TC02457

Appeal number: TC/2011/04063

CAPITAL GAINS TAX – s 171A TCGA 1992 – notional transfer within a group – disposal of debt on repayment of loan notes – statutory construction – whether disposal to a person who was not a member of the group – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DMWSHNZ LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MRS CAROLINE de ALBUQUERQUE

Sitting in public at the Royal Courts of Justice on 8 and 9 October 2012

Mr Graham Aaronson QC and Ms Zizhen Yang instructed by Ernst & Young LLP for the Appellant

Mr Michael Gibbon QC instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Background

1. On 4 May 2011 HMRC notified the appellant that it had completed an enquiry into the appellant's corporation tax self assessment for the year ended 31 December 2003. The conclusion was that a capital gain of £88,692,527 on the repayment of loan notes issued by NBNZ Holdings Limited ("NBNZ") which were held by the appellant was chargeable to corporation tax. We understand that the resulting tax liability is approximately £29 million.

2. The facts upon which HMRC's decision was based are not in dispute. The issue on this appeal is whether the appellant together with another company in the same group made a valid joint election pursuant to *section 171A Taxation of Chargeable Gains Act 1992* ("*TCGA 1992*"). If a valid election was made, the disposal arising on repayment of the loan notes would be deemed to have been made by the other group company. That company had losses to set off which would completely extinguish the chargeable gain.

3. The evidence before us was in the form of an agreed Statement of Facts and Issues together with supporting documentation. We set out below our findings of fact which are relevant to the submissions made by the parties and to our decision.

Findings of Fact

4. The appellant was until 22 October 2003 a member of the Bank of Scotland Group. Until that time its name was BOS Holdings (New Zealand) Limited.

5. On 9 September 1998 the appellant sold its shares in Countrywide Banking Corporation Limited, its wholly owned New Zealand subsidiary. The consideration was NZ$ 850,000,000 and was satisfied by 10 Year Unsecured Floating Rate Notes 2008 ("the Loan Notes"). The Loan Notes were qualifying corporate bonds for the purposes of capital gains tax ("CGT"). As such a gain was crystallised on the disposal of the shares but that gain would only be charged to tax on a future triggering disposal of the Loan Notes. In 2002 the held over gain was £203,753,103.

6. In 2003 Bank of Scotland was owed £42,150,000 by an investment trust called Geared Income Investment Trust PLC ("Geared Income"). Lloyds TSB Bank PLC was owed a similar amount. Together the two banks appointed joint administrative receivers. The effect of this was that capital losses realised by Geared Income would be allowable for CGT. Geared Income thereby realised capital losses on its investments of approximately £180 million.

7. A planned re-structuring was then put in place with a view to effectively setting off Bank of Scotland's share of the losses in Geared Income against some of the held over gains in the Loan Notes.

8. Pursuant to the re-structuring certain transactions took place. The following steps are relevant for present purposes and are described with some simplification:

(1) Geared Income's investments were divided equally and transferred to two newly created subsidiaries. One of these subsidiaries was called GIIT Realisations 1 Limited ("GR1") and was for the benefit of Bank of Scotland. At the same time a further subsidiary of Geared Income was set up called GIIT Realisations 3 Limited ("GR3") also for the benefit of Bank of Scotland.

(2) Geared Income then transferred 26% of its shares in GR1 outside the Geared Income capital gains group. The effect of this was to crystallise capital losses in GR1 of approximately £92 million.

(3) The shares in the appellant were re-structured and on 22 October 2003 the resulting 'A' shares were purchased by GR3. At that time therefore the appellant and GR3 formed part of the same capital gains group.

(4) On 28 October 2003 the appellant served notice on NBNZ requiring repayment of NZ$370 million Loan Notes.

(5) On 28 November 2003 NZ$ 370 million was repaid by NBNZ to the appellant bringing into charge to tax a held over gain of £88,692,527.

(6) On 1 December 2003 GR1 and GR 3 made a joint election pursuant to *section 179A TCGA 1992* to treat the £92 million losses at step (2) as accruing to GR3 rather than GR1. Both parties to this appeal agree that this election was effective.

(7) Also on 1 December 2003 the appellant and GR3 made a joint election pursuant to *section 171A TCGA 1992* to deem the disposal on repayment of the Loan Notes at step (5) to have been made by GR3 rather than the appellant.

9. It is the effectiveness of step (7) which is the subject of this appeal. If it was effective then the chargeable gain at step (5) would accrue to GR3 and it could offset the losses accruing to it at step (6).

10. We should record at this stage that it is not suggested by HMRC that if the re-structuring achieves the intended objective, it is anything other than legitimate tax planning on the part of the appellant and Bank of Scotland. Indeed HMRC accept that a variation of the structure involving a disposal of the NZ$ 370 million Loan Notes to a third party rather than repayment to the appellant could have been effective. There was evidence before us and we accept that the appellant did make attempts to sell the Loan Notes to a number of third party financial institutions but was unable to find a buyer at an acceptable price.

The Issue

11. Before considering the issue which arises on this appeal, and in particular the wording of *section 171A*, it is logical to consider the provisions in *section 171 TCGA 1992*. *Section 171* contains certain general provisions dealing with transfers of assets within a group. The effect of *section 171* is that a transfer of assets between members of the same group of companies is treated as if the consideration is such that no gain

and no loss accrues to the company disposing of the asset. At the material time *section 171* provided as follows:

> "*(1) Where—*
>
> > *(a) a company ("company A") disposes of an asset to another company ("company B") at a time when both companies are members of the same group, and*
> >
> > *(b) the conditions in subsection (1A) below are met,*
>
> *company A and company B are treated for the purposes of corporation tax on chargeable gains as if the asset were acquired by company B for a consideration of such amount as would secure that neither a gain nor a loss would accrue to company A on the disposal.*
>
> …
>
> *(2) Subsection (1) above shall not apply where the disposal is—*
>
> > *(a) a disposal of a debt due from Company B effected by satisfying the debt or part of it; or*
> >
> > *(b) a disposal of redeemable shares in a company on the occasion of their redemption; or …*
>
> …
>
> *(4) For the purposes of subsection (1) above, so far as the consideration for the disposal consists of money or money's worth by way of compensation for any kind of damage or injury to assets, or for the destruction or dissipation of assets or for anything which depreciates or might depreciate an asset, the disposal shall be treated as being to the person who, whether as an insurer or otherwise, ultimately bears the burden of furnishing that consideration.*"

12. Until *Section 171A* was introduced, companies would often transfer an asset to another group company prior to a disposal to a third party in order to effectively match chargeable gains and allowable losses in the same company. *Section 171* permitted this very straightforward and uncontroversial piece of tax planning which helped to ensure full use of allowable losses within a group of companies.

13. *Section 171A* was introduced into *TCGA 1992* by the *Finance Act 2000*. We describe below the amendments to *Section 171A* since 2000, but in the accounting period ending 31 December 2003 *section 171A* provided as follows:

> "*(1) This section applies where—*
>
> > *(a) two companies ("A" and "B") are members of a group of companies; and*
> >
> > *(b) A disposes of an asset to a person who is not a member of the group ("C").*

(2) Subject to subsections (3) and (4) below, A and B may, by notice in writing to an officer of the Board, jointly elect that, for the purposes of corporation tax on chargeable gains—

(a) the asset, or any part of it, shall be deemed to have been transferred by A to B immediately before the disposal to C;

(b) section 171(1) shall be deemed to have applied to that transfer;

(c) the disposal of the asset or part to C shall be deemed to have been made by B; and

(d) any incidental costs to A of making the actual disposal to C shall be deemed to be incidental costs to B of making the deemed disposal to C

(3) No election may be made under subsection (2) above unless section 171(1) would have applied to an actual transfer of the asset or part from A to B.

(4) An election under that subsection must be made before the second anniversary of the end of the accounting period of A in which the disposal to C was made."

14. The issues which arise on this appeal can be stated very shortly and were put in the following order by Mr Aaronson QC for the appellant:

(1) When the Loan Notes were repaid, in addition to the disposal of the Loan Notes by the appellant was there also an acquisition by NBNZ such that the Loan Notes can be said to have been disposed of **to** NBNZ?

(2) On a true construction of *section 171A*, is it necessary for there to be an acquisition by NBNZ or is it sufficient that there is a disposal of the Loan Notes by the appellant?

15. The issues arise because HMRC concluded that *section 171A* did not apply to the repayment of the Loan Notes. In a letter dated 23 December 2009 they stated:

"*The HMRC view is that the natural meaning of the words 'disposes of an asset to a person who is not a member of the group (C)' in Section 171A(1)(b), and the references to a disposal 'to C' is subsections 2(a), 2(c), 2(d) and 4 of Section 171A, including the words 'the actual disposal to C' in subsection 2(d), is that an acquirer of the asset was required for an election under Section 171A to be permitted.*"

16. Further, HMRC's view was and is that the physical act of surrendering the Loan Note certificates on repayment or redemption does not give rise to any acquisition of an asset by NBNZ.

17. In the language of *section 171A:*

A	=	the appellant
B	=	GR3
C	=	NBNZ

18. We consider these issues and the submissions of both parties in the discussion which follows. For the purposes of our discussion we deal with the two issues in the order they were dealt with by Mr Aaronson.

Discussion

(1) *Did NBNZ Acquire an Asset?*

19. The appellant contends that repayment of the Loan Notes by NBNZ was "*an actual acquisition*" of the Loan Notes by NBNZ. In essence this argument is put on the basis that *section 171A(1)(b)* is satisfied on the facts even on the basis of a literal construction of that section.

20. In support of this argument we were taken to the terms of the Loan Notes. Whilst they are expressed to be governed by New Zealand law, both parties agreed that in the absence of any evidence as to New Zealand law we should assume that it is the same as the law of England and Wales.

21. Mr Aaronson referred us to various conditions to which the Loan Notes were subject. These are contained in schedule 2 of the Deed Poll constituting the Loan Notes. Clause 4 deals with the mechanics of repayment or redemption as follows:

> "*…every Noteholder any part of whose Notes is due to be repaid or redeemed under any of the provisions of these Conditions shall, not later than five Business Days before the due date for such repayment or redemption … deliver up to the Issuer … the Certificate for its Notes which are due to be repaid or redeemed in order that the same may be cancelled… If any certificate so delivered to the Issuer includes any Notes not then repayable or to be redeemed, a new Certificate for the balance of the Notes not then repayable or to be redeemed shall be issued…*"

22. Clause 5 provides in relation to cancellation:

> "*All Notes repaid, redeemed or purchased by the Issuer shall be cancelled forthwith thereafter and the Issuer shall not be at liberty to keep the same for the purposes of re-issue or to re-issue the same.*"

23. We note that the term "Noteholder" is defined as "*a person for the time being entered on the Register as the holder of Notes*", although neither party suggested that there was any significance in this definition for the purposes of the appeal.

24. If a noteholder fails to deliver up a certificate at the time of repayment or redemption then the monies due are to be paid into a trust account at which time the issuer is discharged from its obligations in relation to such notes.

25. Mr Aaronson emphasised the requirement for a noteholder to physically transfer the certificate to the issuer. He relied on the fact that it is only "*thereafter*" that the issuer cancels the certificate and that it must do so "*forthwith*". He also explained the legal history leading to provisions in debentures such as that in clause 5. As a matter of established law, until 1907 companies could not retain debentures for re-issue once they had been repaid. In the Companies Act 1907 this rule was relaxed so that companies had power to re-issue debentures unless there was provision in the articles of association or some other contract to the contrary. At the time of the present transactions the relevant statutory provision was *section 194 Companies Act 1985.*

26. Against this background Mr Aaronson contended that the Loan Notes, being debentures, remained in existence until they were cancelled. He referred us to a decision of the House of Lords in *City of Edinburgh v British Linen Bank [1912] AC 133* in which the term "*redemption*" was described as an "*optional repurchase*". Hence he argued that when the Loan Notes were redeemed by NBNZ at the option of the appellant they were in fact repurchased by NBNZ. Conceptually there was a transfer of title by the appellant to NBNZ.

27. Mr Gibbon QC for the respondents accepted that the Loan Notes were debentures as defined by *section 744 Companies Act 1985*, where the term debenture is defined as "*including debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not*". He submitted that *section 194 Companies Act 1985* simply gives companies greater flexibility because they can retain the power to re-issue debentures which have been redeemed.

28. Where Mr Gibbon parted with Mr Aaronson's submissions was the effect of this analysis for the purposes of CGT. He submitted that the mechanics by which debentures are redeemed for company law purposes is neither here not there for the purposes of CGT. The CGT legislation is concerned with the debt itself. Essentially he submitted that once the debt is extinguished, there is no asset for CGT purposes which can be disposed or of acquired.

29. *Section 21(1) TCGA 1992* provides as follows:

> "*All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including:*
>
> *(a) options, debts and incorporeal property generally …*"

30. *Section 251 TCGA 1992* deals with debts generally. Sub-section (1) provides that no chargeable gain shall accrue to the original creditor on a disposal of the debt, except in the case of a debt on a security. More relevant for present purposes is sub-section (2) which provides as follows:

> "*Subject to the provisions of sections 132 and 135 and subject to subsection (1) above, the satisfaction of a debt or part of it (including a debt on a security as defined in section 132) shall be treated as a disposal of the debt or of that part by the creditor made at the time when the debt or that part is satisfied.*"

31. There is no definition in the *TCGA 1992* of the term "disposal". The statute makes clear that the satisfaction of a debt when it is repaid is to be treated as the disposal of a debt by the creditor. In our view that must be because in the absence of such a provision there might be some doubt as to whether there would otherwise be a disposal of an asset. In the case of a straightforward debt, on a disposal of the debt by the creditor, the debtor does not acquire any asset. The asset is the debt and it is extinguished on repayment.

32. We accept Mr Gibbon's submission that the CGT legislation is concerned with the underlying debts, even when they are in the form of a debenture. It is the debt which is the asset for CGT purposes. On redemption or repayment there is a disposal of the debt but there is no corresponding acquisition of any asset by the debtor, in this case NBNZ.

33. We do not consider that the position is any different where the underlying debt is in the form of a debenture. The Loan Notes themselves may still be in existence after they have been repaid or redeemed but before they have been cancelled and whether or not there is a Noteholder as defined in the Deed Poll. However we do not consider that they are an asset for CGT purposes in the hands of NBNZ when there is no principal amount outstanding.

(2) Does the Disposal of the Loan Notes Satisfy the Terms of Section 171A(1)(b)?

34. The second issue is essentially a point of construction. The appellant contends that even if the terms of *section 171A(1)(b)* are not satisfied on a literal construction, it is in any event necessary to apply a purposive construction of the section. HMRC make the same submission and we accept that it is necessary to give a purposive construction to the provision.

35. The question we have to answer is whether Parliament intended by using the word "to" in *section 171A(1)(b)* to restrict the scope of the election to the disposal of an asset involving a corresponding acquisition of an asset by C, in this case NBNZ. Mr Aaronson contends that to construe the provision in that way is a "*hyper-literal*" construction which fails to have due regard to the fact that the word "to" is "*a word of some elasticity*". More importantly he says that such a construction fails to have regard to the context of the provision and to the purposive approach to construing statutes.

36. As one might expect there was very little if anything between the parties as to the proper approach to statutory construction and the relevant principles we should

apply. We record here the principal authorities and submissions relied upon by the parties.

37. Both parties referred us to the decision of the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson [2004] UKHL 51* where Lord Nicholls summarised the approach at [36]:

> "*… two steps … 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. As Ribeiro PJ said in Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46, para 35:*
>
> > *"[T]he 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."*

38. We are not concerned with an aggressive tax avoidance scheme in the present appeal, but the principle of purposive construction remains the same. Was *section 171A* intended to apply to the transaction at step (5) in this case? The starting point is that language is taken to bear its ordinary meaning in the general context of the statute – see *R v Environment Secretary ex parte Spath Homes Ltd [2001] 2 AC 349 at 397b*. Further, it is clear from numerous authorities going back well before *W T Ramsay Ltd v IRC [1982] AC 300* that specific provisions in taxing Acts are to be construed in the context of the scheme of the Act as a whole. We were referred to the decision of Sir John Vinelott in *Chevron UK Ltd v IRC [1995] STC 712* in which he refrained from adopting a literal interpretation of the Oil Taxation Act 1983. He quoted the well known passage of Lord Wilberforce in *Ramsay* at p323:

> " *A subject is only to be taxed upon clear words, not upon "intendment" or upon the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are "clear words" is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded…*"

39. In *Bibby v Prudential Assurance Co Ltd [2000] STC 459*, Sir Richard Scott V-C as he then was similarly rejected a literal interpretation. In doing so he said at 485a:

> "*The warning against a literal construction that would permit the use of a taxing provision for a purpose never intended or contemplated by Parliament was directed at taxpayers, or their tax advisers, but must, in my judgment, be heeded also by the Revenue. The assessments in the*

> *present case have represented, in my view, an attempt to use s 95 for a purpose never intended or contemplated by Parliament. Such an attempt is no more acceptable from the Revenue than it would be from a taxpayer.*"

40. We also have in mind a passage from the judgment of the Privy Council in *Attorney General of Belize v Belize Telecom Ltd [2009] UKPC 10* where Lord Hoffmann stated at [16]:

> " *The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.*"

41. Finally in this context we were referred to *Billingham v Cooper [2001] EWCA Civ 1041* where Walker LJ as he then was said at [35]:

> " *Whatever the difficulties the court has to do its best to make sense of the statute, and that means not only making grammatical sense of the text but also finding a rational scheme in the legislation. That is not to say that the court should start off with preconceptions about what it expects to find, or that it should shrink from saying so in the rare case where a tax statute has "plainly missed fire" (the expression used by Lord Macmillan* in *IRC v Ayrshire Employers Mutual Assurance Association (1946) 27 TC 331, 347). But as Viscount Simon LC said in Nokes v Doncaster Amalgamated Collieries [1940] AC 10 14, 1022 (which was not a tax case, but has often been cited in tax cases):*
>
> > *"... if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.""*

42. Having set the scene we must address the submissions of the parties. Mr Aaronson submitted that HMRC's interpretation of *section 171A* gives the words a meaning that Parliament would never have intended or contemplated. He criticised HMRC's construction as being hyper-literal and giving a result which makes no sense, excludes normal commercial transactions, such as the redemption of loan notes or shares, and serves no conceivable purpose. Mr Gibbon on the other hand disavowed any literal construction and maintained that HMRC was construing the provision purposively.

43. We were referred by both parties to a number of extra-statutory materials from which they sought to derive the intention of Parliament. These comprised the Budget Notes issued prior to the Finance Bill 2000, extracts from Hansard in relation to a Parliamentary Debate on the Finance Bill 2000 and the Explanatory Notes for Finance Bill 2000. Each referred to what was or was to become clause 100 of the Finance Bill 2000.

44. The short extract from Hansard to which we were taken does not address the issue we have to determine on this appeal. Even if it were admissible pursuant to *Pepper v Hart [1993] AC 593* it provides no assistance in determining that issue. Nor in our view do the Budget Notes shed any light on the issue of construction.

45. We are entitled to take into account the Explanatory Note to clause 100 (see *Westminster City Council v National Asylum Support Service [2002] UKHL 38 at [4] to [6]*). Neither party placed substantial reliance on the Notes, but both Mr Aaronson and Mr Gibbon referred to them and we set out in particular the background referred to in the Notes:

> "*8. There is no group relief provision for capital losses by which a company can surrender capital losses to be set against the chargeable gains of another group member. A form of such relief is available by utilising the rules which allow tax neutral transfers of assets between group members. This is achieved by transferring an asset on a tax neutral basis before its eventual* ***disposal outside the group****, so that chargeable gains and allowable losses are brought together within a single company.*
>
> *9. This has necessitated the actual transfer of ownership of an asset between group companies before the disposal outside the group. This new provision, which emerged from consultation with representative bodies, will allow the effect to be achieved by an election by two group members, without the need for the actual transfer of ownership of the asset.*
>
> *10. The new provision will reduce compliance costs and make it simpler for groups to bring together gains and losses. Groups will be able to make* ***sales of assets*** *without the preliminary transfer between group companies, and will be able to make elections under the new provision up to two years after the accounting period in which the sale took place.*" (Emphasis added)

46. This background was not particularly controversial, and indeed both parties accepted that in broad terms this context could be gleaned from a consideration of *section 171* and *section 171A*. Paragraph 8 of the Note describes the position prior to 2000, where groups of companies could rely on the terms of *section 171*. Paragraphs 9 and 10 describe the new clause which became *section 171A*. Both parties accepted that it was clear that *section 171A* was a liberalisation of the position established by *section 171*. Where the parties differed was the significance of the terms we have highlighted in the Notes.

47. Mr Aaronson relied on the description of a "*disposal outside the group*". He submitted that this expression was apt to cover what *section 171A* was aimed at, namely a disposal where an asset left the group without requiring any corresponding acquisition by a third party.

48. Mr Gibbon relied on the description of "*sales of assets*". He submitted that this terminology naturally implies a disposal to someone else, rather than the disposal which arises on the satisfaction of a debt. We do not accept that section 171A is intended to be limited to sales of assets and Mr Aaronson referred us to various transactions where there was a disposal but no sale of an asset and which would clearly fall within section 171A. For example the grant of an option.

49. There is a danger that an exercise which involves consideration of competing constructions as to the meaning of words in external material deflects from the primary issue of construing the Act itself. We do not consider that the Explanatory Notes really help in discerning the intention of Parliament in *section 171A*. They give a helpful context, but we consider both counsel are placing rather too much significance on the words used in the Notes. It is very much a broad summary of the circumstances in which clause 100 came to be included in the Finance Bill 2000.

50. We were also referred to a number of commentaries on section 171A. In particular from *Bramwell on Taxation of Companies and Company Reconstructions*, *Simon's Direct Tax Service*, and *Tiley & Collison's UK Tax Guide*. Mr Gibbon had initially relied on *Bramwell* and *Simon's Direct Tax Service* and was met with a rebuttal from Mr Aaronson referring to previous editions of those texts and reference to *Tiley & Collison*. In the end both parties accepted that none of these texts really help to resolve the point of construction we are dealing with.

51. Mr Aaronson identified a number of situations which were not covered by *section 171A* but which were brought within the section by way of amendment in the Finance Act 2009. These situations all deal with the position where there is a disposal not involving a company outside the group. In particular:

(1) *Section 24 TCGA 1992* (disposals where assets are lost or destroyed or become of negligible value).

(2) *Section 25 TCGA 1992* (disposals where an asset ceases to become a chargeable asset on becoming situated outside the UK)

(3) *Section 161 TCGA 1992* (disposals where a non-trading asset is appropriated to trading stock)

(4) *Section 179 TCGA 1992* (disposals where a company ceases to be a member of a capital gains group)

(5) *Section 185 TCGA 1992* (disposals on a company ceasing to be resident in the UK)

(6) *Section 199 TCGA 1992* (disposals where an asset ceases to be chargeable by virtue of ceasing to be dedicated to an oil field).

52. Mr Aaronson submitted that these omissions from the original *section 171A* were "*remedied*" by *section 31 Finance Act 2009*. The new *section 171A* introduced in 2009 provides as follows:

> "*(1) This section applies where—*
>
> *(a) a chargeable gain or an allowable loss accrues to a company ("company A") in respect of an asset (or would so accrue but for an election under this section),*
>
> *(b) at the time of accrual, company A and another company ("company B") are members of the same group, and*
>
> *(c) had company A disposed of the asset to company B immediately before the time of accrual, section 171(1) would have applied.*
>
> …
>
> *(3) In this section "the time of accrual" means the time the chargeable gain or allowable loss accrues to company A (or would so accrue but for an election under this section).*
>
> *(4) Companies A and B may make a joint election to transfer the chargeable gain or allowable loss, or such part of it as is specified in the election, from company A to company B.*"

53. The effect of the new *section 171A* is that rather than having a deemed transfer of the asset between A and B, if a chargeable gain would otherwise accrue and if section 171(1) would have applied to a disposal between A and B, they can jointly elect to transfer the chargeable gain from A to B.

54. There is no dispute between the parties that if the appellant had transferred the Loan Notes to GR3 before redemption then that transfer would have had the benefit of *section 171(1)*. However Mr Aaronson submitted that this was not one of the gaps in the *Finance Act 2000* provision that was plugged by the *Finance Act 2009*. The present case was an actual disposal outside the group which was equivalent to a

disposal to C. The *Finance Act 2009* remedied the position in relation to hypothetical (or deemed) disposals and situations which fell to be treated as a disposal and re-acquisition by the same person.

55. If Mr Gibbon is right in his submissions, he accepts that the Finance Act 2009 would today give relief to the appellant in that it could jointly elect with GR3 to transfer the chargeable gain to GR3. However he cautioned against reliance on later legislation in construing an earlier Act. In that respect he referred us to Oliver LJ in *Finch v IRC [1985] 1 Ch 1 at p15 d-g*:

> " *Reliance was placed on the decision of the House of Lords in Kirkness v John Hudson & Co Ltd [1955] AC 696 and, particularly, on the speech of Viscount Simonds in that case, for the proposition that, where earlier legislation is ambiguous, recourse may be had to subsequent legislation as an aid to its construction. Now undoubtedly that case is authority for the proposition, but it is essential for its application that there is first established an ambiguity in the earlier legislation. It is clear from Viscount Simonds's speech, and from that of Lord Reid, that 'ambiguity' in this context does not mean merely that different minds may come to different conclusions as to the meaning (see pp. 711, 713 and 735). If subsequent legislation is to be invoked, the earlier provision must be such that, to use Lord Buckmaster's phrases in Ormond Investment Co. v. Betts [1928] A.C. 143, 154, 156, it is 'open to two perfectly clear and plain constructions' or 'fairly and equally open to divers meanings' (emphasis supplied) …*
>
> *It is, as it seems to me, clear from this that it is not enough to show simply that there are two arguable constructions. One has to go further and show that they are both equally tenable, and that there are no indications in the Act under construction favouring one rather than the other.*"

56. Mr Gibbon suggested that there was no ambiguity in section 171A in the sense described by Oliver LJ. The appellant's construction was not equally tenable. Mr Aaronson submitted that the description of the necessary ambiguity by Oliver LJ was not good law and it was sufficient if the ambiguity was such that the provision was capable of bearing more than one meaning. He referred to a number of passages from *Spath Holme Ltd* but we do not see anything in that case which casts doubt on what was said by Oliver LJ.

57. Mr Aaronson submitted that the immediate context of *section 171A* is *section 171*. That is undoubtedly correct. Relief is available pursuant to *section 171(1)* where there is a disposal of an asset from company A "to" company B. This uses the same language as that found in *section 171A(1)(b)*. He went on to submit that if the language used in *section 171* did not apply to a disposal by way of the satisfaction of a debt there would be no need for the exclusion in *section 171(2)(a)* set out above because on HMRC's argument satisfying a debt does not constitute a disposal by one person to another. Mr Aaronson made the same point in relation to *section 171(4)* dealing with compensation for the loss or destruction of an asset.

58. However, as Mr Gibbon submitted "*arguments from redundancy*" carry little weight. He referred us to *Walker v Centaur Clothes Group Ltd [2000] 1WLR 799 at 805* where Lord Hoffmann states:

> " *My Lords, I seldom think that an argument from redundancy carries great weight, even in a Finance Act. It is not unusual for Parliament to say expressly what the courts would have inferred anyway.*"

59. In that case it was HMRC seeking to argue that if the taxpayer's construction was correct then another provision would be redundant. Mr Aaronson suggested that the weight of such an argument would depend on the nature of the provision being construed. For example, if the construction being contended for was a more sensible interpretation of the provision being construed, which appears to have been the position in *Walker*, then the redundancy of another provision carried little weight. Similarly, if the provision said to be redundant was plainly not necessary which he said was not the position in the present case.

60. Whilst we can accept the logic of this suggestion, we do not consider that in the circumstances of the present case the construction contended for by HMRC is such that the redundancy argument does carry much weight. It is equally plausible as Mr Gibbon submits that *sections 171(2)(a)* and *171(4)* were inserted for the avoidance of doubt. The concept of the satisfaction of a debt or the receipt of compensation for loss or damage to an asset being treated as the disposal of an asset to another company is one that might otherwise give rise to at least some doubt in this context.

61. Mr Aaronson submitted that there was no discernible legislative purpose in excluding the right of a company to avail itself of *section 171A* in relation to the repayment of loan notes. However it can also be argued that there was no discernible legislative purpose in excluding the transactions in the six provisions referred to above. We accept that the exclusion of those transactions is plain on the face of section 171A as originally enacted, and the position in relation to loan notes is less clear cut. However we consider that even if there was no discernible legislative purpose, that is what Parliament chose to do through the clear language it used.

62. Mr Gibbon submitted and we accept that section 171A was not an essential part of the relief available under *section 171(1)*. Prior to *Finance Act 2000, section 171* operated without any relief in the absence of an actual transfer between members of the same group. It cannot be said that there was anything irrational about the scheme of the *TCGA 1992* prior to the introduction of *section 171A*. When that section was introduced, it was a matter for Parliament to define the limits of the liberalisation which it was introducing. It could only do so by reference to the language used in *section 171A*. It could have drawn a line in a different place. Indeed the line was subsequently moved with the amendment to *section 171A* in *Finance Act 2009*. There is nothing rational or irrational in Parliament drawing the line where it did.

63. Referring to what Lord Hoffmann said in *Belize Telecom Ltd,* Mr Aaronson asked what would the words used in section 171A convey to a reasonable reader having all the background knowledge which was available to him. For this purpose he

suggested that a reasonable reader would take into account the matters which he had referred us to by way of submission. Having done so a reasonable person would find that the language was apt to cover any disposal outside the group.

64. We take into account the context provided by *section 171* and indeed the *TCGA 1992* as a whole. We consider that the words used are clear and plainly require the disposal of an asset to C. Those words were chosen deliberately and appear a number of times in *section 171A* and *section 171*. Parliament must be taken to be aware of the distinctions made in the *TCGA 1992* between actual disposals, hypothetical (or deemed) disposals and transactions which are "treated as" disposals. Further, Parliament would also have been aware that not all of these types of disposals for the purposes of CGT involve the corresponding acquisition of an asset by another party. In the light of that context it seems to us that *section 171A* clearly does require a disposal to C.

65. By way of illustration, *section 24(1) TCGA 1992* provides that there shall be a disposal of an asset on the occasion of the entire loss, destruction, dissipation or extinction of the asset. The section permits the taxpayer to generate an allowable loss. There is no need for the provision to specify any corresponding acquisition of the asset and it does not do so.

66. Similarly in *section 24(2) TCGA 1992* where an asset comes to have negligible value the taxpayer can make a claim to that effect and CGT applies as if the taxpayer had sold and immediately re-acquired the asset. This permits the taxpayer to generate an allowable loss but it is necessary to specify a re-acquisition for the purposes of any future disposal of the asset.

67. These are merely examples of situations where Parliament has specifically dealt with the immediate consequences of a transaction which it has defined to be a disposal. Indeed it is notable that sub-sections (2) and (4) of *section 171* deal with two types of transactions in different ways. By sub-section (2) the satisfaction of a debt is excluded from relief. By sub-section (4) it is stated that for the purposes of *section 171(1)* the transaction is treated as being a disposal to a particular person. This indicates that Parliament had in mind the significance of what immediately follows the disposal, in particular the requirement for an acquisition by another company.

68. In our view *section 171A* defines the transactions which are to qualify for the relief granted by the section. It does so in terms not just of the disposal of the asset but also in terms of the immediate consequences which must follow if relief is to be available. Namely that the asset must be transferred to and thus acquired by a third party. That is the natural and ordinary meaning of the words used and the context does not require any different meaning.

69. This is not a case such as *Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586* where we are invited to read a statutory provision with the addition of any words so as to give proper effect to the intention of Parliament. We accept Mr Gibbon's submission that the choice of words in *section 171A* was clear and deliberate.

Decision

70. For the reasons given above we find that NBNZ did not acquire any asset on the disposal of the Loan Notes by the appellant. Leaving aside the point of statutory construction, the appellant did not dispose of an asset to NBNZ and therefore the election purportedly made pursuant to *section 171A* was not effective.

71. On the construction issue, for the reasons given above we find that section 171A did require the acquisition of an asset by NBNZ and again the election purportedly made pursuant to *section 171A* was not effective.

72. In all the circumstances we dismiss the appeal.

73. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 21 December 2012