Neutral Citation: [2025] UKFTT 00538 (TC)

Case Number: TC09519

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/11170
TC/2022/11171
TC/2022/11173

INCOME TAX – transactions in securities (TIS) – does s.685(6) ITA 2007 contain a drafting error capable of judicial correction – no – does s.685(6) apply to all returns of sums paid by subscribers on the issue of securities – no – was the cancellation of shares relevant consideration under s. 685(4) – yes – appeal dismissed

Heard on: 14 – 15 February 2025
Judgment date: 12 May 2025

Before

TRIBUNAL JUDGE MICHAELA SNELDERS
JOHN WOODMAN

Between

PAUL HUNT
JAMES HUNT
ROBERT DAVIS

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Laurent Sykes KC of counsel, instructed by KPMG Ireland

For the Respondents: Imran Afzal and Riya Bhatt of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. These appeals concern the application of the transactions in securities ("TIS") legislation in Chapter 1 of Part 13 of the Income Tax Act 2007 (ITA 2007) to consideration received by the appellants for the cancellation of shares by Golf Holdings Ltd ("GHL") which took place on 22 April 2015 ("the 2015 Capital Reduction").

2. The consideration paid to the appellants for the 2015 Capital Reduction was £7,841,000 to Paul Hunt, £1,079,500 to James Hunt and £1,079,500 to Robert Davis ("the Consideration"). The appellants returned the Consideration on their tax returns as capital, subject to Capital Gains Tax.

3. On 4 April 2022 HMRC issued counteraction notices to the appellants pursuant to section 698 of ITA 2007 and notices of assessment for the year ended 5 April 2016 in the following amounts:

(1) Paul Hunt - £1,659, 519.24

(2) James Hunt - £227,746.77

(3) Robert Davis £239,059.90.

4. The appellants are appealing against these counteraction notices and assessments.

5. All statutory references in this decision are to ITA 2007 as amended by the Finance Act 2010 (FA 2010) unless otherwise stated and all references to subsections are to subsections of section 685 of that legislation unless otherwise stated.

FACTS AND PROCEDURAL BACKGROUND

6. We were provided with an electronic documents bundle of 1311 pages. We also had written witness statements from Kevin Bell, a tax partner at KPMG who advised the appellants throughout the relevant period, and Robert Davis, both of whom gave oral evidence at the hearing.

7. The relevant facts are however not controversial and are agreed between the parties as follows:

(1) GHL was incorporated in 2001 and at all material times it was a close company for the purposes of the TIS legislation.

(2) In 2002 GHL acquired 100% of the shares in Wine Inns Ltd, James McCabe Ltd and City of Belfast Warehousing Ltd (the "Subsidiaries").

(3) Prior to that acquisition, the shares in the Subsidiaries were held by the three appellants and by Pat McCormack. GHL acquired Pat McCormack's shares in the Subsidiaries for cash. GHL acquired the three appellants shares in the Subsidiaries by way of share for share exchanges with each share issued by GHL having a par value of £1 and £9 credited by GHL to the share premium account. In total £32,944,500 was credited to the share premium account.

(4) As a result of GHL's acquisition of the Subsidiaries, the three appellants owned GHL which in turn owned the Subsidiaries. In early 2010 Paul Hunt owned approximately 78.4% of the shares in GHL and James Hunt and Robert Davis each owned approximately 10.8% of the shares.

(5) In March 2010 GHL undertook a capital reduction whereby 1,000,000 shares were cancelled and £10 per share was repaid to the appellants. The number of

cancelled shares for each appellant was in proportion to their percentage share ownership of GHL, so that their percentage share ownership of GHL remained the same after this capital reduction.

(6) The subject of this appeal is the 2015 Capital Reduction whereby GHL cancelled a further 1,000,000 shares and in exchange £10 per share was credited to the appellants' loan accounts with GHL. Again the number of cancelled shares for each appellant was in proportion to their percentage share ownership so that each appellant's percentage share ownership remained the same after the 2015 Capital Reduction.

(7) GHL paid the Consideration set out in paragraph [2] to the appellants by way of a credit to each of their loan accounts with GHL and the appellants entered into agreements with GHL that provided for GHL to repay the appellants the amount held to their credit in their loan accounts by instalments over a period of time. The Consideration was nevertheless paid to and received by the appellants for tax purposes on the 22 April 2015 and therefore in the 2015/16 tax year.

(8) GHL's balance sheets as at 31 December 2014 and 31 December 2015 show a profit and loss account of approximately £12,000,000 and the appellants accept that at the time of the 2015 Capital Reduction, GHL had distributable reserves in excess of £10,000,000.

(9) On 28 June 2018 HMRC wrote to each of the appellants stating that the TIS legislation might apply in relation to the 2015 Capital Reduction. After an exchange of correspondence between HMRC and the appellants' representative (KPMG), on 3 December 2021 HMRC sent each of the appellants a notice under section 695, stating that section 684 might apply.

(10) Each of the appellants then made a statutory declaration pursuant to section 696, stating that section 684 did not apply. On 8 February 2022 HMRC made a counter-statement pursuant to section 697. The matter was submitted to the Tribunal to determine whether there was a prima facie case for further action to be taken in relation to each appellant and on 10 March 2022 the Tribunal issued a conclusion stating that there was.

(11) On 4 April 2022 HMRC issued the counteraction notices and assessments as set out in paragraph [3] above. The appellants appealed against these to HMRC on 29 April 2022. On 13 May 2022 HMRC provided their view of the matter upholding their decision and offering a review. The appellants submitted their appeals to the Tribunal on 26 May 2022.

(12) On 16 November 2022 the Tribunal directed that these appeals be joined, and on 22 January 2024 the Tribunal directed that they be stayed until 30 days after the final determination of the Relevant Consideration Issue in an earlier appeal. The decision in the earlier appeal was issued by the First-tier Tribunal ("FTT") on 8 May 2024 (*Osmond and Allen v HMRC* [2024] UKFTT 00378 (TC) ("*Osmond*"). The Relevant Consideration Issue in that decision is not being appealed to the Upper Tribunal ("UT") in *Osmond* so the stay was lifted on 25 September 2024.

THE LAW

8. TIS legislation was first introduced by the Finance Act 1960. It was subsequently enacted in the Income and Corporation Taxes Act (ICTA) 1970, ICTA 1988 and then in ITA 2007. Since its enactment in ITA 2007 it was amended by the Finance Act (FA) 2010 and again by the FA 2016. The TIS legislation in force at the time of the 2015 Capital Reduction was contained in Chapter 1 of Part 13 of ITA 2007 as amended by the FA 2010.

9. Section 684 sets out the conditions that must be met before a person will be liable to counteraction of an income tax advantage, one of which is that the circumstances are covered by section 685 (Receipt of consideration in connection with distribution by or assets of close company). Section 685(1) provides that the circumstances covered by it are circumstances where condition A or condition B is met. In this appeal we are concerned with condition A so the relevant subsections of section 685 are as follows:

> "(2) Condition A is that, as a result of the transaction in securities or any one or more of the transactions in securities, the person receives relevant consideration in connection with –
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> (a) the distribution, transfer or realisation of assets of a close company,
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> (b) the application of assets of a close company in discharge of liabilities, or
>
> (c) the direct or indirect transfer of assets of one close company to another close company,
>
> and does not pay or bear income tax on the consideration (apart from this Chapter).
>
> ……..
>
> (4) In a case within subsection (2)(a) or (b) "relevant consideration" means consideration which –
>
> (a) is or represents the value of –
>
> (i) assets which are available for distribution by way of dividend by the company, or
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> (ii) assets which would have been so available apart from anything done by the company,
>
> (b) is received in respect of future receipts of the company, or
>
> (c) is or represents the value of trading stock of the company.
>
> …….
>
> (6) The references in subsection (2)(a) and (b) to assets do not include assets which are shown to represent a return of sums paid by subscribers on the issue of securities, despite the fact that under the law of the country in which the company is incorporated assets of that description are available for distribution by way of dividend."

10. We were provided with an authorities bundle of 1215 pages. Most of the cases to which we were referred concerned earlier iterations of the TIS legislation. We were referred to *Osmond* which concerned the interpretation of the same version of the legislation that we are concerned with in this appeal and none that concerned the FA 2016 amended version. We will refer to the relevant case law in the context of our discussion below.

THE ISSUE

11. There are various conditions that must be met before the TIS legislation can apply. For example there must be a transaction in securities within the meaning of the TIS legislation, the main purpose, or one of the main purposes, of a person being party to the transaction in securities or any one of the transactions in securities must be to achieve an income tax advantage and the person must in fact achieve an income tax advantage as a consequence of the transaction in securities or any one of the transactions in securities.

12. The appellants accept that the 2015 Capital Reduction meets all the relevant conditions of the TIS legislation other than the condition that the circumstances are covered by section 685.

13. HMRC assert that the circumstances of the 2015 Capital Reduction are within section 685(2)(a) so that condition A is met and the 2015 Capital Reduction is therefore covered by section 685 and the Consideration is relevant consideration within the meaning of section 685(4)(a).

14. The Appellants assert that section 685(6) applies to take the circumstances of the 2015 Capital Reduction out of section 685(2)(a) so that condition A is not met and the 2015 Capital Reduction is therefore not covered by section 685.

15. It follows that the only issue for determination in this appeal is whether the effect of section 685(6) is to take the circumstances of the 2015 Capital Reduction out of section 685(2)(a) so that condition A is not met.

BURDEN OF PROOF

16. HMRC bears the legal burden of proof. This is the usual civil standard of the balance of probabilities. However as the issue in dispute is an entirely legal one nothing turns on where the burden of proof lies.

SUBMISSIONS

17. We were very much assisted by the clear submissions both written and oral by Laurent Sykes KC for the Appellant and Imran Afzal and Riya Bhatt for the Respondents. However, although we have considered all of the submissions, we have not found it necessary to refer to each and every argument advanced or all of the authorities cited in reaching our conclusions.

18. In summary Mr Afzal for HMRC submitted as follows:

(1) There is a drafting error in subsection 685(6). As drafted it refers back to subsection 685(2) but it should refer back to subsection 685(4). The Tribunal is permitted to correct this obvious drafting error and it should therefore read subsection 685(6) as referring back to subsection 685(4) and not subsection 685(2).

(2) The effect of subsection 685(4)(a) is that the maximum amount that a company can distribute by way of dividend operates as a cap on the "relevant consideration" subject to the TIS legislation. At the time of the 2015 Capital Reduction GHL had over £10 million available for distribution by way of dividend so all of the £10 million consideration received by the appellants as a result of the 2015 Capital Reduction is within the cap set by subsection 685(4)(a) and therefore constitutes relevant consideration that is subject to the TIS legislation.

(3) The effect of subsection (6) (if corrected to refer to subsection (4) instead of subsection (2)) is that if a company can distribute share capital/premium by way of dividend (which certain foreign companies and UK unlimited companies can do), that amount is not included in the cap, thereby creating a level playing field between companies that can distribute share capital/premium as dividends and those that cannot. As GHL could not distribute share capital/premium by way of dividend, its share capital/premium was never included in the cap and therefore, if corrected, subsection (6) did not operate to take the share capital/premium out of the cap.

(4) In the event that section 685(6) is not corrected, even as drafted it only applies in circumstances where a company can distribute share capital/premium by way of a dividend. As GHL could not do so, section 685(6) is simply inapplicable, irrespective

of whether it refers back to subsection (4) or subsection (2) and therefore nothing turns on the drafting error in (6).

19. In summary Mr Sykes KC for the Appellants submitted as follows:

(1) Section 685(6) qualifies section 685(2)(a) and (b). The words used in the legislation are clear, unambiguous and do not produce absurdity. There is no obvious drafting error for the Tribunal to correct in order to discharge its interpretative function and the Tribunal is not therefore permitted to amend the clear and unambiguous words of the legislation.

(2) The consideration paid to the appellants pursuant to the 2015 Capital Reduction represents a return of sums paid by subscribers on the issue of securities which, as a result of subsection 685(6), is excluded from subsection 685(2)(a) and condition A is therefore not met.

(3) There is no logical basis on which to maintain that section 685(6) does not apply to UK companies, nor does the case law in relation to the earlier TIS legislation, support this interpretation.

(4) Section 685(6) ensures that the shareholders are not subject to double taxation. When dividends are paid out of distributable reserves they will be taxable income for the shareholders. If the shareholders have already been subject to income tax on a reduction of capital, the result would be double taxation. Avoiding this double taxation is not absurd.

DISCUSSION AND OUR VIEW

Statutory Interpretation

20. We were addressed by both parties on the relevant principles, supported by case law, that we should adopt when interpreting subsection (6).

21. The relevant principles of statutory interpretation were restated by Lord Hodge (with whom Lord Briggs, Lord Stephens, Lady Rose and Lady Arden agreed) at [29] – [31] of the Supreme Court decision in *R (0) v Secretary of State for the Home Department* 2023 [UKSC] 3 as follows:

> "29. The courts in conducting statutory interpretation are "seeking the meaning of the words which Parliament used": Black-Clawson International Ltd v Papienverke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: "statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context." (R v Secretary of State for the Environment, Transport and the Regions, Exp Spath Holme Ltd [2001] 2 AC, 349, 396.) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p397, "Citizens, with the assistance of their advisors, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.

> 30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. In this appeal the parties did not refer the court to external aids, other than explanatory statements in statutory instruments, and statements in Parliament which I discuss below. Sir James Eadie QC for the Secretary of State submitted that the statutory scheme contained in the 1981 Act and the 2014 Act should be read as a whole.
>
> 31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in Spath Holme [2001] 2 AC 349,396, in an important passage stated:
>
> > "The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House ... Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended' they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning."".

22. Sir Launcelot Henderson in the recent Court of Appeal decision in the case of *HMRC v BlueCrest Capital Management (UK) LLP* [2025] EWCA Civ 23 quoted the above paragraphs from Lord Hodge's decision and then went on to say at [63]:

> "While all of this guidance is important, I emphasise in particular that (a) the words which Parliament has chosen to enact are "the primary source by which meaning is ascertained", for "the important constitutional reason" explained by Lord Nicholls in the Spath Holme case that citizens "should be able to rely upon what they read in an Act of Parliament"; (b) "[e]xtemal aids to interpretation must therefore play a secondary role"; (c) no external aids can "displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity"; and (d) "the intention of Parliament" is an objective concept in the sense lucidly explained by Lord Nicholls in Spath Holme [2001] 2 AC 349,396."

23. Mr Afzal invited the Tribunal to consider subsection (6) in the context of how the TIS legislation has evolved since its introduction at section 28 of the FA 1960, subsequent

enactments in chapter 1 of Part 17 of ICTA 1970 and ICTA 1988, chapter 1 of Part 13 of ITA 2007 as originally enacted and then as subsequently amended by the FA 2016. The equivalent of subsection (6) in all of these iterations of the TIS legislation refers back to the equivalent of subsection (4) not subsection (2). It is only subsection 685(6) that refers back to subsection (2) which, Mr Afzal submits, demonstrates that this reference to subsection (2) is a mistake and should be a reference to subsection (4).

24. Mr Afzal also referred the Tribunal to the Consultation Document called "Simplifying Transactions in Securities Legislation" dated 31 July 2009 which concerned the proposed FA 2010 amendments to the TIS legislation that we are concerned with. This document contained the proposed section 685 (numbered 684 in the consultation document) including subsection (6) as it was later enacted, with the reference back to subsection (2). The document stated that "[i]n broad terms, the new section 684 seeks to replicate and simplify the provisions in sections 689 and 690 ITA 2007" (section 689 and 690 of ITA 2007 as originally enacted were the predecessor provisions to section 685). There is no mention in the consultation document of any intention to change the law in this area. This, Mr Afzal submits, further supports his position that the reference to subsection (2) in subsection (6) is an error.

25. However, we find that we are only able to conclude from the above that the consultation document offers no clear explanation of why section 685 refers to subsection (2) rather than subsection (4), as all of the previous TIS legislation had. This document and the earlier legislation, is not alone sufficient for us to find that there was an obvious error in subsection (6) that we have the power to correct.

26. As stated by the House of Lords in *Inco Europe Limited v First Choice Distribution (a firm)* [2000] 1 WLR 586 ("*Inco*") at page 592 "The court must be able to correct obvious drafting errors" but:

> "[t]his power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed."

27. The consultation document provides support for Mr Afzal's submission that the purpose of section 685 was broadly to replicate and simplify sections 689 and 690 of ITA 2007 as originally enacted. The earlier and subsequent versions of section 685 provide support for Mr Afzal's submission that, if the reference to subsection (2) in subsection (6) is an error, had the error in the Bill been noticed then Parliament could have easily corrected this by changing the reference in subsection (6) to subsection (4).

28. However, the above is not enough to satisfy the second requirement set out in *Inco* because it does not establish that "by inadvertence the draftsman and Parliament failed to give effect to" its purpose of broadly replicating and simplifying the predecessor provisions.

29. In order to address this aspect of the test our starting point is to interpret section 685(6) as it is drafted in the context of subsections (2) and (4) and the relevant case law and then

apply that to the facts of this case to establish whether subsection (6) as drafted, fails to broadly replicate and simplify the earlier provisions.

30. Our first task is therefore to understand how this aspect of the TIS legislation operated previously and then compare that to how it operates under the TIS legislation that we are concerned with in this appeal.

Subsection (4)(a)

31. The wording of subsection (4)(a) is materially the same as in earlier versions. Neither party to this appeal submitted that the effect of subsection (4)(a) was any different to the effect of earlier versions and we find that the case law interpreting the earlier versions of subsection (4)(a) applies equally to the interpretation of subsection (4)(a).

32. We were referred to the case of *Hague v Commissioners of Inland Revenue* 44 TC 619 (*Hague*) which was decided by the High Court in 1967 before going on appeal to the Court of Appeal who issued their decision in 1968. The question for determination in that case was how much of a share capital distribution came within section 28(2)(c) of FA 1960 which was a predecessor to subsection (4) and provided:

> "the person in question receives, in consequence of a transaction whereby any other person—
>
> (i) subsequently receives, or has received, an abnormal amount by way of dividend; or
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> (ii) subsequently becomes entitled, or has become entitled, to a deduction as mentioned in paragraph (b) of this subsection,
>
> a consideration which either is, or represents the value of, assets which are (or apart from anything done by the company in question would have been) available for distribution by way of dividend,…."

33. The High Court held that it was so much of the share capital distribution as was attributable to the recent capitalisation out of revenue reserves that come within section 28(c) of FA 1960. The Court of Appeal endorsed this tracing exercise, although it came to a different conclusion as to how that proportion should be quantified.

34. In *Hague* therefore the issue for determination was how much of the assets being distributed would have (apart from the capitalisation out of revenue reserves) been available for distribution by way of dividend and therefore within section 28(2)(c) of FA 1960. In other words the decision in *Hague* was limited to interpreting what part of the consideration ***is*** assets which are available for distribution by way of dividend, or would have been so available had the company not capitalised the revenue reserves.

35. Subsequent decisions have established that the predecessor to subsection (4)(a) also operated as a cap on the amount of consideration that can be subject to a counteraction notice.

36. In the 1971 decision of the Court of Appeal in *Commissioners of Inland Revenue v Brown* 47 TC 217 ("*Brown")* a husband and wife who owned substantially the whole of the issued share capital in a company ("G Ltd") sold their shares in five other companies to G Ltd. G Ltd funded the purchase of shares by securing a loan from a bank. G Ltd's distributable reserves were not reduced or capitalised and so there was no question of the actual distributable reserves being the consideration and therefore no need for a tracing exercise as in *Hague*. The taxpayers in *Brown* conceded that the purchase price paid by G Ltd for the shares was a consideration which represented the value of assets that were "legally" available for distribution by way of dividend because G Ltd's distributable reserves at the time of the transaction were in excess of the consideration that they received. They

asserted however, that the consideration did not come within section 28(2)(c) of FA 1960 because it was not "available" within the meaning of that section. This decision established that "available for distribution by way of dividend" in section 28(2)(c) of FA 1960 means "legally available" and not a more subjective form of "available" that would require the Tribunal to make an assessment as to whether it would be good business or sound commercial practice to distribute the funds as a dividend.

37. The 1975 High Court decision in *Addy v IRC* 51 TC 71, then went on to articulate how section 28(c) operates as a cap on the value of consideration which is subject to it, where Goff J states at page 83 para G:

> "Therefore, Mr Bromley submits, there is no need for any apportionment because the amount distributed was less than the total available for distribution by way of dividend. In my judgment that is correct."

38. From this case law we find that the predecessors to subsection (4)(a) had the function of limiting the consideration that came within the TIS legislation to consideration that either:

(1) ***is*** an asset which is available for distribution by way of a dividend by the company or would have been so available apart from anything done by the company; or

(2) ***represents the value*** of an asset which is available for distribution by way of a dividend by the company or would have been so available apart from anything done by the company.

39. In other words it operated to both trace the assets that had been available for distribution as in *Hague* and also to provide a cap on how much of the consideration came within the TIS legislation as in *Brown* and *Addy*.

40. Applying subsection (4)(a) to the facts of this appeal, the 2015 Capital Reduction was not an asset and never had been an asset capable of distribution by way of dividend but it does represent the value of an asset available for distribution by way of dividend because at the time of the 2015 Capital Reduction, GHL had over £10 million available for distribution. It follows that all of the consideration for the 2015 Capital Reduction is relevant consideration within subsection (4)(a).

Equivalent of subsection (6) prior to FA 2010

41. We turn then to subsection (6) which excludes certain assets. The earlier versions of subsection (6) excluded assets:

> "which (while of a description which under the law of the country in which the company is incorporated is available for distribution by way of dividend) are shown to represent a return of sums paid by subscribers on the issue of securities."

42. In *Addy* the Appellant was seeking to rely on an earlier version of subsection (6) to exclude consideration that represented share capital. Goff LJ set out why the earlier version of subsection (6) did not achieve this outcome as follows:

> "In my judgment, however, the passage in the section relied on has no application because it relates solely to foreign companies: see per Cross J. in Hague's case [1969] 1 Ch., at page 405 and 44 T.C., at page 631, and per Megarry J. in Commissioners of Inland Revenue v. Brown 47 T.C. 217, at page 234-and his reasoning, it will be remembered, was adopted by Russell L.J. at page 236. Where the company is an English one assets representing share capital are excluded, but not because of this provision. It is because they are manifestly not available for distribution as dividend."

43. The subsequent decision of the FTT in *Bamberg v Revenue and Customs Commissioners* [2010] UKFTT 333 (TC) ("*Bamberg*") explains why the exclusion is not in fact limited to foreign companies but to any company that can legally distribute its share capital by way of dividend at [14] as follows:

> "In none of these cases did the possible application of C(2) to a UK company affect the decision since in all of them it was accepted that the capital of the particular UK companies was not available for distribution by way of dividend. In Addy Goff J said that for an English company assets representing share capital were manifestly not available for distribution as dividend. However, if the company had been an UK unlimited company there would be nothing to prevent distribution of share capital as dividend. If the point had been put to him we are sure he would not have considered that the provision was restricted to foreign companies. While therefore there are clear statements that C(2) is restricted to foreign incorporated companies we consider that we are not bound by them as they are obiter. We see no reason why C(2) should not apply to a UK incorporated unlimited company."

44. *Bamberg* then goes on to explain why the mere fact that the carve out is not restricted to foreign incorporated companies does not assist the appellant in that case at [15] as follows:

> "Having decided that C(2) can be applicable to a UK company, we do not consider that this assists Mr Thornhill's case. The effect of C(2) is that assets representing a return of sums paid by subscribers on the issue of securities are not available for distribution by way of dividend; …..C(2) determines the maximum that can be paid as dividend as the amount of distributable reserves (not including a return of share capital if that is otherwise distributable)".

45. The case law interpreting the earlier versions of subsection (6) therefore establish that its effect is to remove from the consideration, and the cap on consideration, within predecessors to subsection (4), the return of sums paid by subscribers on the issue of securities ("Return of Share Capital"), but only in circumstances where such sums are legally available for distribution by a company ("Distributable Return of Share Capital"). This will apply to some foreign incorporated companies and UK unlimited companies but did not at the time and still does not apply to UK limited companies who are not legally able to Return Share Capital by way of dividend.

Subsection (6)

46. The wording of subsection (6) is different from the earlier and later versions in two respects. Firstly, and as mentioned previously, it refers back to subsection (2) rather than subsection (4). Secondly it uses the words "despite the fact" which is not used in any of the other versions of the legislation except as originally enacted in ITA 2007. For ease of reference subsection (6) is as follows:

> "The references in subsection (2)(a) and (b) to assets do not include assets which are shown to represent a return of sums paid by subscribers on the issue of securities, despite the fact that under the law of the country in which the company is incorporated assets of that description are available for distribution by way of dividend."

47. The FTT decision in *Osmond* considered the effect of subsection (6). In that appeal the FTT agreed with the parties at paragraph [60] as follows:

> "The parties agree that the reference in subsection 6 to subsections (2)(a) and (b) should be references to subsections 4 (a) and (b). We agreed that this is how the legislation should be read and that that cross-reference is an error."

48. On that basis and having considered the decisions in *Addy* and *Bamberg* the FTT concluded as follows at [64] – [66]:

> "64. To comprise relevant consideration within subsection (4)(a) the consideration must be or represent the value of assets which are available for distribution by way of dividend by the company. It is clear from *Addy* that available for distribution by way of dividend means lawfully distributable and is not limited to distributions out of revenue reserves. So, share premium or capital of a UK limited company is not so legally distributable.
>
> 65. However, share premium or capital may be distributable if the company is located in a foreign jurisdiction or indeed by a UK unlimited company. For such companies, share premium does fall within the definition of relevant consideration in subsection (4)(a).
>
> 66. The purpose, therefore, of subsection (6) is to take out of this definition, share capital which is so distributable."

And at [70]:

> "…..We do not consider that *Bamberg* suggests, let alone is authority for the proposition, …. that subsection (6) could, as UK company law currently stands, extend to UK limited companies. We reject [the] suggestion that the words "despite the fact" in subsection (6) can be so construed either literally or purposively."

49. The FTT goes on to conclude at paragraph [79] in *Osmond*:

> "The provisions of subsection (6) need to be construed in light of the purpose for which the TIS regime as a whole was introduced. It is consistent with that purpose that it is interpreted as taking out of the definition of relevant consideration in subsection (4) only any additional amount which is been added to that pot by virtue of share premium being lawfully distributable. It is not intended to take out of account share premium which has not been originally added in to that pot. Such an interpretation would, in our view, be more than illogical, it would result in absurdity. It would drive a coach and horses through the application of the TIS regime."

50. We agree with the FTT's findings on this issue in *Osmond,* had subsection (6) referred back to subsection (4). Mr Sykes also accepted that if subsection (6) did refer back to subsection (4) it would have the effect as found by the FTT on this issue in *Osmond* and the Appellants' appeal would fail.

51. We turn then to consider what impact the reference back to subsection (2) in subsection (6) has on the above interpretation.

52. In one respect, the reference to subsection (2) in subsection (6) will still have the effect of removing Distributable Return of Share Capital from the definition of relevant consideration in subsection (4).

53. This is because the definition of relevant consideration in subsection (4) is a two stage process as follows:

(1) First, subsection (2)(a) provides that the person must receive relevant consideration ***in connection with*** the distribution, transfer or realisation of ***assets*** of a close company.

(2) Then, subsection (4)(a) sets out what constitutes relevant consideration ***in a case within subsection (2)(a)***.

54. Where the consideration paid to subscribers is in connection with the Distributable Return of Share Capital, subsection (6) operates to remove that from subsection (2)(a) so that the consideration received for it can never be relevant consideration within subsection (4)(a). Taking this asset out of subsection (2) so that it never comes within subsection (4) may have been considered to be a simplification of the legislation.

55. It follows that, had GHL been an unlimited UK company or a company incorporated in a jurisdiction that allowed the Return of Share Capital to be distributed by way of dividend, the 2015 Capital Reduction would not be an asset within subsection (2)(a) and therefore the consideration received by the Appellants in connection with it would not be relevant consideration within subsection (4)(a), such sums being subject to income tax in any event (see the Court of Appeal decision in *HMRC v First Nationwide* [2012] EWCA Civ 278).

56. In relation to the cap function of subsection (6) the reference to subsection (2) will result in a different outcome than if it had referred back to subsection (4). This is because Distributable Return of Share Capital is an asset that is available for distribution by way of a dividend, and therefore included in the value of the cap on relevant consideration set by subsection (4)(a). However subsection (6) does not then remove it from the cap as it would if it referred back to subsection (4).

57. The effect of this is that the cap on relevant consideration within subsection (4) for UK unlimited and some foreign incorporated companies will be higher than that of a UK limited company in circumstances where they have the same amount of share capital/premium and distributable reserves. As a result there is no longer a level playing field in this respect. However we heard no submissions on whether the impact this has in practice goes beyond "broadly" replicating and simplifying the earlier provisions and we make no findings on this point.

58. Certainly, on the facts of this case, this interpretation of subsection (6) has no impact because GHL could not lawfully distribute a Return of Share Capital by way of dividend and therefore subsection (6) is, as submitted by Mr Afzal, simply inapplicable.

59. However, Mr Sykes submits that the impact of the reference to subsection (2) in subsection (6) on the interpretation of subsection (6) is far greater than as set out above. He submits that it has the effect of removing all Return of Share Capital from subsection (2), irrespective of whether or not it is Distributable Return of Share Capital. Mr Sykes submits that it therefore follows that because the 2015 Capital Reduction is a Return of Share Capital it is not an asset within subsection (2)(a) and the consideration received by the appellants for it cannot be "relevant consideration" within subsection (4)(a) and so condition A is not met and the TIS legislation does not apply.

60. Mr Sykes submits that "despite the fact that" in subsection (6) should be read as "even where" rather than, as submitted by Mr Afzal, "where", and he referred us to a number of examples in legislation where "despite the fact" had been used to mean "even where" including;

(1) section 23B(11) of the Children Act 1989 which reads:

> "(11) If the local authority have lost touch with a relevant child, despite taking reasonable steps to keep in touch,
>
> they must without delay—

(a) consider how to re-establish contact;"

(2) section 90 of the Leasehold Reform, Housing and Urban Development Act 1993 which reads:

> "(1) Any jurisdiction expressed to be conferred on the court by this Part shall be exercised by the county court.
>
> …
>
> "(4)Where any proceedings are brought in the county court by virtue of subsection (1) or (2), the court shall have jurisdiction to hear and determine any other proceedings joined with those proceedings, despite the fact that, apart from this subsection, those other proceedings would be outside the court's jurisdiction."

(3) Section 1049(3) of the Corporation Tax Act 2010 which reads:

> "(3) If the share capital is issued in a case where section 410(2), (3) or (4) of ITTOIA 2005 (stock dividend income) applies—
>
> (a) the share capital does not, despite paragraph C in section 1000(1) (redeemable share capital), constitute a distribution within the meaning of section 1000(1),"

61. The above statutory examples demonstrate that "despite the fact" can mean "even where" but they do not establish that it cannot mean "where" if the context so requires. It is therefore necessary to consider the context to determine what is meant by these words in subsection (6).

62. In the legislation in paragraph [60] above, to which Mr Sykes referred, the words from "despite the fact" offer helpful clarification that the circumstances set out in the second part of the sentence, do not disapply the first part, when it might be thought that they could. They therefore have the purpose of removing a potential ambiguity. This is not the case in subsection (6). There is no reason to consider that a company that can lawfully distribute Return of Share Capital by way of a dividend would not be included in the first part of the subsection and so the words from "despite the fact" would have no purpose if "despite the fact" meant "even where".

63. Also, the original ITA 2007 version of subsection (6) used the words "despite the fact" but referred back to the predecessor to subsection (4) and therefore operated in the way described by the FTT in *Osmond*. The "despite the fact" words in that version of subsection (6) clearly meant "where" so, if Parliament had intended subsection (6) to exclude a broader range of assets in the 2010 version of ITA 2007, we would have expected this to be indicated clearly by the use of different words or simply removing this caveat entirely.

64. The interpretation of "despite the fact" as meaning "where" in subsection (6) is further supported by the context that all the earlier versions and the later version of subsection (6) limited the exclusion to Distributable Return of Share Capital. To interpret subsection (6) in the way that Mr Sykes suggests and extend the exclusion to all Returns of Share Capital would, as stated by the FTT at paragraph [79] of the *Osmond* decision, "drive a coach and horses through the application of the TIS regime", which was not the stated purpose of the 2010 amendments.

65. Mr Sykes referred us to the example of Sebastian in the 2015 Consultation Document which suggests that the proposed changes to the TIS legislation at that time were intended to bring factual scenarios similar to the circumstances of the 2015 Capital Reduction within the TIS legislation. He submits that this supports his submission that the TIS legislation at the time of the 2015 Capital Reduction did not cover such circumstances. We note however that there is a footnote to this example in that document that states "It does not reflect HMRC's view of the correct tax treatment in all circumstances". However, even if it were HMRC's

view that this was a possible interpretation of the 2010 TIS legislation, this could not displace a clear and unambiguous meaning of the words of subsection (6) in their context.

66. Mr Sykes also submitted that interpreting subsection (6) as only excluding Distributable Returns of Share Capital will result in double taxation for the appellants because both the 2015 Capital Reduction and any subsequent distribution of its reserves by way of dividend will be subject to income tax. However, this would be taxation of two separate pots of money on two separate occasions. First the 2015 Capital Reduction, and then, potentially, any dividends paid out of distributable reserves. This is not double taxation. Even if this were double taxation, there is nothing in the TIS legislation to suggest that it should be disapplied in the event of double taxation and it would not be a basis on which to interpret subsection (6) so as to avoid double taxation.

CONCLUSION

67. For all the reasons set out above, we find that the words "despite the fact" in subsection (6) mean "where" and therefore have the effect of limiting the circumstances where Returns of Share Capital do not count as assets in subsection (2) to where such assets are lawfully distributable by way of dividend. We agree with the FTT interpretation of these words at paragraph [70] of its decision in *Osmond* (as quoted at paragraph [48] above) and find that the reference in subsection (6) to subsection (2) rather than subsection (4) does not change that interpretation.

68. It follows that section 685(6) does not take the circumstances of the 2015 Capital Reduction out of section 685(2)(a) and condition A is met.

69. When interpreting the words of subsection (6) purposively and in their context, we find that subsection (6) is clear on its face and the outcome of this appeal is the same irrespective of whether subsection (6) refers to subsection (4) or subsection (2). It follows that we cannot, as required by *Inco,* be "abundantly sure… that by inadvertence the draftsman and Parliament failed to give effect to" the stated purpose of broadly replicating and simplifying the earlier provisions. On that basis we find that subsection (6) does not contain an obvious drafting error capable of correction by this Tribunal.

70. In this regard, we are not following the FTT decision in *Osmond*. We have set out fully above our reasons for taking a contrary view on this point as required by the UT at paragraph [23] of its decision in *HMRC v Sutterwalla* [2024] STC 1271. We also note that because this point was agreed between the parties in *Osmond*, the FTT hearing that appeal would not have had the benefit, as we have had, of extensive, conflicting written and oral submissions on the point over a significant proportion of a two day hearing.

71. For all the reasons above we dismiss the appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

72. 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.

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