TC01664

Appeal number: TC/2010/07502

Corporation Tax – marginal small companies' relief – whether claims made on correct basis – whether possibility of other companies being associated – extent of information available from overseas shareholders – held, on totality of evidence reasonably available that possibility of existence of other associated companies could be discounted – appeal allowed

FIRST-TIER TRIBUNAL

TAX

SEASCOPE INSURANCE SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
NICHOLAS DEE

Sitting in public at 45 Bedford Square, London WC1 on 7 November 2011

Stephen Brown, Mazars LLP, for the Appellant

Simon Foxwell, Advocate, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant, "Seascope", appeals against the decision by the Respondents ("HMRC") to disallow its claims to marginal small companies' relief in respect of its corporation tax liability for the four accounting periods ending on 31 December 2004, 31 December 2005, 31 December 2006 and 31 December 2007.

The law

2. The relevant parts of s 13 of the Income and Corporation Taxes Act 1988 ("ICTA 1988"), now replaced in rewritten and amended terms by s 19 of the Corporation Tax Act 2010, provided:

> **13 Small companies' relief**
>
> (1) Where in any accounting period the profits of a company which—
>
> (a) is resident in the United Kingdom, and
>
> (b) is not a close investment-holding company (as defined in section 13A) at the end of that period,
>
> do not exceed the lower relevant maximum amount, the company may claim that the corporation tax charged on its basic profits for that period shall be calculated as if the rate of corporation tax (instead of being the rate fixed for companies generally) were such lower rate (to be known as the "small companies' rate") as Parliament may from time to time determine.
>
> (2) Where in any accounting period the profits of any such company exceed the lower relevant maximum amount but do not exceed the upper relevant maximum amount, the company may claim that the corporation tax charged on its basic profits for that period shall be reduced by a sum equal to such fraction as Parliament may from time to time determine of the following amount—
>
> $$(M - P) \times \frac{I}{P}$$
>
> where—
>
> M is the upper relevant maximum amount;
>
> P is the amount of the profits; and
>
> I is the amount of the basic profits.
>
> (3) The lower and upper relevant maximum amounts mentioned above shall be determined as follows—
>
> (a) where the company has no associated company in the accounting period, those amounts are £300,000 and £1,500,000 respectively;
>
> (b) where the company has one or more associated companies in the accounting period, the lower relevant maximum amount is £300,000 divided by one plus the number of those associated companies, and the upper relevant maximum amount is

£1,500,000 divided by one plus the number of those associated companies.

(4) In applying subsection (3) above to any accounting period of a company, an associated company which has not carried on any trade or business at any time in that accounting period (or, if an associated company during part only of that accounting period, at any time in that part of that accounting period) shall be disregarded and for the purposes of this section a company is to be treated as an "associated company" of another at a given time if at that time one of the two has control of the other or both are under the control of the same person or persons.

In this subsection "control" shall be construed in accordance with section 416.

(5) In determining how many associated companies a company has got in an accounting period or whether a company has an associated company in an accounting period, an associated company shall be counted even if it was an associated company for part only of the accounting period, and two or more associated companies shall be counted even if they were associated companies for different parts of the accounting period.

(6) For an accounting period of less than 12 months the relevant maximum amounts determined in accordance with subsection (3) above shall be proportionately reduced."

The facts

3. The evidence consisted of a bundle of correspondence, together with a bundle containing the corporation tax returns for the four years covered by the appeal, including a copy of the accounts for the year to 31 December 2006. There was no oral evidence. Mr Brown provided certain further information in the course of presenting the case for Seascope; although this did not constitute evidence as such, we have considered it in the course of arriving at our decision, but taking into account that it does not carry the weight which could be attributed to formal evidence.

4. From the evidence we find the following background facts.

5. On 1 September 2008 HMRC issued a notice to Seascope under paragraph 24(1) of Schedule 18 to the Finance Act 1998 of their intention to enquire into Seascope's return for the period ended 31 December 2006. The notice, copied to Seascope's accountants Mazars, requested a copy of the group structure to which Seascope belonged. Additional information relating to matters such as business function of elements of the structure dealing with UK customers, transactions with connected parties, transfer pricing was also requested, as well as a breakdown of Seascope's income by reference to type of service provided and an analysis of any split of commission between group entities. An early meeting with Seascope was also requested.

6. On 26 September 2008 Mazars wrote to HMRC to clarify the group structure to which Seascope belonged, and to request that the enquiry be completed forthwith.

Mazars explained that Seascope was the100 per cent subsidiary of Seascope Holdings Ltd, a company resident in the UK. The issued share capital of the latter was held as follows:

> 67.59 per cent by Gulfstream Investments Ltd, a company resident in Liberia;
>
> 16.67 per cent by Maritime Brokers Ltd, a company resident in Liberia;
>
> 10.46 per cent by AC Gordon;
>
> 5.28 per cent by AV Flanagan.

7. Mazars confirmed that during the year to 31 December 2006 Seascope undertook no transactions with Gulfstream Investments Ltd or Maritime Brokers Ltd, either directly or indirectly. Further, during that year, Seascope together with its group and associated entities met the European Commission's definition of a small enterprise. Consequently any transactions between Seascope and Seascope Holdings Ltd were, by virtue of paragraph 5B of Sch 28AA ICTA 1988, exempt from the transfer pricing rules imposed at paragraph 1 of that Schedule. During this period Seascope undertook no transactions with any other persons to which paragraph 1(b) of that Schedule could be said to apply. Mazars explained that Seascope's income represented insurance brokerage, commissions and fees for related services net of commission attributable to its principal activity, that of insurance broking. In the light of these facts there was no risk that Seascope had gained any tax advantage within Sch 28AA, and therefore they believed that the preparation of a more detailed response to HMRC's letter of 1 September 2008 would represent an unreasonable burden on their client.

8. HMRC relied on 23 October 2008. While they noted Mazars' comments in the letter dated 26 September 2008, the response was not sufficient to enable the enquiry to be completed. HMRC repeated their request for certain information, but confining the scope of their questions concerning other companies to Gulfstream Investments Ltd.

9. Mazars responded on 27 November 2008. They had no record of who controlled Gulfstream Investments Ltd. As far as Mazars were aware, Gulfstream Investments Ltd was an investment holding company. The income figure for Seascope represented brokerage and commissions received from placing insurance business in the Lloyd's, London and overseas insurance markets. Commission was not split up among any group entities. It was all earned and recorded in Seascope, as this was the only trading entity. As HMRC was aware, Seascope had been trading as a Lloyd's insurance broker since 1971 and was authorised and regulated by the Financial Services Authority.

10. HMRC responded on 30 January 2009; a different officer, in HMRC's Large and Complex Businesses local compliance office, had taken over the enquiry. He requested clarification on certain issues. He continued:

> "I note also that in your latest letter you state that you have no record of who controls Gulfstream Investments Limited. It is my

> understanding that to put together a computation for Marginal Small Companies Relief (MSCR), knowledge of the control of related parties would be essential. I would welcome your opinions on this issue."

11. In their letter dated 21 April 2009, Mazars provided information in response to HMRC's letter dated 30 January 2009. In the light of the information relating to insurance brokerage, commissions and fees, they question whether any useful insight could be gained from a breakdown where only one service was being provided. They stated that, as far as they were aware, Gulfstream Investments Limited was a non-trading holding company resident in Liberia. Seascope had no contact with that company other than to distribute dividends. They suggested that if the officer would like further information relating to Gulfstream Investments Limited, he should write to their registered address as set out in their letter.

12. After a further exchange of letters, an audio conference between two HMRC officers and two individuals from Mazars took place on 23 July 2009; no-one from Seascope was present. Various items of information were confirmed. As part of one of the questions raised by HMRC, one of the officers asked how Seascope could say with assurance that none of the parties were related when Seascope did not know who ultimately controlled them; he referred to Mazars' letter dated 27 November 2008 (see above).

13. Subsequent correspondence dealt with issues other than that of who ultimately controlled the parties involved. On 7 December 2009, HMRC wrote to Mazars to confirm comments made in a previous telephone conversation. As the officer did not consider that any significant progress had been made in the enquiry, he did not believe that any further correspondence would be of any benefit. He indicated his intention to attend Seascope's premises and review the books, records and contracts in order to obtain the information required. In relation to Seascope's claim for marginal small companies' relief, he commented:

> "The issue of related party transactions was then highlighted – a topic that may impact on your client's MSCR claim. You were unable to provide any detailed information concerning the ultimate controlling parties of the company. I therefore remain concerned that an MSCR claim has been made without full, detailed knowledge of all potentially related parties."

14. A meeting was held at Seascope's offices on 24 February 2010, attended by Seascope's Financial Director, another member of its staff, one representative from Mazars, and two officers of HMRC. A note of the meeting was subsequently prepared by HMRC and amended to take account of comments from Seascope and Mazars.

15. It was explained at the meeting that the previously existing insurance business carried on by the "Seascope Group" had been hived down into Seascope for regulatory reasons, as the Financial Services Authority required insurance and non-insurance activities to be kept separate.

16. Various matters relating to Seascope were discussed. One heading was "Control of [Seascope] and its implications". HMRC expressed concern that as Seascope did

not know who ultimately controlled Gulfstream Investments Ltd, it was not in a position definitively to declare the number of associated companies, as it might have associations through the ultimate controlling parties of which it was unaware. HMRC stated that the onus of proof in such situations was on the company claiming the marginal small companies' relief.

17. The note summarised the comments of Mr Flanagan (one of the Seascope directors) and Annette Grove of Mazars:

> "A Board Meeting is held at which the reserves and assets are assessed with regard to whether a dividend can be justified. The decision is made by the Directors and then the payment and quantum of dividend are approved at the AGM. Gulfstream will send a proxy view in writing to the meeting. They do not attend in person and the results of [Seascope] are not discussed with them. The letter is sent from the Liberian address. The Directors' remuneration and bonuses are approved by a Committee of the Board."

18. On 11 May 2010 HMRC wrote to Mazars, referring to their agreement at the meeting to provide information with regard to the claim for marginal small companies' relief; a response was yet to be received. The officer stated:

> "As discussed at the meeting, if no definitive information can be gleaned as to the ultimate controlling parties of Seascope, then the company is unable to state with certainty the number of companies with which it is associated. Seascope are, therefore, unable to make a valid claim for MSCR.
>
> I propose, in the absence of appropriate evidence from you by 20 May 2010, to disallow all claims for MSCR and to raise an assessment for the additional tax that will be due as a result of the disallowance. Interest will also be chargeable where appropriate."

19. Assessments were issued by HMRC on 9 June 2010 for the four accounting periods ending 31 December 2004, 2005, 2006 and 2007 respectively. Mazars wrote on 8 July 2010 to appeal against the assessments and applied to postpone the tax assessed. The stated that the information available to Seascope supported its claim for marginal small companies' relief, and that Seascope was in the process of collating the required records as requested by HMRC in their letter of 7 December 2009 and also following the meeting in February 2010. They accepted the offer of a review by HMRC.

20. On 23 July 2010 Mazars wrote to HMRC referring to the enquiry, and to HMRC's request for evidence to support Seascope's claim for marginal small companies' relief. Mazars attached a document dated 21 July 2010 and signed by George Economou, describing himself as "President/Director", headed "Gulfstream Investments Limited". This stated:

> "TO WHOM IT MAY CONCERN
>
> This is to confirm that our company:

> 1. Is the Owner of 3650 shares in Seascope Holdings Limited, of 57 Mansell Street, London E1 8AN, out of total of 5,400 shares, viz. 67.5925% of the issued share capital of the Company.
>
> 2. Does not control any other company.
>
> 3. Is not owned 74% or more by another company.
>
> 4. Is not owned 74% or more by a person who also controls another company."

21. On 19 August 2010 an officer of HMRC's Appeals and Review Unit wrote to Seascope with the conclusions of his review. His decision was that the officer's decision in the letter dated 11 May 2010 should be upheld. The review officer acknowledged that further information had been provided since the start of the review [ie the attachment to Mazars' letter dated 23 July 2010]. He commented:

> "I am grateful for the provision of this information. However it is unfortunately not sufficient to settle the question of associated companies. Depending on the precise details, control over [Seascope] could be exercised by either
>
> - a person (either an individual or a company) holding sufficient interest in both Gulfstream Investment Ltd and Maritime Brokers Ltd: or
> - one of the two individuals holding a direct interest in Seascope Holdings Ltd if they also held sufficient interest in Gulfstream Investments Ltd, or in both Gulfstream Investments Ltd and Maritime Brokers Ltd.
>
> I therefore conclude that on the basis of the information held, the assessments issued for the above years on 9 June 2010 are correct."

22. Mazars wrote to the review officer on 17 September. They stated:

> We do not agree with the outcome of your review regarding the claim for marginal small companies' relief by Seascope for the following reasons:
>
> - The two individual shareholders you refer to in your letter dated 19 August 2010, Mr AB Flanagan and Mr AC Gordon do not hold direct or indirect interests in Maritime Brokers Limited or Gulfstream Investments Limited. As disclosed in the financial statements, Mr Flanagan and Mr Gordon are also Directors of Seascope. The attached representations also confirm this position.
> - You refer to a possibility that control over Seascope could be exercised by a person (wither an individual or a company) holding sufficient interest in both Gulfstream Investments Limited and Maritime Brokers Limited. Maritime Brokers holds 16.67% of Seascope Holdings Limited and Gulfstream Holdings Limited holds 67.59% of Seascope Holdings Limited. This is only a potential theoretical possibility if Gulfstream Investments Limited is owned more than 49% by

> an individual or company (i.e. resulting in an indirect interest of more than 33.33% in Seascope via Gulfstream Investments Limited and a possible 16.67% indirect interest via Maritime Brokers Limited). Although this is only a potential theoretical possibility we have requested a written representation from Gulfstream Investments Limited confirming this position which will be forwarded separately."

23. Mazars enclosed declarations by Mr Flanagan and Mr Gordon respectively that the shares which they owned in Seascope Holdings Ltd were their only direct or indirect interest in shares in shares in Seascope Holdings Ltd. Mazars also commented on "reasonable care" and "process"; we consider below certain aspects of their comments on the former. They indicated that they had notified their appeal to the Tribunal.

24. Mazars subsequently obtained a further declaration from Mr Economou (the director of Gulfstream Investments Ltd) dated 31 January 2011. Although this was sent to HMRC, a copy of it was not included in the bundle; a copy was attached to Mr Brown's skeleton argument. We accepted it as part of the evidence. It stated:

> "This is to confirm that our company:
>
> 1. is the Owner of 3,650 shares out of a total of 5,400 shares (i.e. 67.59% of the issued share capital) in Seascope Holdings Limited of 57 Mansell Street, London E1 8AN.
>
> 2. Is not owned 49% or more by another company
>
> 3. Is not owned 49% or more by a person who also controls another company."

25. In a letter from Mazars to HMRC dated 21 February 2011, Mazars referred in detail to the history of the matter, and commented:

> "I think it is worth noting that when you wrote on 6 January 2010 with regard to inspection and production of documents saying that you would "consider the use of formal inspection and information powers", your separate list of documents and information did not include anything in relation to the MSCR claim. I suspect that this is because you realised that information and documents relating to the ultimate controlling parties of Gulfstream is not in the possession or power of Seascope.
>
> However when I made this point to you during our conversation prior to your e-mail of 4 February 2011 you subsequently made the comment in your e-mail that you would not regard the claim to MSCR to be valid without such information. I am not sure whether you believe that this information is actually in the possession or power of Seascope or not but would be grateful if you would now clarify this point. If you do believe that this information is in the possession or power of Seascope I would be grateful if you would state the grounds you would use to substantiate that view. If you do not then I would be a little concerned that HMRC's line, which I am assuming has been cleared with the relevant specialist in CT&VAT, is that a company

> must obtain evidence that is not in its possession or power to obtain before it can make a valid claim to MSCR."

(We consider below other matters raised in this letter, and in the reply dated 10 March 2011 from HMRC.)

26. Further exchanges of correspondence continued, but the parties were unable to resolve the matter without Seascope pursuing the appeal to the Tribunal. On 5 September 2011 HMRC wrote to Gulfstream Investments Limited requesting details of al the shareholders in that company, and a letter from each shareholder stating their shareholdings in that company, any other shareholdings of 5 per cent or greater that they held in any other entity, and any shareholdings that were held any connected parties that exceeded 5 per cent in any entity. There was no evidence of any response having been received by HMRC.

Arguments for Seascope

27. Mr Brown referred to the introduction by the Finance Act 1972 of a relief for small companies in the form of a reduced rate of corporation tax. The relief would be open to obvious abuse if a business could be divided among two or more companies so that each earned profits below the specified amount; to counteract this, s 13(3) ICTA required the relevant specified amount to be divided by the number of associated companies plus one.

28. Throughout the periods which were the subject of the appeal, Seascope had made self assessment returns for corporation tax showing that it had two associated companies and had claimed partial relief. He provided a diagram setting out the direct ownership of Seascope during the periods in question, which showed a summary of the evidence that had been provided to HMRC during both the enquiry and the appeals process.

29. Of the four direct shareholders of Seascope Holdings Ltd, HMRC's enquiries had focused on Gulfstream Investments Limited as the largest shareholder, as evidence had been provided that neither individual shareholder had any interest in the shares of either of the other companies holding shares in Seascope Holdings Ltd.

30. Mr Brown emphasised that information as to the ultimate ownership of Gulfstream Investments Limited was not in the possession or power of Seascope. Had HMRC considered it to be in the possession or power of Seascope, they could at any time during the enquiry have issued an information notice requesting the information, and had it not been forthcoming, could ultimately have charged daily penalties for failure to supply the information. That being the case, Seascope and its advisers believed it to be reasonable to assume that the relevant information was not in the possession or power of Seascope.

31. HMRC had first mentioned to Seascope in their letter dated 27 May 2009 that they would be writing to Gulfstream Investments Limited. In the event, they had not written to that company to request the information until 5 September 2011.

32. Mr Brown referred to the history of the provision of information relating to the absence of any other companies being controlled by Gulfstream Investments Limited, and the document dated 21 July 2010 signed by its President/Director. This had not been accepted by HMRC, for the reasons set out in their letter dated 19 August 2010. Subsequently further information in the form of another document signed by Mr Economou and dated 31 January 2011 had been provided; this had not been included in the bundle, and a copy was attached to Mr Brown's skeleton argument.

33. The document confirmed that Gulfstream Investments Limited owned 67.59 per cent of the shares in Seascope Holdings Ltd, was not owned as to 49 per cent or more by another company, and was not owned as to 49 per cent or more by a person who also controlled another company.

34. HMRC had then expressed the view that it would still be theoretically be possible for there to be further associated companies if two or more people (individuals or companies) controlled Gulfstream Investments Limited and together also controlled other companies. They had recently written to that company requesting information (see paragraph [24] above). Gulfstream Investments Limited had yet to respond. In any event, even with that information there would remain a theoretical possibility of other associated companies. For example, if A, B and C each owned 25 per cent of Gulfstream Investments Limited with A and B each also holding 4 per cent of X Ltd and C holding 43 per cent of X Ltd, this would create another associate. There were a number of other theoretical possibilities which could result in the same problem.

35. There was no level of evidence set out in statute that it was necessary to provide in order to substantiate a claim to marginal small companies' relief. Although HMRC had said that they were only seeking to be fair and consistently apply the rules as would be done in relation to every other company, Mr Brown was not aware that every other company's claim to the relief was accompanied by a letter from each shareholder giving details of other shareholdings in excess of 5 per cent along with details of shareholdings above 5 per cent held by connected parties, as Seascope was being asked to do in the present case.

36. HMRC had made a great deal of Liberia being considered to be in their view a tax haven. Mr Brown submitted that this point had no relevance to the one at issue in this appeal. Having conducted a full enquiry into Seascope, HMRC had found no evidence of transactions between Seascope and Gulfstream Investments Limited other than the payment of dividends. Those had been paid out of income that had already been subject to tax in the UK, and had Gulfstream Investments Limited been resident in the UK, it would not have been subject to further UK tax on receipt of them. It should also be noted that Gulfstream Investments Limited had held its shares in the Seascope business since 1987.

37. In the opinion of Seascope and its advisers, it was not necessary to prove beyond all reasonable doubt that there were no further associated companies. They believed that sufficient evidence had been provided to show that on the balance of probability there were no further associated companies. They requested that the appeals should be

allowed and that Seascope's claims to marginal small companies' relief should be considered valid for all the years under appeal.

38. Mr Brown responded to certain points put in argument by Mr Foxwell. The acquisition by Gulfstream Investments Ltd from AON had been in 1987, but Seascope in its present form (as set up for regulatory reasons) had been carrying on its business since 1981. Looking back to its inception, the business in its differing forms had been in existence for about 40 years. It was not unusual for a company like Seascope to know its clients in detail; it was a Lloyd's broker.

39. The marginal small companies' relief was not a concession; it was statutory. Mr Brown maintained that appropriate claims had been made by Seascope for the relief, and that sufficient evidence had been provided. HMRC had stated that there was a choice between transparency and obtaining the relief, and opacity resulting in the relief being denied. Mr Brown was not aware of HMRC's basis for this proposition. The hearing was the first occasion when he had been aware of the suggestion that there was a larger business. There was no evidence of related party transactions. Seascope and its advisers had approached the owners of Seascope Holdings Ltd, and had been provided with two statements. HMRC had raised no query as to the "affidavits" provided by the individual shareholders.

40. Mr Brown accepted the possibility of more associated companies existing, but this could only arise by taking matters to the "nth degree". He emphasised that the standard of proof was not "beyond all reasonable doubt". He submitted that as HMRC had said at a much earlier stage that they would write to Gulfstream Investments Limited, there had been a reasonable expectation that they would do so.

41. HMRC had referred to a brokerage figure of £35 million; this was incorrect, as the actual brokerage figure had been much less. They had also referred to Liberia's status as a tax haven; however, there had been no transactions with the Liberian companies other than the payment of dividends. There was now an agreement on tax matters between the UK and Liberia, although he acknowledged that it had not yet been brought into force.

42. He and his client felt a degree of frustration; Seascope's business was a regulated one, and its "top line" had been queried. It had not been possible to provide evidence of Seascope's ultimate ownership, nor did the legislation require it. Seascope had gone back twice to Gulfstream Investments Limited and come back with the "49 per cent affidavit" [ie the document dated 31 January 2011]. He accepted that in formal terms this was not an affidavit, but the documents in similar form provided by the individual directors of Seascope had not been queried by HMRC; further, their names and addresses were registered at Companies House.

Arguments for HMRC

43. Mr Foxwell wished to put on record that there had been no witnesses for Seascope.

44. HMRC submitted that Seascope's claims for marginal small companies' relief for the four years in question were not valid. It did not know with any certainty how many associated companies it had. In their letter dated 21 April 2009 Mazars had used the words "as far as we are aware". In their subsequent letter to HMRC dated 23 June 2009, Mazars had stated that Seascope had no dealings with Gulfstream Investments Limited.

45. HMRC had been offered a dilemma in relation to Seascope's claim, as it had failed to demonstrate with sufficient certainty how many associated companies it had. It had only been able to allude to how many there might be, and had effectively sought to pass the onus to HMRC by implying that HMRC needed to prove that there were associates, rather than Seascope itself seeking to show that there were no other associates. As the ownership of Seascope Holdings Ltd lay with Gulfstream Investments Limited, a company registered in the tax haven of Liberia, HMRC submitted that it was inevitable in such circumstances that they would seek more evidence, a higher standard of certainty, than for a wholly UK-based company. Mr Foxwell referred to the history of Liberia's special tax provisions and its secrecy.

46. Seascope had expended considerable energy in clarifying the involvement of the UK parties in relation to Seascope and its immediate parent. Affidavits had been provided to verify various shareholdings, but Seascope had chosen not to pursue actual clarification regarding the ultimate owner of Seascope, preferring to ask HMRC to do so. Mr Brown commented that at the meeting in February 2010 very little information had been provided as to Seascope's ultimate owners, and submitted that it was unusual for a company not to know such details. In the light of Liberia's status as a tax haven, with no agreement to exchange information with the UK tax authorities, Seascope's reluctance to contact its ultimate owners merely compounded HMRC's doubts.

47. The enquiry was now over three years old; HMRC submitted that more than enough time had been available should Seascope have chosen to seek concrete information in respect of its ownership and associates. However, it preferred to insist that HMRC should accept what information had been given as probably accurate, even though it still accepted that it was possible that there were other associates. HMRC submitted that it was unusual for a company not to be curious as to its ultimate ownership. Seascope was dealing with brokerage of up to £35 million per year with a number of foreign clients in Norway, Greece and Hong Kong. In spite of the international nature of its business it said that it had no dealings with Gulfstream Investments Limited other than to hand over its dividends and provide accounts; that company only attended board meetings by proxy.

48. Given the efforts made by Seascope and its advisers to explain the position, and the affidavits obtained, HMRC might appear to be intransigent or overly pedantic in these circumstances. However, HMRC was merely seeking to be fair and consistently apply the rules as it would with any other company.

49. HMRC submitted that if a company was seeking to claim a tax relief it was reasonable for HMRC to expect it to provide proof that its claim was valid, and not

merely to accept that it was likely to be largely correct. It was not reasonable, with the onus on Seascope to verify the validity of its claim, to ask HMRC to find the evidence for themselves.

50. Companies could be associated in a myriad of ways through shareholdings, relationships with directors, their families, other companies, and loan capital in a winding up. The matters confirmed in the document signed by Mr Economou on 21 July 2010 did not remove the possibility of control being exercised in other ways than directly by Gulfstream Investments Limited itself.

51. Mazars had accepted that control by another entity was a "theoretical possibility" but said that they could not "evidence controlling parties that do not exist". HMRC submitted that it was possible to evidence their non-existence by provision of Gulfstream Investments Limited's own audited accounts and detailed shareholdings as well as those of Maritime Brokers Ltd.

52. Instead HMRC were asked to accept at face value that the directors had noticed nothing suspicious from their day to day running of the business and that these distant and silent shareholders were "benign". HMRC were unable to accept what in effect was saying "take our word for it, everything is fine". The further information from Mr Flanagan and Mr Gordon had certainly helped HMRC to understand he position better, but even Seascope's agent Mazars had accepted that there could be further associated companies.

53. HMRC accepted that there was no legislation that specified what evidence was necessary, as each case would vary as to its facts. Nevertheless, evidence was what was needed to fulfil HMRC's duty to be satisfied in protecting the UK's finances. This was Seascope's problem, not HMRC's. Seascope had two choices: be transparent as to its ownership and perhaps qualify for the relief, or be opaque and accept the standard rate of corporation tax with no reduction. Mr Foxwell submitted that the relief was a form of concession, and that companies should not be allowed to scour the world for a better tax rate.

54. HMRC accepted that no evidence had been produced by either side to show that Seascope had more associated companies than the number shown on its returns. Nevertheless, the onus to prove that the claim was valid had not been discharged. HMRC were unable to be satisfied that the claims to marginal small companies' relief were valid, and asked that the appeals be dismissed.

Discussion and conclusions

55. Seascope's appeal raises the difficult question of the extent of the evidence required to substantiate a claim to tax relief, in this case to marginal small companies' relief. It is clear that in order to show that the relevant conditions are met, the burden of proof falls on the taxpayer. Seascope's submission is that the standard of proof is the balance of probabilities, rather than beyond reasonable doubt. HMRC's position is that the onus falls on the taxpayer, and that where there is an association with an entity based in a tax haven, more evidence and a higher standard of certainty is

required on the taxpayer's part than would be appropriate in the case of companies wholly within the UK.

56. The civil standard of proof was considered in two House of Lords cases, *In re B (Children)* [2008] UKHL 35 and *In re CD* [2008] UKHL 33. In *In re B* Lord Hoffman said at [13]:

> "I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not."

He continued:

> "[14] Finally, I should say something about the notion of inherent probabilities. Lord Nicholls said, in the passage I have already quoted, that —
>
> > "the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability."
>
> [15] I wish to lay some stress upon the words I have italicised. Lord Nicholls was not laying down any rule of law. There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."

57. Without setting them out in this decision, we also refer to the comments of Lady Hale in the same case at [70] and [72] and those of Lord Carswell in *In Re CD* at [28].

58. The approach adopted by HMRC in the present case comes close to asking Seascope as the taxpayer to prove a negative, that there are no associated companies other than those taken into account in the claims for marginal small companies' relief. In our view, this is taking matters too far; we accept Mr Brown's contention that this appears to be asking for proof beyond reasonable doubt. As demonstrated by Mazars both in correspondence and in Mr Brown's argument before us, it is always theoretically possible for associations to exist, often by purely coincidental circumstances. Although not mentioned to us by the parties, we note the subsequent changes to s 13 ICTA 1988 made by s 35 of the Finance Act 2008, which inserted sub-ss (4A)-(4C) and made consequential amendments to sub-s (4). Except in certain tax avoidance circumstances, this removed partners from being taken into account for the control test under s 13(4) ICTA 1988. Although the replacement of these provisions by s 27 of the Corporation Tax Act 2010 has since been amended by a new version of that section introduced by s 55 of the Finance Act 2011, the previous form of the legislation illustrates the extensive compass of the test in what was s 13(4) ICTA 1988.

59. As we have indicated, the question raised by the appeal is how far a taxpayer has to go to satisfy HMRC that the conditions for the relief are met. HMRC's approach, of requiring more evidence in relation to a company whose UK parent company's shares are in turn held as to a substantial majority by one Liberian company and as to over half the balance by another Liberian company, appears to assume a greater level of improbability that Seascope's claims to the relief meet the relevant conditions. We have doubts as to the correctness of this approach. In principle, the proof that a claim by a UK company indirectly owned by one or more non-UK companies meets the conditions should not differ from the proof required in respect of a wholly UK-owned company. Any difference could raise issues of tax discrimination, which were not raised before us and which we therefore do not propose to consider in this decision.

60. It is clear that in the event of an enquiry being commenced in the latter (ie UK-based) category of case, HMRC would be in a better position to require and obtain information as to all the companies to be taken into account. However, as Mr Brown pointed out in his argument, there are always theoretical possibilities of association, and information as to these is not as a matter of course required by HMRC in relation to UK-owned companies seeking the relief. We can envisage circumstances in which an apparently wholly UK-based set of associated companies could, as a result of connections or associations between shareholders, be regarded as associated with non-UK resident companies.

61. In terms of Lord Hoffman's formulation of the civil standard of proof and inherent probabilities, we consider that the test to be met by Seascope is to satisfy HMRC, and ultimately this Tribunal, that on the balance of probabilities its claims for the relief were correctly made. In doing so, the difficulties for Seascope in persuading an indirect non-resident majority shareholder to go further than Gulf Investments Limited has already done to produce information as to any of its associations need to be taken into account.

62. We accept that it is in that company's interests to ensure that Seascope is in a position to make successful claims, as the amounts available for dividend payments to the shareholders of its parent company will at least to some extent be affected by Seascope's success or otherwise in claiming the relief.

63. The implication in HMRC's argument that because of the Liberian ownership of a large percentage of the share capital of Seascope's UK parent company, there is a greater possibility that Seascope may be associated with other companies and that therefore it cannot be established whether Seascope's claims to relief were validly made, is that it is less likely that the tests are satisfied and therefore some form of enhanced proof is required. We see no reason to treat Seascope as being inherently less likely than a wholly UK-owned company to have made valid claims to the relief.

64. In arriving at this view, we take account of the information provided in correspondence and at the hearing as to the long history of the business carried on by Seascope, and the previous ownership by AON. This negates to a significant extent the implication in HMRC's argument that the Liberian companies had in some way sought to set up business in what they considered to be the most tax-efficient location.

The actual position was that in 1987 those companies had purchased a pre-existing structure. Thus we discount the implication that some form of tax avoidance exercise had been involved.

65. We also take into account the efforts made by Gulfstream Investments Limited to provide information in response to Seascope's requests. Mr Foxwell did not consider the documents signed by Mr Economou and provided to Seascope to have been of evidential value, and was not satisfied that the "affidavits" signed by the two directors of Seascope Holdings Ltd were appropriately verified; there was nothing except correspondence from Mazars. However, we consider all of these documents to be of some value in establishing the facts relating to Seascope's claim, even if they are not notarised statements. In any event, HMRC had not asked for statements in notarised form.

66. Although Seascope was in a position to request confirmation of the details relating to Gulfstream Investments Limited's shareholding and certain information as to the latter's associations, we accept that for a subsidiary within an international group structure there may be difficulty in going beyond a certain point in requesting information from an ultimate parent company as to possible "associations". That company may be (or feel) entitled to set limits to the information provided, especially if it considers that the enquiry may be going beyond what it considers reasonable.

67. The appeals raise the question how far a reasonable officer of HMRC should go in the course of his enquiries into such a claim if the officer has no specific reason for suspicion that there is any doubt as to the basis for the claim. We have found nothing in the correspondence to indicate that there was any such specific reason. Beyond a certain point, extensive enquiries become disproportionate, as in *Estate 4 Ltd v Revenue and Customs Commissioners* TC 011331. Although there appears to have been some initial reluctance on the part of Seascope and its advisers to engage with HMRC's enquiry, the subsequent efforts to deal with the questions raised do not appear to us to have been open to criticism.

68. In Mazars' letter dated 21 February 2011 (paragraph [23] above), Mr Brown raised the question of "possession or power" in the context of making a claim to marginal small companies' relief. If the final sentence of the last paragraph of the quoted passage was intended to refer to every claim to the relief, we do not consider the statement to be correct. As a matter of ordinary tax compliance, a company makes its claim to the relief, normally in its corporation tax self assessment return. Unless HMRC see any reason to enquire into the claim, it will as a matter of practice be accepted. It is only where HMRC consider it necessary to open an enquiry that further information in support of the claim will be sought. Only then will the "possession or power" issue become relevant.

69. Once it does, other issues arise. In particular, has Seascope (and its UK parent company) made all reasonable efforts to seek to obtain the information requested by HMRC in support of the claim? This question is linked to the other question as to the extent of the information which it is reasonable for HMRC to have requested. We find that (apart from the initial stages of HMRC's enquiry into Seascope), the efforts of

Seascope have been reasonable in relation to such elements of that enquiry as were, in turn, reasonably pursued.

70. Once HMRC's enquiries moved into issues of association which appeared purely theoretical rather than having any apparent underlying factual justification, we find that on the basis of the facts and matters considered at paragraphs [58] to [66] above, they ceased to be reasonable in the context of Seascope's claim to relief, and that therefore Seascope was justified in not seeking the further information from Gulfstream Investments Ltd [or Maritime Brokers Ltd]. We note that HMRC have only recently attempted to seek further information from Gulfstream Investments Ltd, although we accept Mr Foxwell's submission that it was not the task of HMRC to make that approach.

71. Mr Foxwell submitted that it would have been possible to evidence the non-existence of parties controlling the overseas shareholdings, by production of the accounts of Gulfstream Investments Ltd and Maritime Brokers Ltd. Although (assuming that accounts of Liberian companies could be expected to disclose such information) such accounts would have verified the position, information from Gulfstream Investments Ltd, the controlling shareholder, was produced in an alternative form, and subsequently amplified to deal with "associations". We do not consider that any accounts, whatever their form, would have disclosed sufficient information to supply definitive evidence to prove complete absence of any possibility of "associations"; as Mr Brown stated in correspondence and in his submissions, a number of theoretical possibilities can be imagined. We find that the information which would have been required to seek to verify the answer to this question was not within the possession or power of Seascope. In making this finding, we are not prepared to go as far as to state that as a matter of law a claim to marginal small companies' relief can automatically be treated as valid in circumstances where relevant information as to controlling shareholders' associations is not within the possession or power of the claimant company. In our view, the position will depend on the whole of the surrounding evidence in the particular case.

72. Mr Foxwell emphasised the absence of witnesses for Seascope. In the context of Seascope's claim, we consider that the matters finally at issue have ultimately resolved themselves so as to questions concerning the overseas shareholders. As the correspondence shows that persons within the UK have been unable to satisfy HMRC as to the absence of associations between those shareholders and any third parties, it would not have assisted to have evidence from the UK directors.

73. The decision whether the conditions for relief have been met depends on weighing the information realistically and practicably available. Taking into account all the information and evidence before us, we find that sufficient evidence has been provided by Seascope to demonstrate that the possibility of the existence of any further associated companies beyond those covered by its claims can be discounted. Seascope has thus shown that the basis for its claims to marginal small companies' relief for the four years the subject of its appeal has been substantiated, and that the conditions for that relief have been met. We find that the claims in respect of those years were correctly made.

74. As the issue of the relief has been the recent focus of the enquiry opened on 1 September 2008, it is not clear to us whether the determination of this issue brings the enquiry to an end. No question of a closure notice was raised by Seascope's appeal, and we therefore leave to the parties the question whether the enquiry should now be closed.

75. For the above reasons, Seascope's appeal is allowed.

Right to apply for permission to appeal

76. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision 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.

JOHN CLARK
TRIBUNAL JUDGE
RELEASE DATE: 14 December 2011