point is this. The FTT's decision was based on the acquisition cost for Mr Myers being the amount wholly and exclusively given by him for the SHL shares for the purposes of s. 38, taken by the FTT to be £600. But if HMRC succeeded in overturning Decision 1, this would not necessarily lead to the same result. It would lead instead to Mr Myers' acquisition cost being the market value. This might or might not be £600; indeed it might plausibly be suggested that the market value of the SHL shares on 17 March 2006 was no more than the £552 obtained for them on 20 March. In that case the loss would not be £48 but nil. That illustrated that HMRC's argument on Decision 1 was not a means of upholding the FTT's decision by a different route, but an argument for a different result.

50. Attractively though it was advanced by Mr Ewart, we reject this submission also. We accept that it might well have been possible for HMRC to argue that the result of taking market value for Mr Myers' acquisition cost would be that his allowable loss was not £48 and might be as little as nil, and that they could therefore have asked the UT, if it agreed with their challenge to the FTT's conclusion on Decision 1, to remit the matter to the FTT to find the actual market value on 17 March with a view to establishing that it was less than £48. We agree with Mr Ewart that had they done this, they would have been arguing for a different result and hence would have required permission to appeal. So too if they had pursued their challenge to Decision 8(a), which would have led, if successful, to the conclusion that no allowable loss was deductible at all; again this would have been an argument for a different result to that reached by the FTT, for which permission would be required. A decision that the allowable loss is not necessarily £48 and might be as little as nil, or a decision that no loss is capable of being offset against income at all, is clearly different to a decision that Mr Myers has an allowable loss of £48, and the fact that the difference between £48 and nil is in this context of no practical significance cannot affect the principle.

51. But HMRC do not contend that Mr Myers' allowable loss is nil. They have dropped the challenge to Decision 8(a), and so far as market value is concerned, they have eschewed any attempt to establish that success on Decision 1 should lead to a different result, or to have market value assessed

by the FTT. Their Respondents' notice accepts in terms that they seek to affirm the FTT's decision on different grounds, and before us Mr Brennan confirmed that HMRC was proceeding on the basis that the market value of the shares in SHL on 17 March 2006 was, or at any rate could be taken as, £600. (Indeed, as appears from the FTT's Decision at [72], HMRC's position below was that the market value was "some £600 odd"). In other words, for the purposes of this hearing HMRC do not challenge the FTT's finding that Mr Myers' acquisition cost was £600. All they wish to do is seek to uphold that finding on alternative grounds, namely that the acquisition cost should be taken as the market value of the shares on 17 March 2006, that being accepted by HMRC to be £600.

52. That seems to us to fall squarely within the principle that a respondent who seeks to uphold the decision below by a different route is not thereby appealing, and so does not need permission to do so. One can usefully compare the classification of different types of Respondent's Notice in the Court of Appeal formerly set out in the RSC. RSC Ord 59 r 6(1) (conveniently set out in *Noga* at [34]) distinguished three different types of notice: (a) a notice to vary the decision below either in any event or in the event of the appeal being allowed; (b) a notice to affirm the decision below on other grounds; and (c) a notice of cross-appeal. A notice to vary or of cross-appeal required the Respondent to set out the precise form of order which he invited the court to make, but a notice to affirm did not, precisely because the Respondent was not seeking any different order. In this terminology, HMRC's notice, which does not seek any different decision from the UT from that given by the FTT, is a notice to affirm, not a notice to vary or a cross-appeal.

53. Procedure in the case of an appeal to the UT is found in the rules applicable to the UT, namely the Tribunal Procedure (Upper Tribunal) Rules 2008/2698. Rule 24(1A) permits a respondent to provide a response to a notice of appeal. Rule 24(3) provides that if a respondent does so, the response must state various matters, including by rule 24(3)(e):

> "the grounds on which the respondent relies, including (in the case of an appeal against another tribunal) any grounds on which the respondent was unsuccessful in the proceedings which are the subject of the appeal, but intends to rely in the appeal."

We agree with Mr Brennan that this is the rule under which HMRC's notice was given and that their notice is the equivalent of a notice to affirm. As such it is not the exercise of a right of appeal and does not require permission.

54. We accept that if HMRC succeeded in overturning Decision 1, they could not prevent Mr Myers from arguing that market value might be more than £600 and that the question of market value should be remitted to the FTT; but that would be a matter for Mr Myers. It does not affect HMRC's acceptance that if they succeeded in overturning Decision 1 *they* would not be seeking any different decision to that made by the FTT, namely that (as Mr Myers' acquisition cost was £600) Mr Myers was entitled to an allowable loss of £48 which he could set against his income.

55. It is for these reasons that we decided the Permission issue in HMRC's favour. Our decision is that HMRC do not need permission to challenge Decision 1 made by the FTT. We have not thought it necessary, or likely to be helpful, to consider whether, if we were wrong on that, the UT could, or should, itself grant permission to HMRC.

The s. 38 issue

56. s. 38 provides as follows:

> "(1) Except as otherwise expressly provided, the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to–
>
> (a) the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset, together with the incidental costs to him of the acquisition…"

57. The issue for the FTT was therefore whether the £6,001,200 paid by Mr Myers on the exercise of his option was "consideration in money … given by him … wholly and exclusively for the acquisition of" the 600 B shares in SHL, and if not what amount of money was.

The decision of the FTT on this issue

58. The decision of the FTT on this s. 38 issue cannot be separated from their discussion of the s. 17 issue which appears immediately before in the Decision. The relevant part starts at [55] as follows:

> "55 It seems to us that having regard to the scheme as a composite whole each party to the scheme acted in his or its own separate and distinct interests. Thus:
>
> (1) Bathrooms (Mr Forster's business) received additional cash for lending its business to the scheme;
>
> (2) Plumbing received a few pounds for executing a few documents which affected it very little;
>
> (3) SHL received a surplus on each Round (£1,200 in relation to Mr Myers) from its participation;
>
> (4) SHL's director, Dr Masters, obtained the ability to enable his clients to participate in the scheme;
>
> (5) Hambros made arrangement fees in respect of each of the (very short term) loans it made;
>
> (6) Gioventura made what on its own would be regarded as a non commercial loan to the trustees but did so in the sure expectation that it would receive an amount equivalent to the loan in the

form of share subscriptions from Europoint, and, as a result of its participation, it benefitted from the few thousand pounds which each set of trustees paid to settle outstanding liability on the loans it had made to them (£1,500 in Mr Myers' case).

(7) Mr Mark Jenner received £300 for each direction he made;

(8) Europoint owned Gioventura. The participation of Europoint and Gioventura secured for Gioventura the benefit described above, and for Europoint the added value of its subsidiary;

(9) The trustees were entitled to remuneration as trustees;

(10) Each participant obtained in respect of his outlay (£6m), the benefit of the trusts of which he was a beneficiary, and, in return for the expense of the sums which ended up in the pockets of all the above, obtained the ability to present himself as having obtained an allowable loss.

56 Each party (other than the participants) thus received a monetary recompense for the effort of signing bits of paper or taking the vanishingly small risk that the money would not go round as planned. Each party acted in the scheme as a whole and in its or his own part in it with regard to his or its own separate and distinct interests.

57 Thus if one regards the whole scheme as a bargain, it was at arm's length, and if one considers Mr Myers' payment to SHL of £6m it too was at arm's length having regard to the benefits that payment created, in particular the value in his trust.

58 There was no evidence that the other participants in the scheme were contractually bound to play their part, or that Mr Myers knew precisely when and what each of them would do. But it would be wholly unrealistic to regard the receipt of the benefit under the trust as not being part of the transaction under which he subscribed for the shares, or to regard him as simply laying out £6m for some practically worthless shares.

59 On this basis we would find that the grant of the options, the acquisition of the options by the participants, and the exercise of the options were transactions by way of a bargain at arm's length…."

59. Against this background, the FTT decided the s. 38 issue at [61] (having set out the text of s. 38(1)(a)) as follows:

"61 The question is thus what amount was given "wholly and exclusively" for the SHL shares by the participants? In the "single transaction" to which section 144 requires attention Mr Myers paid £1 for the option and £6m odd when exercising the option, but he did so pursuant to a single scheme under which as a result of his payment he was to be a beneficiary of a trust endowed with assets available to

> benefit him (and his relatives) of £6m. It is not realistic in our view to regard him as paying £6m in the expectation or with the object that all he would get was the virtually worthless shares in SHL. In the context of the scheme he was not giving £6m wholly or exclusively for the SHL shares. The most that he could be said to be giving for them was their £600 redemption value; the rest of the £6,001,200 was given for the benefits arising under the trust and the fees of the other parties to the scheme in giving him the chance of claiming an allowable loss."

60. It can be seen that the FTT's conclusions on the s. 17 and s. 38 issues form a coherent whole. At [55] the FTT analyse the benefits of the scheme to each of the parties involved having regard to the scheme "as a composite whole". They identify the benefit to a participant such as Mr Myers of his outlay (of £6m) as being the benefit of the trust of which he was a beneficiary. At [57] they characterise his payment of the £6m as being at arm's length "having regard to the benefits that payment created, in particular the value in his trust." At [58] they say that it would be unrealistic to regard the receipt of that benefit as not being part of the transaction under which he subscribed for the shares. In other words, their conclusion that the acquisition of the shares was an arm's length bargain is founded on looking at that acquisition not in isolation (laying out £6m for some practically worthless shares) but as part of a composite whole under which value would flow into his trust.

61. Having so analysed the transaction for the purposes of s. 17, it seems unsurprising that when at [61] they come to analyse the same transaction for the purposes of s. 38, they take exactly the same view of it, namely that it cannot be looked at in isolation as the payment of £6m simply for some virtually worthless shares, but that the payment was also given for the benefits arising under the trust.

62. It seems to us therefore that the FTT's conclusion on the s. 38 issue follows logically from their analysis of the s. 17 issue. Indeed one answer to the Appellants' appeal on the s. 38 issue is the simple one that having adopted and embraced the FTT's conclusion on Decision 1 (the s. 17 issue), there is no room left for the Appellants to challenge the FTT's conclusion on Decision 2 (the s. 38 issue) as the two necessarily go together.

63. We would not however like to leave it there, and will consider whether the FTT's conclusion on the s. 38 issue, viewed by itself and without reference to the FTT's decision on the s. 17 issue, is flawed. We do not see that it is.

The principles – the Ramsay doctrine

64. The general approach to the application of taxing statutes to transactions that form part of a larger whole is by now very well established. It was of course laid down by the House of Lords in *W T Ramsay Ltd v IRC* [1982] AC 300 (***"Ramsay"***) where Lord Wilberforce said at 323G-324A:

> "While obliging the court to accept documents or transactions, found to be genuine, as such, it [ie the *Duke of Westminster* principle] does

> not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded: to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."

65. Subsequent cases have illuminated this approach. Among the many examples we can refer in particular to the statement by Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35]:

> "the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

This statement was cited with approval by Lord Nicholls in *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51 at [36]; see also *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] UKSC 19 at [47] per Lord Walker.

66. This formulation draws attention to the two features of the *Ramsay* approach, a requirement to construe statutory provisions purposively, and a requirement to view transactions realistically. See also *BMBF v Mawson* at [32] and [36] per Lord Nicholls:

> "32 The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found…
>
> 36…the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so."

Purposive construction of s. 38

67. We start therefore with the construction of s. 38 purposively construed. Mr Ewart said that this required identifying what the consideration was paid for. He said that the FTT had mistakenly thought that the words "wholly and exclusively" required them to answer the question why the person acquiring the asset had paid the money, whereas the correct question was simply what the money had been paid for.

68. We agree that s. 38 requires a focus on what the money paid under a transaction was paid for, not on the subjective reasons why the payer made the payment. This is what the language, with its reference to "consideration in money … given … wholly and exclusively for", requires.

69. But we do not accept that the FTT made the error of thinking that s. 38 was concerned with why Mr Myers paid £6m. If they had thought that had been the question, the answer would have been very straightforward: there is no doubt that Mr Myers paid the £6m because he hoped that it would generate a capital loss and enable him to avoid paying income tax on almost all his earnings from employment. But the FTT do not ask themselves why Mr Myers paid the £6m. They ask themselves the different, and to our minds correct, question: what did he pay it for ? Thus in [58] they say that it would be unrealistic to regard Mr Myers as:

> "simply laying out £6m for some practically worthless shares."

And in [61] they said that apart from at most £600:

> "the rest of the £6,001,200 was given for the benefits arising under the trust and the fees of the other parties."

Mr Ewart says that they were demonstrably wrong about the fees (which Mr Myers paid separately), but that is not the point. The point is that they were asking what the £6m was given for, not why it was given.

70. Mr Ewart referred us to [153]-[155], where the FTT discussed the application of s. 149AA, as follows:

> "153 If we are wrong and the SHL B shares fell within section 436, the question arises as to what acquisition cost is specified by the section. If this section did apply the base cost of Mr Price's and Mr Lucas' SHL shares would be the actual amount or value "given for" the securities. Mr Brennan argued that this was not the analogue of Mr Myers' £6,001,200, but realistically only £1,200: either because that would be the net amount left behind in SHL after the expected redemption of the Preference Shares, or because the £6m was in fact given for the benefit under the trust.
>
> 154 It seemed to us that Parliament's use of two different phrases in section 38 and section 149AA might indicate a difference between amounts given "wholly and exclusively" for the acquisition of an

asset and the amount "given for" an asset. In the context of this scheme we have concluded ([64 to 66]) that the option exercise price was not paid wholly and exclusively for the shares; the question is thus whether it may similarly be concluded that the option exercise price was not "given for" the SHL shares.

155 It seemed to us that section 149AA was concerned with what had to be paid to get the shares, whereas the words of section 38 permitted attention to other purposes for which a payment might also be made. Thus we concluded that it was possible to say that £6,001,200 was given for the shares."

71. Mr Ewart said there was an inconsistency between the FTT's conclusion that the amount "given for" the shares for the purposes of s. 149AA was £6,001,200 but the amount "given … wholly and exclusively for" the acquisition of the shares for the purposes of s. 38 was only £600. We did not in fact receive any extended argument on s. 149AA, and we express no view as to whether the FTT's conclusions on s. 149AA are correct; but whether they are right or not, we think their conclusions on s. 38 should be assessed by what they say about s. 38, not by what they say about s. 149AA.

72. Mr Ewart also pointed to the words in [155] where the FTT say that s. 38 "permitted attention to other purposes for which a payment might also be made" with a view to persuading us that the FTT had in considering s. 38 committed the error of asking why the £6m was paid rather than what it was paid for. We prefer to base our understanding of the FTT's reasoning in relation to s. 38 on the paragraphs where they deal with s. 38 (specifically [61]) rather than on this brief reference back in a different part of their Decision; for reasons we have already given we consider that [61] demonstrates that the FTT made no error in this respect.

73. We therefore reject Mr Ewart's criticism of the FTT in this regard.

Realistic view of the facts

74. The second part of the *Ramsay* principle requires a realistic and unblinkered view of the facts. "Unblinkered" here means, as the citation from Lord Wilberforce in *Ramsay* makes clear, that the court or tribunal should not be distracted from the realities by looking at a transaction in isolation, divorced from its wider context. If the transaction was intended to have effect "as part of a nexus or series of transactions" it should be so regarded.

75. Again we see nothing in the FTT's decision on this point which demonstrates a wrong approach. The FTT had already found as a fact at [27] that all the transactions (with immaterial exceptions) were pre-planned; and at [29] that there should be attributed (that is, we think, to the participants) an understanding of the arrangement as a whole, with Mr Myers being treated as knowing and intending that the making of the £6m payment would result in the virtual extinction of his trust's liability under the loan from Gioventura. So it is not surprising that at [55] the FTT looked at the scheme as a composite whole; or that at [58] the FTT concluded that it would be wholly unrealistic to

regard the receipt of the benefit under the trust as not being part of the transaction under which he subscribed for the shares. All this seems to us to be a paradigm example of the FTT adopting a realistic and unblinkered approach to the facts, viewing the exercise by Mr Myers of his option to subscribe for the class B shares not as a free-standing transaction isolated from its wider context but as a part of a nexus or series of pre-planned transactions. As such it is entirely in accordance with the *Ramsay* principles.

76. As for the FTT's conclusions at [58] that it would be "unrealistic" to regard Mr Myers "as simply laying out £6m for some practically worthless shares", and at [61] that apart from at most £600 "the rest of the £6,001,200 was given for the benefits arising under the trust", it is not obvious to us that there is any point of law involved at all. These look very much like factual conclusions. In *Drummond v HMRC* [2009] EWCA Civ 608 (***"Drummond"***), a case which we will have to look at in more detail below, the taxpayer had bought certain life policies for £1.962m. The Special Commissioner (Sir Stephen Oliver QC) had found that for the purposes of s. 38 no part of the £1.962m was incurred in the acquisition of the policies, a decision that was held to be erroneous by Norris J. But in case he was wrong on that he had also made a reasoned finding that £210,000 of the £1.962m had not been "given…wholly and exclusively for" their acquisition (a conclusion with which Norris J agreed). In the Court of Appeal, Rimer LJ at [31] said of this:

> "In my judgment that was a finding of fact that was properly open to the Special Commissioner. Mr Drummond's challenge to this part of Norris J's decision is, in substance, a challenge to that finding. I see no basis on which this Court can, might or should take any different view on it."

We do not readily see why the same is not true here.

77. If that is right the only question is whether that is a factual conclusion that was properly open to the FTT. In our view it was. Indeed we would go further and say that it is one with which we entirely agree. A person does not normally pay £6m for an asset worth £600, and this immediately calls into question what the £6m is really being paid for. A person who really pays £6m for an asset worth £600 might do so in order to make a gift to the recipient, but this can be ruled out: it has never been suggested that Mr Myers paid £6m as a gift to SHL. Or he might do so if he had made a bad bargain, wrongly believing the asset to be worth what he was paying for it. Again this can be ruled out: Mr Myers knew perfectly well that the SHL shares were not worth anything like £6m. Once it is clear both that Mr Myers was overall acting with a view to his own commercial interests and not out of bounty, and that Mr Myers knew that the shares were practically worthless, the only realistic explanation of the facts is that what he was paying for was not just the shares but some other *quid pro quo* as well.

78. It is not difficult to identify what the *quid pro quo* was. It was the reduction in value of the outstanding liability on the loan from Gioventura to his trust from £6m to a trivial amount (some £1,500). This was an essential part of the scheme as a whole, and it can be readily inferred that Mr Myers would not

have subscribed £6m for the SHL shares without the agreement of Gioventura that if he did so his trust's liability to Gioventura would be restructured in this way. As the FTT said at [29] Mr Myers knew and intended that payment of the £6m would result in the virtual extinction of his trust's liability under the loan from Gioventura; their conclusion at [58] and [61] that this was what he was really paying for seems to us not only to be a permissible finding, but the only possible conclusion on the facts viewed as a whole.

79. In the course of the hearing we asked Mr Ewart what the position would have been had there been a tri- (or quadri-) partite agreement under which Mr Myers agreed to pay £6m to SHL and in return SHL agreed to issue him with 600 class B shares and Gioventura agreed to waive repayment of its loan to his trustees. He accepted that in such a transaction it could not be said that the £6m was paid wholly and exclusively for the shares. This seems to us to be undeniably right. But if this is so, we see no difference in reality between such a transaction embodied in a single document and the actual transactions which took place here pursuant to the pre-planned scheme. Gioventura did agree that if Mr Myers subscribed £6m to SHL it would waive repayment of its loan for 79 years; and it was only because it had done so that Mr Myers paid the £6m. We do not think it matters that Gioventura had already agreed to do this before Mr Myers agreed to subscribe the £6m, for two reasons. First in a scheme where everything is pre-planned we very much doubt that it makes a difference in what order the orchestrated transactions take place: they are all in return for the others. Second in any event Gioventura's agreement to waive the loan if Mr Myers subscribed for the shares is no different in principle from a unilateral contract under which A agrees to pay B £100 if B walks to York. B is under no obligation to walk to York, but if he chooses to do so he is entitled to A's £100, and the £100 is what he acquires by walking to York.

80. It is no different here. Gioventura agreed to waive its loan if Mr Myers subscribed for the shares (no doubt because it knew that the subscription would trigger redemption of Europoint's preference shares and Europoint would then subscribe the monies back into itself). Mr Myers did subscribe for the shares. By doing so he triggered the waiver of the loan. That was what he acquired (along with the shares) by paying the £6m. It seems to us beyond doubt that the real *quid pro quo* for Mr Myers' subscription of the £6m was not the shares worth £600 but the virtual extinction of Gioventura's debt, thereby in effect settling £6m on his trust.

81. Unless therefore there is any authority which compels a different answer, we see no flaw in the FTT's analysis. On the contrary it appears to us to follow loyally the guidance given in *Ramsay* and indeed to have been the only conclusion possible on a realistic view of the facts.

Authorities relied on by Mr Ewart

82. Mr Ewart relied on two authorities which he said demonstrated that the FTT had erred, namely *Eilbeck v Rawling* (1981) 54 TC 101, and *Drummond* which we have already referred to.

83. *Eilbeck v Rawling* was heard in the House of Lords together with *Ramsay* but started as separate proceedings. It concerned a tax avoidance scheme under which Mr Rawling bought a reversionary interest in a Gibraltar settlement (which held £600,000 in cash) for £543,600; certain advances were made out of the Gibraltar settlement; and Mr Rawling then sold the interest in the Gibraltar settlement (which now held £255,390 in cash) for £231,130. The scheme required Mr Rawling's acquisition cost of the reversionary interest in the Gibraltar settlement to have been £543,600, which was certified not to exceed the open market value of the reversionary interest.

84. Slade J held that the sum of £543,600 was not paid wholly and exclusively for the reversionary interest, regarding it as also paid as part of the consideration for the scheme; but on this point the Court of Appeal disagreed (although agreeing in the result). Buckley LJ said that the Crown having accepted the genuineness of the transactions could not deny the genuineness of the agreement for sale or dispute that the £543,600 was paid for the reversion and nothing else (at 162D-I). Donaldson LJ agreed: the £543,600 was consideration for the reversionary interest, and not consideration for the scheme as a whole (at 167C-H). Templeman LJ took a rather different view, holding that overall Mr Rawling did not make a loss, but did say that if, contrary to his view, each step in the transaction was to be considered in splendid isolation, then the £543,600 was paid for the reversionary interest and nothing else (at 166E-H).

85. In the House of Lords, Lord Wilberforce adopted a very similar view to Templeman LJ, namely that it would be wrong to segregate from what was an integrated and interdependent series of operations one step, namely the sale of the Gibraltar reversion, and attach fiscal consequences to that step regardless of the other steps and operations with which it was integrated; overall there was neither gain nor loss (at 192F-G). Lord Fraser dismissed the appeal on a different point, namely that Mr Rawling had acquired the whole reversionary interest but only disposed of part of it (at 195G-196A). There is no discussion in either speech of the wholly and exclusively point.

86. We do not see that there is anything in *Eilbeck v Rawling* which undermines the FTT's approach. The amount that Mr Rawling paid for the reversion in that case was no more than its market value, and so there was no reason to think that what he paid was in reality paid for something else. It is no doubt possible to read Buckley and Donaldson LJJ's judgments as suggesting that if HMRC accept that transactions are genuine, they have to take the consideration stated in the documents at face value. But to read them in that way and treat such a principle as still applicable cannot stand with the way in which the *Ramsay* doctrine was articulated in the House of Lords and has been expounded since, nor indeed with Lord Wilberforce's approach in *Eilbeck v Rawling* itself which casts serious doubt on any approach that involves looking in isolation at any one step in an integrated and interdependent series of operations.

87. The other case on which Mr Ewart relied was *Drummond*. This was another tax avoidance scheme. In this case Mr Drummond agreed on 4 April 2001 to buy 5 second-hand life policies at a price of about £1.96m. The policies had a

surrender value of about £1.75m and were duly surrendered the next day for that amount. One of the questions was the amount of consideration paid wholly and exclusively for the acquisition of the policies under s. 38. As already mentioned Sir Stephen Oliver QC, the Special Commissioner, made two alternative decisions, the first (reversed by Norris J on appeal) that no part of the £1.96m qualified under s. 38, the second (upheld by Norris J) that only £1.75m of the £1.96m qualified. In relation to the latter finding he said (79 TC 793 at 811H) that:

> "it would I think be unreal to view the transaction as one in which Mr Drummond acquired assets known to have a value of £1.75 million for £1.96 million."

There was evidence that it had been explained to Mr Drummond that the £210,000 difference between the £1.96m he would be paying and the £1.75m he would receive was the vendor's gross profit from the transaction which would be used to pay various costs and fees (the promoter's fee, a contribution to a fighting fund, a contingent fee payable into an escrow account, the introducer's commission and fees to an IFA). Sir Stephen Oliver QC held that the £210,000 was not incurred exclusively for the acquisition of the 5 policies, but was in reality money for the services of the various advisers.

88. Norris J agreed with this analysis: see [2008] EWHC 1758 (Ch) at [27] where he said:

> "Mr Drummond paid a total of £1.962 million and in return he acquired the five AIG policies. The total of £1.962 million can be broken down into a number of discrete sums and matched to the benefits or services. London and Oxford's fees, the introductory commissions, the fees for "independent financial advice", the contribution to the fighting fund, and the contingency payment of £98,000 into the escrow account were plainly not payments made wholly and exclusively for the acquisition of the five AIG policies."

The Court of Appeal upheld this: see Rimer LJ [2009] EWCA Civ 608 at [31] (above paragraph [76]).

89. We do not see anything in *Drummond* that undermines the FTT's analysis. Indeed properly understood we think it strongly supports their approach. It demonstrates that for the purposes of s. 38 it is not enough simply to look at the consideration expressed in the contractual documents, as there is no doubt that Mr Drummond was contractually obliged to pay the whole £1.96m as the price for the 5 policies. Rather, one has to look at what the money was in reality paid for. In a case where the value of the assets acquired was known to be only £1.75m, the difference between that and the contractual price must in reality have been paid for something else as it would be unreal to regard Mr Drummond as having paid £1.96m to acquire assets known to be worth £1.75m. An examination of the facts showed what that something else was, in that case the various services of the advisers.

90. In the same way in the present case it is not enough simply to look at the terms

of Mr Myers' option which obliged him to pay £6m if he wished to subscribe for the class B shares. One has to look at what the money was in reality paid for. In circumstances where the value of the assets acquired was known to be only £600, the difference between that and the option price must in reality have been paid for something else, as it would be unreal to regard Mr Myers as having paid £6m to acquire assets known to be worth £600. An examination of the facts showed what that something else was, namely the waiver by Gioventura of its loan and the consequent increase in value of Mr Myers' trust.

91. In our view therefore neither of the authorities relied on by Mr Ewart casts any doubt on the correctness of the FTT's treatment of the s. 38 issue.

92. Mr Ewart also referred us to *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] UKSC 19, but his purpose in doing so was to distinguish it in anticipation of Mr Brennan's argument. We do not think it is necessary in the circumstances to consider it.

93. It is for these reasons that we decided that the Appellants' appeals on the s. 38 issue fail. Our decision is that the appeals should be dismissed.

Mr Justice Nugee

Howard Nowlan
Judge of the Upper Tribunal

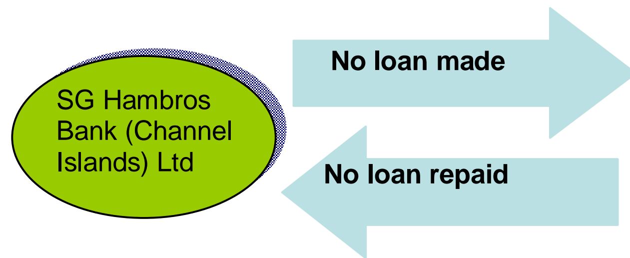
Release date: 17 April 2015

Round 1 involving John Myers

All transactions on 17 March 2006

Round 2 involving Steven Price & James Lucas

All transactions on 3 April 2006



User Trust

Loans totalling £14.06 million to 24 users

User

£14.06 million from 24 users for £1 ordinary B shares issued by Stony Heating Ltd

Stony Heating Ltd

£14.06 million on redemption of £0.01p preference shares in Stony Heating Ltd

Europoint Ltd

£14.06 million for 2 $1 shares issued by Gioventura Ltd

Gioventura Ltd

Loans totalling £14.06 million to 24 users trusts