



Neutral Citation: [2026] UKFTT 00483 (TC)

Case Number: TC 09830

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Taylor House

Appeal reference: TC/2023/00769

CORPORATION TAX – relief claimed for donations to a charity on the basis that they were qualifying charitable donations – no relief was due if the donations were made as part of an arrangement involving the acquisition of property by the charity from the Appellant or a person associated with the Appellant or if the donations were associated with any such acquisition – in this case, the charity had acquired the shares in the Appellant’s parent company before the donations were made and had used the cash which it held as a result of receiving the donations to pay part of the consideration for its acquisition of the shares – concluding that, on the facts, the donations were not made as part of an arrangement involving the acquisition of the shares or associated with the acquisition of the shares and therefore, even if the vendor of the shares was a person associated with the Appellant, the donations were qualifying charitable donations and relief was properly due – consideration of various submissions made as to the purpose and application of Section 193 of the Corporation Tax Act 2010 and the application of the definition of control in Section 450 of the same Act in relation to charitable companies – appeal upheld

Heard on: 10, 11 and 12 February 2026

Judgment date: 30 March 2026

Before

TRIBUNAL JUDGE TONY BEARE

Between

ANSTON INVESTMENTS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Firth KC, of counsel, instructed by Brian White Limited

For the Respondents: Miss Ruth Hughes KC, Mr Francis Ng and Ms Emma Germany of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

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INTRODUCTION

1. This decision relates to three assessments to corporation tax which were issued by the Respondents to the Appellant under paragraph 41 of Schedule 18 to the Finance Act 1998 (the FA 1998”) as follows:

Accounting period ended:	Date of assessment	Amount of assessment (£)
24 December 2016 (the “2016 AP”)	19 December 2022	180,047.40
24 December 2017 (the “2017 AP”)	19 December 2022	84,034.52
24 December 2018 (the “2018 AP”)	29 September 2022	610,355.00

2. Each assessment was made on the basis that donations made by the Appellant in the relevant accounting period to its parent company, Clydpride Limited (“Clydpride”), a company limited by guarantee and registered as a charity in England and Wales, did not qualify for relief from corporation tax as qualifying charitable donations for the purposes of Part 6 of the Corporation Tax Act 2010 (the “CTA 2010”).

3. In the rest of this decision, a reference to a Section is to a Section of the CTA 2010 unless otherwise indicated.

BACKGROUND

4. The circumstances which have given rise to the appeal may be summarised as follows:

- (1) Venerate Holdings Limited (“Venerate”) is a company incorporated and resident for tax purposes in Jersey, the shares in which are held as to 50% each by two Jersey resident discretionary trusts, the Fraternity Trust and the Bonne Chance Trust (together, the “Jersey Trusts” and, each, a “Jersey Trust”);
- (2) prior to the execution of the agreement referred to in paragraph 4(3) below:
 - (a) Venerate was the beneficial owner of 100% of the shares in Newcom Limited (“Newcom”), a company incorporated in England and Wales and resident for tax purposes in the UK; and
 - (b) Newcom was the beneficial owner of 100% of the shares in the Appellant, which is also a company incorporated in England and Wales and resident for tax purposes in the UK;
- (3) pursuant to a share purchase agreement executed on 5 April 2011 (the “SPA”), Clydpriide acquired the entire issued share capital of Newcom from Venerate. The SPA provided, inter alia, as follows:
 - (a) the consideration for the sale would be an amount equal to the net asset value of Newcom and its subsidiaries (which included the Appellant) (the “Newcom group”) on 24 March 2011 (the “Final Accounts Date”) provided that, for this purpose, the properties held by the Newcom group at the Final Accounts Date would be valued at their market value (assuming a sale between a willing buyer and a willing seller), instead of at their book value, as at the Final Accounts Date;
 - (b) on completion, which was to take place on the date that the SPA was executed, Clydpriide would pay Venerate £2m on account of that net asset value and then, once the net asset value had been determined, if it turned out to be higher than the initial payment, the balance (the “deferred consideration”) would be payable on three months’ notice, such notice not to expire before the first anniversary of completion. Interest was payable in addition to the deferred consideration, if demanded (although, in the event, interest was not in fact demanded or paid);
 - (c) Clydpriide was required to execute a charge over the shares in Newcom; and
 - (d) pending the discharge by Clydpriide of the entire deferred consideration and any interest:
 - (i) Clydpriide was obliged to comply with various covenants in relation to the shares and the Newcom group; but
 - (ii) Clydpriide could sell any of the properties which were held by the Newcom group at the time when the SPA was executed provided that the relevant property was sold at full market value and Clydpriide paid to Venerate, in diminution of the deferred consideration, fifty per cent. of the net proceeds of sale after deducting the costs of sale and any borrowing directly charged on the relevant property (in relation to each relevant property, the “Net Sale Proceeds”);
- (4) in the period following the sale:
 - (a) certain of the properties which were held by the Appellant at the time when the SPA was executed were sold; and

- (b) Clydpriide paid instalments of the deferred consideration to Venerate in an amount equal to fifty per cent. of the Net Sale Proceeds in relation to each such property; and
 - (5) also in the period following the sale, the Appellant made substantial donations to Clydpriide for which it claimed relief in its company tax returns as qualifying charitable donations.
 - 5. The following additional facts are also relevant to this decision:
 - (1) the only members of Clydpriide have at all times relevant to this decision been Mr Leon Faust (“LF”) and his wife, Mrs Tirzah Faust (“TF”);
 - (2) the directors of Clydpriide have at all times relevant to this decision been:
 - (a) LF (until 21 April 2018 and then again from 25 March 2019);
 - (b) Mr Aron Faust (“AF”), the son of LF and TF;
 - (c) Mr Martin Linton (until 21 April 2018);
 - (d) Mr Jacob Halpern (from 21 April 2018); and
 - (e) Mr Jonathan Weinstein, the brother-in-law of AF and the son-in-law of LF and TF (from 21 April 2018);
 - (3) each Jersey Trust owning the shares in Venerate is a discretionary trust the beneficiaries of which include TF, the children or issue of TF and their spouses, widows or widowers;
 - (4) those shares were settled in the relevant Jersey Trust by yet another Jersey resident discretionary trust, the Ester Orzel Settlement (the “EO Settlement”), which was settled by TF’s mother, Mrs Ester Orzel (“EO”), and the beneficiaries of which include the children of LF and TF; and
 - (5) neither Mr Linton nor Mr Halpern is related in any way to any member of the Faust or Orzel families.
 - 6. For reasons which I will explain, the Respondents consider that certain of the donations referred to in paragraph 4(4) above did not qualify for relief as qualifying charitable donations. Consequently, they have issued the assessments which have given rise to the appeal to which this decision relates under the discovery provisions in Schedule 18 of the FA 1998.
 - 7. Those assessments have given rise to two issues which are in dispute between the parties as follows:
 - (1) first, whilst the Appellant has accepted that the assessment in relation to the 2018 AP was validly made, it has challenged the validity of the assessments in relation to each of the 2016 AP and the 2017 AP. In the rest of this decision, I will refer to this issue as the “Discovery Issue”; and
 - (2) secondly, the Appellant submits that the donations in question did constitute qualifying charitable donations for the purposes of Part 6 of the CTA 2010. In the rest of this decision, I will refer to this issue as the “193 Issue”, for reasons which will become apparent.
- CASE MANAGEMENT DECISION**
- 8. Before going any further, I should briefly mention a procedural issue which arose shortly before the hearing of the appeal and with which I was required to deal at the start of the hearing.

9. The Respondents filed their original statement of case on 10 October 2023 and an amended statement of case (as so amended, the “SOC”) on 11 March 2024. Both the original statement of case and the SOC dealt solely with the 193 Issue and did not contain any pleadings in relation to the validity of the assessments. It was not until the Respondents received the Appellant’s skeleton argument for the hearing that they became aware that that omission would preclude them from making submissions in relation to the Discovery Issue at the hearing. The Respondents therefore made an application to re-amend the SOC so as to include pleadings in relation to the validity of the assessments and to admit an additional witness statement pertaining to the Discovery Issue. The Appellant objected to that application.

10. I have set out in Appendix One to this decision further information in relation to the relevant application and objection and my case management decision in relation to them, which was to uphold the application. The consequence of that decision was that the Respondents were allowed to make submissions at the hearing in relation to the Discovery Issue.

THE RELEVANT LEGISLATION AND THE SCOPE OF EACH ISSUE

The Discovery Issue

11. Paragraphs 41 et seq. of Schedule 18 to the FA 1998 permit the Respondents to issue an assessment to corporation tax if, inter alia, one of their officers discovers that, as regards an accounting period of a company, an excessive relief has been given to the company in one of the circumstances specified in paragraphs 43 or 44 of Schedule 18 to the FA 1998 so that there has been a loss of tax.

12. Even if the circumstance specified in one of those paragraphs exists and there has been a loss of tax, paragraph 46 of Schedule 18 to the FA 1998 imposes time limits for the issue of any such assessment.

13. The general rule is that a discovery assessment cannot be made more than four years after the end of the accounting period to which it relates. In this case, the assessment in respect of the 2018 AP was made on 29 September 2022 and was therefore within that four-year time limit.

14. However, the assessments in respect of the 2016 AP and the 2017 AP, which were made on 19 December 2022, were outside that four-year time limit. Nevertheless, paragraph 46(2) of Schedule 18 to the FA 1998 extends the time limit for making a discovery assessment to six years after the end of the relevant accounting period where the loss of tax in question was brought about carelessly by the company in question or a person acting on its behalf. Consequently, the assessments in respect of each of those two accounting periods are valid only if the Appellant (or a person acting on behalf of the Appellant) was careless in treating the donations made to Clydpriide in the relevant accounting period as qualifying charitable donations and that carelessness led to the loss of tax in question.

The 193 Issue

15. In Chapter 1 of Part 6 of the CTA 2010:

(1) Section 189 provides that a company can claim relief for qualifying charitable donations made in an accounting period in calculating the corporation tax chargeable for that accounting period; and

(2) Section 190 provides that, for this purpose, qualifying charitable donations include “payments which are qualifying payments for the purposes of Chapter 2 (certain payments to charity)”.

16. Section 191, which is within Chapter 2 of Part 6 of the CTA 2010, then sets out six conditions which a donation needs to satisfy if it is to be a qualifying payment. It is common

ground that the donations to which this appeal relates satisfied five of the six conditions. The only condition over which there is a dispute is Condition D in Section 191(5), which provides as follows:

“(5) Condition D is that the payment is not disqualified under section 193 (associated acquisition etc by the charity).”

17. The fact that the terms of Condition D are set out in Section 193 is why I have described the second issue in the appeal as the “193 Issue”.

18. Section 193 provides as follows:

“Associated acquisition etc

(1) A payment is disqualified under this section if—

(a) it is conditional on an acquisition of property by the charity from the company or a person associated with the company,

(b) it is associated with such an acquisition, or

(c) it is part of an arrangement involving such an acquisition.

(2) An acquisition by way of gift is to be ignored for the purposes of this section.”

19. It can be seen that the section requires, inter alia, the persons who are “associated” with the paying company to be identified.

20. To that end, Section 201 provides as follows:

“201 Associated persons

For the purposes of this Chapter a person is associated with a company if the person is connected with –

(a) the company, or

(b) a person connected with the company.”

21. Since Section 201 defines a person who is “associated” with the company by reference to connection, and there is no definition of connection within Part 6 of the CTA 2010 itself, the general definition set out in Sections 1122 and 1123 applies. These sections, in turn, depend on the definition of “control” in Sections 450 and 451 and related definitional provisions.

22. I have set out the relevant legislation in full in Appendix Two to this decision.

THE EVIDENCE

Introduction

23. The evidence at the hearing took the form of various documents and the witness evidence of LF and Officer Darren Macdonald of the Respondents. As it transpired, the witness evidence of Officer Macdonald was not relevant to any of the matters in dispute in connection with either of the two issues and therefore I will not summarise it in this decision.

The documentary evidence

24. I was provided with the following documentary evidence:

(1) the memorandum of association of Clydpride (the “memorandum”). The key relevant features of the memorandum were as follows:

- (a) the chief objects of the company were the advancement of religion in accordance with the Orthodox Jewish faith and the relief of poverty;
 - (b) the income and property of the company were to be used solely for the promotion of the company's objects and were not to be transferred directly or indirectly by way of dividend, bonus or otherwise by way of profit to the members; and
 - (c) upon winding up, the members were not to be entitled to any surplus. Instead, the surplus was required to be transferred to another charitable institution with similar objects to those of the company;
- (2) the articles of association of Clydpride (the "articles"). The key relevant features of the articles were as follows:
- (a) the members would be:
 - (i) the subscribers to the memorandum; and
 - (ii) such other persons as were admitted to be members in accordance with the articles;
 - (b) the number of members would not exceed twenty-five;
 - (c) other than the subscribers to the memorandum, no person could be admitted as a member unless he or she made an application to that effect and the board, at its absolute discretion, chose to admit him or her;
 - (d) a member would cease to be a member on, inter alia, his or her death or resignation;
 - (e) the board had the right to remove a member if, in the opinion of not less than seventy-five per cent. of the board, the member was acting in a manner prejudicial to the interests of the company and failed to remedy that conduct within one month of being required by the board to do so;
 - (f) a general meeting (the ordinary general meeting) would be held at least once each year;
 - (g) other general meetings (extraordinary general meetings) could be called by the board or, on requisition, by the members;
 - (h) subject to paragraph 24(2)(i) below, the quorum required for general meetings of the company was three members;
 - (i) if there was no quorum at a general meeting requisitioned by the members, the general meeting would be dissolved whereas, if there was no quorum at an ordinary general meeting or a general meeting called by the board, the meeting would be adjourned and, at the adjourned meeting, the members present would be deemed to be a quorum;
 - (j) the business and affairs of the company were to be managed by the board and the board could exercise all such powers of the company as were not required by the Companies Acts or the articles to be exercised by general meetings;
 - (k) the board was to be composed of not less than three and not more than ten directors;
 - (l) a director would cease to be a director on, inter alia, his or her death or resignation; and

- (m) the board had the right to appoint directors and, on an affirmative vote of not less than seventy-five per cent. of the board, remove a director;
- (3) a letter of 27 August 2010 to the Charity Commissioners of England and Wales (the “Charity Commissioners”) from LF on behalf of Clydpride in which LF explained that:
 - (a) Clydpride’s funds arose out of investments and grants made to it by the Appellant;
 - (b) the Appellant was connected to Clydpride as he was a director of both companies; and
 - (c) the owners of the Appellant had indicated their intention to liquidate the company.

LF went on as follows:

“[The Appellant], for some years, donated all its profits to [Clydpride] save that, for the last couple of years, it reduced those donations with a view to retaining some of its profits for working capital purposes. As [Clydpride’s] main source of income would be lost if [the Appellant] was liquidated, as envisaged, and as [Clydpride holds] substantial cash deposits generating a negligible rate of interest, we are minded to acquire the shares of [the Appellant], in order to safeguard [Clydpride’s] future income. To that end, [Clydpride has] commissioned a valuation of [the Appellant’s] assets with a view to acquiring that company”.

LF concluded by explaining to the Charity Commissioners that he and TF intended to carry on acting as executive director and secretary respectively of the Appellant and, as those positions were salaried, he wanted to know if there were any consequences under the Charities Act 2011 (the “CA 2011”) of their continuing so to act;

- (4) minutes of a meeting of the directors of Clydpride of 18 August 2010 at which:
 - (a) the directors approved the terms of the letter to the Charity Commissioners referred to in paragraph 24(3) above;
 - (b) subject to there being no objection from the Charity Commissioners pursuant to that letter, the directors approved the purchase of the Appellant (by acquiring the Newcom shares) for a purchase price equal to the Appellant’s net asset value;
 - (c) LF agreed that he and TF would accept reduced salaries from the Appellant with effect from 30 September 2010 although that would be kept under review; and
 - (d) the directors approved the making of a short term secured loan of £300,000 to the Appellant in return for a fee of £3,000 and interest of five per cent. per annum and it was noted that this would be beneficial to Clydpride because the funds which it held on deposit were producing a negligible return;
- (5) a letter from Mr Josh Martin of Copping Joyce, Chartered Surveyors to LF as director of the Appellant of 4 February 2011, confirming instructions to carry out a desk top valuation of twenty-two properties owned by the Appellant “which are required for transfer and assets between two of your own companies” and stating that the valuation in question was “not [to be] a Red Book valuation and to assume a willing seller to a willing buyer” and was for “internal purposes”;
- (6) a letter from Mr Martin to LF as director of Clydpride of 11 February 2011, confirming that the twenty-two properties had been valued based on research into recent

sales in the area and confirming that the valuation did not “meet the full requirements of a “Red Book” valuation as defined by the Royal Institution of Chartered Surveyors”;

(7) minutes of a meeting of the directors of Clydpride of 4 September 2013 at which it was noted that the purchase of the Newcom group had “secured investment income with which to continue our grant making ability, for the foreseeable future” and the board noted, with satisfaction, that the sales of the Appellant’s properties were proceeding well and at prices that were far in excess of the values originally attributed to the properties;

(8) minutes of a meeting of the directors of Clydpride of 11 January 2015 in which the directors again noted that the sales of the Appellant’s properties were going well and that this meant that the deferred consideration due to Venerate was being paid more quickly than had originally been anticipated;

(9) minutes of a meeting between various officers of the Respondents and Mr Brian White (“BW”) of Brian White Limited, representing Clydpride, of 27 November 2020 at which BW confirmed that the Newcom shares had been bought at their market value at the time when the SPA had been executed. The Faust family had taken the view that they did not require more wealth and that the purchase price for the Newcom shares would stay with them but that any future profits arising in the Newcom group would be for the benefit of Clydpride;

(10) an email from LF to BW of 13 May 2022 in which he stated that control of Clydpride lay “unarguably” in the unfettered hands of the directors and not the members and that “[call] them what you will, it is the bods sitting at the Board Meetings who, control the Company”;

(11) an email from BW to the Respondents of 30 September 2022 in which BW:

- (a) confirmed that no advice on the deductibility of the donations had been taken by the Appellant as no-one had considered that there was an issue to consider; and
- (b) said that, had the Appellant consulted him at the time, he would have advised the Appellant that there was no issue with claiming the relief; and

(12) various accounts and tax returns of the Appellant which revealed, in respect of each of the accounting periods specified in the table below, the following information in relation to the relevant accounting period:

Accounting period ended	Rental income accrued (£)	Taxable profits before the donation to Clydpride (the Appellant’s “PDTPs”) (£)	Donation to Clydpride (£)	Deferred consideration paid by Clydpride (£)	Deferred consideration outstanding at the end of the accounting period (£)	Difference between the donation to Clydpride and the deferred consideration paid by Clydpride (£)
Opening balance of deferred consideration					10,672,823	

24 March 2011			1,085,000			
24 December 2011	249,864	1,321,263	1,321,263	978,855	9,693,968	342,408
24 December 2012	322,673	2,959,086	2,959,086	156,898	9,537,070	2,802,188
24 December 2013	291,291	877,169	877,169	1,708,102	7,828,968	(830,933)
24 December 2014	371,153	2,570,558	2,570,558	1,478,265	6,350,703	1,092,293
24 December 2015	390,504	2,155,124	2,155,124	628,070	5,722,633	1,527,054
24 December 2016	440,416	900,237	900,237	2,074,058	3,648,575	(1,173,821)
24 December 2017	439,725	1,762,599	1,762,599	436,181	3,212,394	1,326,418
24 December 2018	434,140	3,804,196	3,804,196	367,500	2,844,894	3,436,696
24 December 2019	512,400	944,686	944,686	2,844,894	0	(1,900,209)
Total			17,294,918			

The evidence of LF

25. LF is a man of advanced years and somewhat hard of hearing. In addition, many of the events to which LF's evidence related had occurred a considerable number of years ago. Together, these features meant that the process of obtaining LF's evidence was not entirely straightforward. However, I considered LF to be an honest and credible witness and have relied on that evidence and the documentary record in reaching my findings of fact below.

26. The salient points arising out of LF's evidence were as follows:

(1) despite the concession which had been made by Mr Firth on behalf of the Appellant at the start of the hearing – to the effect that the only members of the Appellant throughout the period relevant to this decision had been himself and TF – he said that he believed that neither he nor TF had ever been a member of the Appellant. Instead, the members had been individuals unrelated to the Faust family who had been responsible for forming the company, whom he had never met and who had never undertaken any activities on behalf of the company or interfered in the running of the company;

(2) prior to the execution of the SPA, the Appellant had donated to Clydpride in each accounting period an amount equal to all of its PDTPs in that accounting period although there were a couple of accounting periods in which the Appellant had not donated an amount equal to all of its PDTPs in that accounting period to Clydpride but had instead retained an amount equal to part of its PDTPs for working capital purposes. Donating an amount equal to all of its PDTPs to a charity was tax efficient and Clydpride had been

chosen by the Appellant to be the recipient of the Appellant's donations because it was the charity which LF's mother had created and because LF was a director of Clydpriide;

(3) that connection between Clydpriide and the Appellant was the reason why the correspondence between him and Mr Martin set out at paragraphs 24(5) and 24(6) above had assumed that the hypothetical sale on which the valuation of the Appellant's properties was based was "between two of your own companies" and that the valuation was for "internal purposes";

(4) the reason why Clydpriide had acquired the Newcom group was because Venerate wished to liquidate the Newcom group and Clydpriide considered that the acquisition of the Newcom group was needed to secure the future income of Clydpriide so that it could carry on its charitable activities;

(5) Clydpriide was a substantial entity with significant investments of which the Newcom shares were only one. At the time of the hearing, it had some £40 million to £50 million of assets and, at the time when it acquired the Newcom shares, its assets were easily sufficient for it to pay the deferred consideration for the Newcom shares without recourse to future donations from the Appellant;

(6) in practice, Clydpriide had used the cash arising from the donations to pay the deferred consideration to Venerate but it was up to Clydpriide to decide how to manage its assets, including its cash. Clydpriide was obliged by the CA 2011 to manage its affairs as efficiently as possible. If it made more commercial sense to pay the deferred consideration out of cash that was in its bank account because of donations received from the Appellant than to realise other cash by disposing of one of its investments or borrowing against one of its investments, then it had an obligation to do that;

(7) from time to time, the directors of Clydpriide sought guidance from the Charity Commissioners as it was obliged to do in order to fulfill its obligations under the CA 2011 but nothing of material effect had ever been the subject of those communications and they were very much pro forma. The Charity Commissioners had not been very interventionist in relation to Clydpriide because they had had no need to be. This meant that the directors were able to run the company as they wished subject only to the duties imposed by law;

(8) he had not taken any tax advice in relation to the deductibility of the donations made by the Appellant to Clydpriide. His auditors had not raised any questions with him about the deductibility when they prepared the tax returns but he could not say whether the auditors were aware of the connection between Venerate and Clydpriide when they prepared those returns; and

(9) nevertheless, he did not think that that failure to obtain tax advice had been careless.

FINDINGS OF FACT

27. In addition to the facts set out in paragraphs 4 and 5 above, which are common ground, I make the following findings of fact for the purposes of this decision, in each case for the reason indicated:

(1) Finding – Clydpriide has been for many years the Faust family's charity.

Reason for finding – the fact that both of the members and the majority of directors on the board at all relevant times were members of the Faust family, the letter from LF to the Charity Commissioners set out at paragraph 24(3) above, the letters from Mr Martin set out at paragraphs 24(5) and 24(6) above and the evidence of LF set out at paragraphs 26(2) and 26(3) above;

(2) Finding – in practice, control of the affairs of Clydpriide at all relevant times was exercised by its board and the members played no role in running those affairs.

Reason for finding – the email from LF to BW set out at paragraph 24(10) above and the fact that LF was apparently unaware when he testified that he and TF were the members of Clydpriide and that it was not until the first morning of the hearing that the Appellant’s advisers first became aware that that was the case;

(3) Finding – for many years while it was a subsidiary of Venerate, subject to the exception mentioned in paragraph 27(4) below, it was the practice of the Appellant to make a donation to Clydpriide in each accounting period in an amount equal to all of its PDTPs in that accounting period so as:

- (a) to reduce the Appellant’s taxable profits to nil in that accounting period; and
- (b) allow Clydpriide to use the donation to carry on its charitable activities of acquiring investments and making grants.

Reason for Finding – the letter from LF to the Charity Commissioners set out at paragraph 24(3) above and the evidence of LF set out at paragraph 26(2) above;

(4) Finding – the only exception to the above practice was that, in the period preceding the sale of Newcom to Clydpriide pursuant to the SPA, there were a small number – “a couple”, according to LF in his letter to the Charity Commissioners of 27 August 2010 – of accounting periods in which the Appellant did not donate an amount equal to all of its PDTPs in that accounting period to Clydpriide but instead retained an amount equal to some of those PDTPs for working capital purposes.

Reason for Finding – the letter from LF to the Charity Commissioners set out at paragraph 24(3) above and the evidence of LF set out at paragraph 26(2) above;

(5) Finding – in each of the Appellant’s accounting periods following the acquisition of the Newcom shares by Clydpriide, the Appellant made a donation to Clydpriide in an amount equal to all of its PDTPs in that accounting period and, whilst the Net Sale Proceeds in relation to each of the properties sold by the Appellant in that accounting period were a component in the calculation of the Appellant’s PDTPs in that accounting period, they were just one of the factors taken into account in that calculation so that the Appellant’s PDTPs in any accounting period might be considerably higher or considerably lower than fifty per cent. of such Net Sale Proceeds.

Reason for finding – the information in the table set out at paragraph 24(12) above;

(6) Finding – when LF wrote to the Charity Commissioners to explain that Clydpriide proposed to acquire ownership of the Appellant, the Faust family, as the owners of Venerate through the Jersey Trusts, had determined that, subject to Venerate’s receiving an amount equal to the then-current market value of the Newcom group, they were content for all of the future growth in value of the Newcom group to be for the benefit of Clydpriide. It was for that reason that Venerate agreed in the SPA to sell the Newcom shares on the terms that it did.

Reason for finding – the terms of the SPA and the minutes of the meeting between BW and various officers of the Respondents on 27 November 2020 set out at paragraph 24(9) above;

(7) Finding – both at the time when the deferred consideration was paid by Clydpriide to Venerate and at the time of the hearing, Clydpriide had substantial assets. At the time of the hearing, LF estimated the value of Clydpriide to be approximately £40 million to

£50 million. It was therefore not dependent on the donations which it received from the Appellant to discharge the deferred consideration which became due to Venerate pursuant to the SPA.

Reason for finding – the evidence of LF set out at paragraphs 26(5) and 26(6) above;

(8) Finding – Clydpriide used the cash arising from the donations made to it by the Appellant to pay the deferred consideration under the SPA.

Reason for finding – the evidence of LF set out at paragraph 26(6) above; and

(9) Finding – the Appellant did not obtain any tax advice as to the ability of the donations to which the present decision relates to constitute qualifying charitable donations.

Reason for finding – the email from BW to the Respondents of 30 September 2022 set out at paragraph 24(11) above and the evidence of LF set out at paragraphs 26(8) and 26(9) above.

DISCUSSION

Introduction

28. As I will go on to describe, the parties found that there were quite a number of issues in relation to which they did not agree. I would normally deal, in turn, with each of the issues in dispute before ultimately reaching my overall conclusion in relation to the appeal on the basis of my conclusions in relation to those issues. However, in this decision, I am going to depart from that convention because I consider that the answer in this case is plain without my needing to reach a view in relation to most of the disputed issues.

The legal and commercial reality of the transactions

29. I will start by observing that, in my view, the Respondents have not properly understood the legal and commercial reality of the transactions which have occurred. In particular, they have:

- (1) failed to take into account the practice of the Appellant in the period when it was still a subsidiary of Venerate prior to the execution of the SPA;
 - (2) consequently, failed to distinguish between, on the one hand, the trigger for the payments of deferred consideration by Clydpriide pursuant to the SPA and, on the other hand, the trigger for the donations made by the Appellant to Clydpriide after the Appellant became a subsidiary of Clydpriide on the execution of the SPA;
 - (3) failed to take into account the fact that the cash paid by Clydpriide to Venerate by way of the consideration for the Newcom shares was paid in return for equivalent value passing from Venerate to Clydpriide under the SPA in the form of the Newcom shares;
 - (4) focused on the non-arm's length features of the SPA without apparently observing that those features – Venerate's agreement to accept the deferral of most of the consideration and Venerate's decision not to demand interest for the late payment of the deferred element of the consideration – meant that value was in fact passing from Venerate to Clydpriide as a result of the sale of the Newcom shares by Venerate to Clydpriide, and not vice versa; and
 - (5) failed to take adequate notice of the fact that Clydpriide's cash resources from time to time were something quite distinct from Clydpriide's net assets from time to time.
30. Taken together, the above points mean that the Respondents have erroneously formed the view that transactions which were intended to benefit, and did actually benefit, only

Clydpriide (and the charitable activities of Clydpriide) were transactions which were designed to benefit Venerate and, indirectly, the Jersey Trusts.

31. I would elaborate on the above view as follows.

32. Based on the facts described in paragraphs 4 and 5 above and my findings of fact in paragraph 27 above, the legal and commercial reality of the transactions which occurred is as follows.

33. For a number of years, subject to exceptions in accounting periods in which the Appellant wished to retain an amount equal to some of its PDTPs for working capital purposes, the practice of the Appellant was to donate an amount equal to all of its PDTPs in each accounting period to Clydpriide.

34. By the time that the sale of the Newcom shares was in contemplation, the Faust family had determined that they no longer wished to continue to hold the Newcom group through Venerate and that, subject to Venerate's retaining an amount equal to the then-current market value of the Newcom group, they were content for all of the future growth in value of the Newcom group to be for the benefit of Clydpriide. It was for that reason that Venerate and Clydpriide entered into the SPA on terms that, in return for the transfer of the Newcom shares, Clydpriide would pay to Venerate an amount equal to the then-current market value of the Newcom group.

35. Just pausing there, this was a generous act on the part of the Faust family, generosity which they compounded by allowing most of the consideration owed by Clydpriide to Venerate pursuant to the SPA to remain outstanding without demanding interest. The only condition which they imposed was that, as and when a property which was held by the Newcom group at the time when the SPA was executed was sold, part of the deferred consideration owed by Clydpriide to Venerate would be paid. That amount would be equal to fifty per cent. of the Net Sale Proceeds realised in relation to the relevant property.

36. Quite separately from the change in ownership of the Newcom group described in paragraph 34 above, when that change in ownership occurred, the practice I have described in paragraph 33 above continued. In other words, the Appellant continued to make a donation to Clydpriide in each accounting period in an amount equal to all of the Appellant's PDTPs in the relevant accounting period. (In passing, I should say that, in my experience, it is not uncommon for the trading subsidiaries of charities to follow this practice in relation to their taxable trading profits. In giving his evidence, LF described the practice as "lawful tax avoidance". I would go somewhat further and describe it as perfectly legitimate and appropriate tax planning using a relief for which the legislation expressly provides.)

37. The table set out in paragraph 24(12) above bears out the analysis described above. It can be seen that, not only was there a significant donation to Clydpriide by the Appellant in its accounting period ended 24 March 2011 – which preceded the acquisition of the Newcom shares by Clydpriide – but also that:

(1) the donations made by the Appellant in each accounting period following the sale were in an amount equal to all of the Appellant's PDTPs in the relevant accounting period; and

(2) as a result of the existence of taxable profits and losses in each accounting period that had nothing whatsoever to do with the sale of the properties which were held by the Appellant when the SPA was executed, the amount donated by the Appellant to Clydpriide in each accounting period bore no correlation to the amount of deferred consideration which became due from Clydpriide to Venerate as a consequence of those sales.

38. Indeed, the table I have mentioned in the above paragraph reveals that, in three of the accounting periods after the acquisition of the Newcom shares by Clydpriide – the accounting period ended 24 December 2013, the 2016 AP and the accounting period ended 24 December 2019 – the amount of deferred consideration paid by Clydpriide considerably exceeded the donation made to Clydpriide by the Appellant. In other words, those were accounting periods in which the PDTPs of the Appellant in that accounting period were lower than fifty per cent. of the Net Sale Proceeds realised by the Appellant in relation to the properties sold in that accounting period. It follows from this that, in my view, if the Appellant had made PDTPs of nil (or a tax loss) in any accounting period in which it realised Net Sale Proceeds in relation to one or more properties that it had sold in that accounting period, it would have made no donation to Clydpriide in the relevant accounting period whereas Clydpriide would still have been required to pay to Venerate, by way of discharging the deferred consideration, an amount equal to fifty per cent. of the Net Sale Proceeds in relation to those properties which the Appellant had sold in the relevant accounting period.

39. At the hearing, Miss Hughes, on behalf of the Respondents, described the statement I have just made as pure speculation and a conclusion which I was not entitled to draw. I disagree. It is absolutely plain from the evidence I have described that the quantum of the donations made by the Appellant to Clydpriide in each accounting period was dictated by, and solely by, the Appellant's PDTPs in that accounting period and not by the, quite separate, figure determined by reference to the Net Sale Proceeds in relation to the properties which were sold by the Appellant in that accounting period.

40. It is true that, in terms of cash, Clydpriide used the donations which it received from the Appellant to make the payments that became due to Venerate under the SPA. However, Clydpriide was not in any way economically dependent on those donations in order to do so. Clydpriide was, at the time when the relevant donations were made, and remains, a substantial entity which holds significant assets other than cash. It could have chosen to pay the deferred consideration out of the proceeds of realising some of its investments other than the Newcom shares or the proceeds of a borrowing from a third-party bank secured by those investments. It was entirely free to manage its assets and liabilities in whatever manner it decided, subject only to the constraints of law.

41. Having said all of that, I do not think that the way in which Venerate and Clydpriide chose to express the obligation on Clydpriide to pay the deferred consideration in Schedule 7 to the SPA was particularly clear or consistent with the legal and commercial reality of the transaction which I have just described. The relevant language said as follows:

“The Buyer may pending receipt by the Seller of the full amount of the Deferred Consideration and any interest payable sell any of the Properties provided that the same is sold at full market value and the Buyer pays to the Seller in diminution of the Deferred Consideration 50% of the net proceeds of sale after deducting, the costs of sale of such Property and any borrowing directly charged on that Property.”

42. The problem with this drafting is that it entirely disregards the legal and commercial reality that Clydpriide (the Buyer) was a totally different legal entity from each member of the Newcom group that Clydpriide was acquiring and therefore did not itself hold the properties to which reference was made. Consequently, Clydpriide itself could never receive the proceeds of selling any of those properties. Whilst the commercial intention of the drafting is plain – it is that Clydpriide would be entitled to procure that a member of the Newcom group sold a property provided that the sale was at market value and Clydpriide discharged such part of the deferred consideration as was equal to fifty per cent. of the Net Sale Proceeds arising in relation to the property that was sold, the way in which the drafting elided Clydpriide and the Newcom group

might have been taken to suggest that what Clydpriide was required to pay to Venerate by way of deferred consideration was not an amount equal to fifty per cent. of the relevant Net Sale Proceeds but rather fifty per cent. of the actual relevant Net Sale Proceeds themselves. As I have already said, this was an impossibility because Clydpriide was never going to receive the actual relevant Net Sale Proceeds themselves. It was only ever going to be able to receive an amount equal to the relevant Net Sale Proceeds from the member of the Newcom group which had sold the property in question. As a result, the payment which Clydpriide was required to make to Venerate by way of deferred consideration could never be fifty per cent of the actual relevant Net Sale Proceeds themselves.

43. I do not think that the inelegant drafting to which I have referred in paragraphs 41 and 42 above changes the legal and commercial reality of what occurred in any way. It remains the case that Clydpriide could only ever pay to Venerate an amount equal to fifty per cent. of the relevant Net Sale Proceeds and not fifty per cent. of the actual relevant Net Sale Proceeds themselves. It therefore does not affect the conclusions I have drawn as to the legal and commercial reality of the transactions in question. However, I can see that it might perhaps have contributed to the error which the Respondents have made in their analysis of those transactions.

The 193 Issue

44. Having described the legal and commercial reality of the relevant transactions as I see it, I now turn to the linked questions of whether any of the donations made by the Appellant in the relevant accounting periods can properly be said to have been either:

- (1) paid as “part of an arrangement” involving the acquisition of the Newcom shares by Clydpriide, for the purposes of Section 193(1)(c); or
- (2) “associated” with the acquisition of the Newcom shares by Clydpriide, for the purposes of Section 193(1)(b).

45. It can be seen that, in setting out those questions in the way I have, I have assumed for the moment that Venerate was a person “associated” with the Appellant for the purposes of Section 201 at all times – an assumption that, as I will go on to address, I consider to be correct from the technical perspective. In passing, I should add that this was not the Appellant’s strongest point as, whatever the technical merits of Mr Firth’s submissions on the subject, the finding of fact that I have made in paragraph 27(1) above (and the reason for that finding) suggest that Clydpriide was at all relevant times the Faust family’s charity and therefore intimately connected to the Faust family and Venerate. In fact, this appears to have been accepted by LF because, if it had not been the case:

- (1) he would not have written to the Charity Commissioners on 27 August 2010, at a time when the Appellant was still a subsidiary of Venerate, to explain that the Appellant was connected to Clydpriide; and
- (2) Mr Martin, in his letter to LF of 4 February 2011, would not have described the transaction which was to be effected by the SPA as an “internal transaction” taking place between “two of your companies”.

46. Returning to the two questions set out at paragraph 44 above, I should observe that there was considerable debate between the parties at the hearing as to the precise meaning of the words “arrangement” and “associated” in this context and that, in answering each of the questions, I propose to adopt the wide interpretation of those words which was advanced by Miss Hughes at the hearing in order to consider the Respondents’ case at its strongest.

Donations paid as “part of an arrangement” involving the acquisition of the Newcom shares

47. I start by addressing the question of whether any of the donations made by the Appellant in the relevant accounting periods can properly be said to have been paid as “part of an arrangement” involving the acquisition of the Newcom shares by Clydpriide. In this context, as I have just indicated, I propose to adopt the wide definition of “arrangement” proposed by Miss Hughes, which is the one given by Lord Walker in *Jones v Garnett* [2007] 1 WLR 2030 (“*Garnett*”) at paragraphs [47] to [50]. This reveals that:

- (1) an intention to avoid tax is not essential – see *Garnett* at paragraph [48];
- (2) nor is a high degree of complexity, artificiality or pre-planning – see *Garnett* at paragraph [49]; and
- (3) there is no precise test for what constitutes an “arrangement” because “arrangement” is a wide, imprecise word. “The planned result may be far from certain of attainment. It may be subject to all sorts of commercial contingencies over which the taxpayer has little or no control” – see *Garnett* at paragraph [50].

48. However, the fact that the word “arrangement” has a wide meaning is ultimately not relevant in this case because the question is not whether there was an “arrangement” involving the acquisition of the Newcom shares – there clearly was – but rather whether the donations made by the Appellant to Clydpriide were part of that “arrangement”. Given my view of the legal and commercial reality of the transactions in this case, as described in paragraphs 29 to 43 above, it is plain to me that they were not. With the exception of those accounting periods prior to the execution of the SPA in which the Appellant retained an amount equal to some of its PDTPs for working capital purposes, as noted by LF in his letter to the Charity Commissioners set out at paragraph 24(3) above, the Appellant donated an amount equal to all of its PDTPs to Clydpriide both before and after it became a subsidiary of Clydpriide. The acquisition therefore had absolutely no impact upon, or relevance to, the donations made by the Appellant to Clydpriide. I therefore fail to see how those donations can properly be described as being paid as part of the “arrangement” involving the acquisition of the Newcom shares by Clydpriide.

49. Putting it another way, there were effectively two “arrangements” in this case – one “arrangement” involving the acquisition of the Newcom shares by Clydpriide and another, quite separate, “arrangement” involving ongoing donations by the Appellant to Clydpriide in an amount equal to all of the Appellant’s PDTPs in each accounting period. The payments of deferred consideration were part of the former “arrangement” but the ongoing donations by the Appellant to Clydpriide were not.

Donations “associated” with the acquisition of the Newcom shares

50. Turning then to address the question of whether any of the donations made by the Appellant in the relevant accounting periods can properly be said to have been “associated” with the acquisition of the Newcom shares by Clydpriide, as I did in relation to the word “arrangement”, I propose to adopt the broad definition of the word “associated” proposed by Miss Hughes. The First-tier Tribunal (the “FTT”) in *John Harvey v The Commissioners for His Majesty’s Revenue and Customs* [2024] UKFTT 001098 (TC) (“*Harvey*”), which related to the equivalent income tax legislation, held at paragraph [230] that the word “associated” is an ordinary English word and should be construed broadly.

51. I therefore propose to construe the word “associated” in its broadest sense as meaning “connected with or related to”.

52. So, were any of the donations made by the Appellant to Clydpriide in the relevant accounting periods “connected with or related to” the acquisition of the Newcom shares by Clydpriide?

53. At first blush, the Respondents appear to be on slightly stronger ground in relation to this contention than in relation to their contention that the donations were paid as “part of an arrangement” involving the acquisition of the Newcom shares by Clydpriide. After all, as it transpired, Clydpriide used the cash which it received from the Appellant by way of the donations to pay the deferred consideration to Venerate and the deferred consideration was in return for the acquisition of the Newcom shares by Clydpriide. I have therefore considered whether this use of the cash by Clydpriide might fairly be said to have created an “association” between the donations and the acquisition of the Newcom shares for the purposes of Section 193(1)(b).

54. Although that argument is superficially attractive, I am not at all persuaded that it did. As I have already noted in discussing the legal and commercial reality of the transactions which took place, there was absolutely no causative connection between the donation in each accounting period – which was solely a function of the PDTPs of the Appellant in that accounting period and would have been paid even if Clydpriide had not acquired the Newcom shares – and the acquisition of the Newcom shares by Clydpriide.

55. Of course, there was a causative connection between the acquisition of the Newcom shares by Clydpriide and the payments of deferred consideration paid by Clydpriide to Venerate but the mere fact that Clydpriide happened to use the cash which had been generated by the donations to pay the deferred consideration as opposed to cash generated from other sources is not enough, in my view, to give rise to an “association” between the donations that had given rise to that cash in the hands of Clydpriide and the acquisition of the Newcom shares. There was no causative relationship or connection between the two matters and the two matters were entirely unrelated and unconnected. Putting it another way, the cash which Clydpriide had at its disposal as a result of receiving the donations was not the same as the donations themselves. Clydpriide could easily have generated cash from an alternative source and the fact that it chose not to do that did not give rise to a connection between the donations by which it obtained the cash and the acquisition of the Newsom shares.

Conclusion

56. In effect, both potential challenges by the Respondents founder on the fact that the donations by the Appellant were totally unrelated to the acquisition of the Newcom shares by Clydpriide. They were part of a pattern of conduct which preceded that acquisition and were solely a function of the Appellant’s PDTPs in the accounting period in which each donation was made.

57. The mere fact that, in a particular accounting period, the Net Sale Proceeds in relation to the properties sold by the Appellant in that accounting period (which triggered the requirement to pay part of the deferred consideration for the Newcom shares) may have been a factor in the calculation of the Appellant’s PDTPs in that accounting period is neither here nor there. The donation in that accounting period had an entirely different cause and measure from the cause and measure of the payments of deferred consideration. As I have already observed in paragraph 38 above, it was perfectly possible that the Appellant’s PDTPs in a particular accounting period could end up being less than fifty per cent. of the Net Sale Proceeds in relation to the properties sold in that accounting period so that the donation in that accounting period was less than the payment of deferred consideration triggered by the sale of the relevant properties.

58. Similarly, the mere fact that Clydpride chose to use the cash which it held as a result of receiving the donations, as opposed to cash generated by realising (or borrowing against the security of) one of its investments, may have connected the cash itself to the acquisition of the Newcom shares by Clydpride but that did not connect the donations which gave rise to the cash to that acquisition.

59. For the reasons set out above, I consider that the Respondents' case in this instance has no merit from the technical perspective.

60. I also think that it lacks merit in terms of fairness and justice.

61. In my opinion, it is entirely misconceived to consider that the benefit of any of the donations made by the Appellant to Clydpride were somehow "enjoyed" by Venerate or the Jersey Trusts or, as Miss Hughes put it at the hearing, "destined in part to fund Venerate and thus [LF's] family trust". The mere fact that the cash arising from the donations was used to pay the deferred consideration did not mean that the donations were not being used exclusively for the charitable purposes of Clydpride for the simple reason that the deferred consideration became due to Venerate only as a result of the receipt by Clydpride of consideration from Venerate under the SPA – in the form of the Newcom shares – that was equal in value to the consideration which Clydpride became obliged to pay to Venerate. Indeed, Venerate's willingness to leave most of the consideration outstanding for a lengthy period without claiming interest on the amount outstanding from time to time meant that the effect of the SPA was such that value actually passed from Venerate to Clydpride as a result of the SPA. Consequently, the result of the transaction was, in fact, that Venerate actually gave to Clydpride more value than it received from Clydpride. In my view, to regard the SPA as giving rise to the passing of value from Clydpride to Venerate and, through Venerate, to the Jersey Trusts is simply wrong.

62. I do not really understand why the Respondents have chosen to challenge the deductibility of donations which did not involve tax avoidance and have so clearly been used exclusively to benefit the charitable sector.

63. For the reasons set out above, I consider that the Appellant is entitled to succeed in relation to the 193 Issue.

The Discovery Issue

64. That conclusion has the effect that the Appellant is also entitled to succeed in relation to the Discovery Issue because, even if the failure by the Appellant to obtain tax advice on the deductibility of the donations as qualifying charitable donations was "careless", it follows from the conclusion I have reached above that no loss of tax has arisen as a result of that failure. The absence of a loss of tax resulting from any alleged carelessness is fatal to the Respondents' case on the Discovery Issue.

65. As it happens, I do not consider that the failure by the Appellant to obtain tax advice in this case was careless.

66. In that regard, it was common ground that:

- (1) the failure to obtain tax advice before claiming relief for the relevant donations as qualifying charitable donations would have been careless only if it involved a failure to take reasonable care – see Section 118(5) of the Taxes Management Act 1970; and
- (2) the reasonable care which should have been taken should be assessed by reference to what a prudent and reasonable taxpayer in the position of the Appellant would have done – see *Atherton v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 41 (TCC) at paragraph [37].

67. However, the parties disagreed on the question of whether a prudent and reasonable taxpayer in the position of the Appellant would have considered it appropriate to take tax advice before claiming the relief.

68. Mr Firth's position was that there was no reason in this case for a reasonable taxpayer to have considered that tax advice was necessary, because the Appellant had been making donations in an amount equal to all of its PDTPs to Clydpriide for many years. In contrast, Miss Hughes said that a reasonable taxpayer would have considered it appropriate to take tax advice because of the size of the donations and the involvement in the transactions of Venerate and the Jersey Trusts.

69. I am inclined to agree with Mr Firth on this point. In truth, the disagreement between the parties in relation to carelessness is simply another reflection of the parties' widely-divergent respective understandings of the nature of the transactions which have occurred. Whilst the Respondents see the donations as forming part of an arrangement designed to benefit a Jersey resident company (Venerate) and two Jersey resident trusts (the Jersey Trusts) – which inevitably suggests that a prudent and reasonable taxpayer would have taken tax advice in relation to the ability to claim relief for the donations – as far as the Appellant was concerned, it had been making donations to Clydpriide in an amount equal to all of its PDTPs for many years and claiming relief for the donations as qualifying charitable donations so that nothing was changing as a result of the change in ownership of the Newcom group. Since I have already indicated above that I agree with the Appellant's understanding of the transactions, it is not surprising that I have reached the conclusion that it was reasonable for the Appellant to assume that it could continue to claim relief for its donations notwithstanding the change in ownership of the Newcom group and that no tax advice was necessary.

Disposition

70. The above means that, in my view:

- (1) the assessments in respect of the 2016 AP and the 2017 AP are invalid because they were made more than four years after the end of each of those accounting periods and, even if the Appellant's failure to obtain tax advice was careless, which I do not think it was, that carelessness did not give rise to a loss of tax; and
- (2) even if the assessment in respect of the 2018 AP is valid – because it arose out of a discovery that satisfied the requirements of paragraphs 41 et seq. of Schedule 18 to the FA 1998 and it was made in time – it is wrong in law and should be reduced to nil.

71. I therefore uphold the Appellant's appeal.

OTHER POINTS

Introduction

72. The above is sufficient to dispose of the appeal but, because Mr Firth raised a number of points in relation to the proper construction and application of Section 193 in this case, and I heard lengthy submissions from both parties in relation to those points, I will now go on to set out below my conclusions in relation to those of Mr Firth's points which have not been rendered redundant by the assumptions I have made above in order to put the Respondents' case in the appeal at its strongest – in other words, my adoption of a broad construction of the words "arrangement" and "associated" in Section 193.

The purposive construction of Sections 191(5) and 193 (the "Relevant Provisions")

73. Turning then to Mr Firth's other points, the first related to the scope of the Relevant Provisions when they were construed purposively.

74. In order to address this submission, I should explain that, before the consolidation in 2010, the legislation which became the Relevant Provisions was to be found in Section 339 of the Income and Corporation Taxes Act 1988 (the “ICTA 1988”). More specifically, it was in Section 339(3E) of ICTA 1988, which was one of the amendments made to Section 339 of the ICTA 1988 by Section 26 of the Finance Act 1990 (the “FA 1990”).

75. Section 26 of the FA 1990:

- (1) made an amendment to the original legislation to clarify that relief from corporation tax for what had previously just been described as “payments” was limited to “payments of a sum of money”;
- (2) removed the absolute prohibition on relief for donations to charity by a close company; and
- (3) inserted certain provisions which would prevent a donation to charity by a close company from qualifying for relief. Those provisions specified that relief would be precluded if:
 - (a) the donation was less than £600 after deducting income tax (Section 339(3A) of the ICTA 1988);
 - (b) the donation was made subject to a condition as to repayment (Section 339(3B)(a) of the ICTA 1988);
 - (c) the paying company or a person connected with it received a benefit in consequence of the payment of more than a de minimis amount (Section 339(3B)(b) of the ICTA 1988); and
 - (d) the payment was conditional on, or associated with, or part of an arrangement involving, the acquisition of property by the charity other than by way of gift from the paying company or a person connected with it (Section 339(3E) of the ICTA 1988).

76. Section 339(3E) of the ICTA 1988 was the provision which became the Relevant Provisions on consolidation. For completeness, I would note that, before that consolidation, in 2006, the limitations set out in both Section 339(3B) and Section 339(3E) of the ICTA 1988 were extended to apply to all companies and not just close companies, by Section 58 of the Finance Act 2006.

77. Mr Firth submitted that:

- (1) the Relevant Provisions needed to be construed on a purposive basis and, specifically, by reference to the mischief which Section 339(3E) of the ICTA 1988 had been enacted to counteract;
- (2) the purpose which needed to be identified in this context was the purpose of Section 339(3E) of the ICTA 1988 specifically, and not, if different, the purpose of the changes which were made to Section 339 of the ICTA 1988 by Section 26 of the FA 1990, taken as a whole – see *McQuillan v The Commissioners for Her Majesty’s Revenue and Customs* [2017] UKUT 344 (TCC) at paragraphs [33] to [35];
- (3) in doing so, it was permissible to take into account secondary material, such as the debates which took place in Parliament in the lead up to the enactment of the FA 1990;
- (4) that material revealed that the mischief which the section was intended to address was that a close company might try to claim relief for what was effectively a donation in kind and not in cash. In the absence of the provision, a company might make a cash donation to a charity in circumstances where the intention was that the charity would use

the cash to acquire property from the paying company or a person connected with the paying company;

(5) the material did not suggest that Parliament, in enacting the provision, was intending to introduce a broad spectrum anti-avoidance regime such as the tainted donations rules which it subsequently introduced in the Finance Act 2011 and which are to be found in Section 939C; and

(6) accordingly, the Relevant Provisions should be limited in their application to cases where what appeared to be a donation in cash was really a disguised donation in kind.

78. I agree with the first three of the above submissions.

79. The Relevant Provisions do need to be construed on a purposive basis and, in doing that:

(1) it is necessary to identify the purpose of Section 339(3E) of the ICTA 1988 specifically and not, if different, the purpose of the changes which were made to Section 339 of the ICTA 1988 by Section 26 of the FA 1990, taken as a whole (although I would add that the purpose of Section 339(3E) of the ICTA 1988 specifically might well be informed by the context in which it was introduced and therefore by the other parts of the section); and

(2) it is permissible to take secondary material into account in identifying the mischief at which Section 339(3E) of the ICTA 1988 was aimed. That is exactly the approach adopted by the Supreme Court (the “SC”) when it considered the meaning of the legislation in issue in *UBS AG v The Commissioners of Her Majesty’s Revenue and Customs* [2016] UKSC 13 (“*UBS SC*”) at paragraphs [3] et seq. – see, in particular, paragraph [9]. It should be noted that this is a very different exercise in statutory construction from using secondary material to determine the meaning of a statutory provision, which is subject to much stricter constraints – see *Pepper v Hart* [1993] AC 593, Lord Mance in *Recovery of Medical Costs for Asbestos Diseases (Wales) Bill: Reference by the General Counsel for Wales* [2015] UKSC 3 at paragraph [55] and the Judicial Committee of the Privy Council in *Presidential Insurance Company Limited v Resh St Hill* [2012] UKPC 33 at paragraphs [23] and [24].

80. However, I do not see anything in the secondary material applicable in this case which supports the three remaining submissions.

81. It is true that that secondary material reveals that, when enacting Section 26 of the FA 1990, Parliament was concerned to make it clear that the donations referred to in Section 339 of the ICTA 1988 were donations in cash and not in kind. That was why the words “of a sum of money” were inserted into Section 339(1) of the ICTA 1988. However, the mere fact that Parliament was intending to limit relief to donations which were made in cash says nothing whatsoever about Parliament’s purpose in enacting Section 339(3E) of the ICTA 1988. Instead, when that provision is read in context, and in the light of the statement in Parliament that it is part of measures which are designed to prevent tax avoidance, it is plain that, in the context of a donation by a close company, Parliament was intending to limit relief to a cash donation which was made without any ulterior use or purpose beyond the donation itself.

82. Hence, in relation to a payment by a close company, Section 339(3B)(a) of the ICTA 1988 precluded relief for a payment which was subject to a condition as to repayment, Section 339(3B)(b) of the ICTA 1988 precluded relief for a payment where the paying company or a person connected with it received a benefit in consequence of the payment of more than a de minimis amount and Section 339(3E) of the ICTA 1988 precluded relief for a payment where the payment was conditional on, or associated with, or part of an arrangement involving, the

acquisition of property by the charity from the paying company or a person connected with the paying company, other than by way of gift.

83. In fact, it seems to me from the extract from Hansard to which I was directed at the hearing that, in enacting these provisions, there may have been some confusion within Parliament as to whether Section 339(3E) of the ICTA 1988 was aimed at disqualifying a donation linked to an acquisition of property by the charity from the paying company or a person connected with the paying company or vice versa. I say that because the example given by the Economic Secretary to the Treasury (Mr Richard Ryder) when introducing the legislation made reference to a disposal of property by the relevant charity to the paying company as opposed to an acquisition of property by the relevant charity from the paying company or a person connected with the paying company. Mr Ryder said as follows:

“If donors want to make separate arrangements with charities to pay for goods and services supplied by a charity, they are free to do so, but they should keep such arrangements apart from their gift aid gifts. If they don’t, complications may be introduced into an otherwise straightforward scheme”.

84. I think this is instructive because it strongly suggests that the purpose of Parliament in enacting the provision had nothing whatsoever to do with ensuring that only donations in cash fell within the scheme. After all, had that been the case, then Mr Ryder would have got the donor and the acquirer the right way around in the example he gave. Instead, it is plain that his focus was on ensuring that only donations which were not linked to a transfer of property between the charity and the paying company or a person connected with the paying company qualified for relief. As stated by Mr Ryder, the aim was clearly to avoid complications creeping into an otherwise straightforward scheme for giving relief for cash donations.

85. I do not think that it advances the debate in relation to construction to say that, as so construed, there might well have been circumstances falling within Section 339(3E) of the ICTA 1988 that did not involve tax avoidance. Nor does it advance that debate to say that, as so construed, there might well have been circumstances involving a payment linked to the acquisition of property by the charity that fell outside Section 339(3E) of the ICTA 1988. The fact is that the debate recorded in Hansard suggests that Parliament identified that a donation which was linked to the transfer of property between the charity and the paying company or a person connected with the paying company might give rise to an inappropriate advantage and ruled such donations out of the scheme to the extent that the transfer of property in question was to the charity and not by the charity.

86. In short, I broadly agree with the FTT in *Harvey* – which was addressing the equivalent legislation in the income tax legislation – when it said at paragraphs [222] to [225], that:

- (1) the legislation in what is now Sections 191 to 198 was “deliberately broad and widely framed”;
- (2) the aim of the provisions as a whole “carefully strips away the possibility that the gift may have arisen in circumstances where some ulterior use or purpose beyond a charitable donation exists”; and
- (3) the conditions in what is now Sections 191 to 198 “are understandable, capable of straightforward application and require no gloss to be added”.

87. For the above reasons, I consider that the purposive construction of the Relevant Provisions is that they prevent relief from being claimed for a cash donation which is made in any of the circumstances described in Section 193, regardless of whether or not, in a particular case, the relevant circumstances have given rise to tax avoidance or involve dressing up what is in substance a donation in kind as a cash donation.

Does the association between the property transferor and the donor need to be part of the arrangement?

88. Mr Firth's second point was that, on a proper construction of the language used in the legislation, where the person disposing of the property to the charity was a person associated with the donor, it was not sufficient that that association existed. Instead, the association between the property transferor and the donor needed to be part of the arrangement. Although he initially denied that this was the same as saying that the donor needed to be aware of the association at the time of making its donation, he subsequently accepted that the two were effectively the same because it was impossible for the association to be part of the arrangement unless the donor was aware of the association.

89. I can see no basis for this interpretation of Section 193(1)(c) given the manner in which Section 193 as a whole is laid out.

90. Section 193(1)(a) applies to a donation which is conditional on an acquisition of property by the charity from the donor or a person associated with the donor. Likewise, Section 193(1)(b), when construed in line with the section preceding it, to which it expressly refers, applies to a donation which is associated with an acquisition of property by the charity from the donor or a person associated with the donor. The section simply refers to "such an acquisition", which means that it requires the reader to read the section as referring to the type of acquisition mentioned in the previous section. In each case, therefore, the applicability or otherwise of the relevant section turns on:

- (1) first, identifying whether there has been an acquisition of property by the charity from the donor or a person associated with the donor; and
- (2) secondly, whether the relevant donation was either conditional on, or associated with, that acquisition.

91. When one then turns to Section 193(1)(c), it is notable that it uses precisely the same formulation as the one used in Section 193(1)(b). In other words, the applicability or otherwise of the section turns on:

- (1) first, identifying whether there has been an acquisition of property by the charity from the donor or a person associated with the donor; and
- (2) secondly, whether the relevant donation was part of an arrangement involving that acquisition.

92. There is no indication in the manner in which the section is set out and when that is read in the light of the two previous sections that the fact that the transferor of property in question was the donor or a person associated with the donor needs to have been one of the terms of the arrangement. There merely needs to have been an acquisition of the relevant kind falling within the same arrangement as the donation. To say otherwise would be to introduce an unwarranted element of subjectivity into a test that is wholly objective. An attempt to do something similar in relation to legislation imposing tax on loans received "in connection with" employment failed in the Court of Appeal (the "CA") in *The Commissioners for His Majesty's Revenue and Customs v Marlborough DP Ltd* [2025] EWCA Civ 796. It was held that the legislation in question imposed an objective test and there was no basis for reading it as if it included a causative element. I think that the same applies here.

The time at which association should be tested

93. Mr Firth's third point related to the time at which the association between the donor and person making the property transfer needed to be tested in the context of the Relevant Provisions. In his view, this had to be at a single point in time. He said that the approach

advocated by Miss Hughes – which was that the test needed to be applied on an ongoing basis over a period of time – was unworkable and there was no authority for it in the language of the Relevant Provisions. In this regard, Mr Firth contrasted the language used in the tainted donation provisions in Section 939C – which expressly required the question of whether a person was connected to the donor to be determined at one of a number of specifically-identified “relevant times” – with the absence of any such equivalent approach in the Relevant Provisions.

94. He went on to say that, given that the association had to be tested at a single point in time, there were only two candidates:

- (1) the point at which the relevant donation was made; or
- (2) the point at which the relevant property transfer was made.

Mr Firth submitted that it had to be the former time because that was when the legislation had to be applied. The donor would need to know when it completed its tax return for the accounting period in which the donation was made whether the Relevant Provisions applied to the donation or not. In a case where the relevant property transfer was to be made only after the donation was made, it would not be possible for the donor to know whether the property transferor was going to be associated with it at the relevant future date and that could be a long way in the future. In construing legislation, there was a presumption against absurdity – see *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 (“*PACCAR*”) at paragraphs [37] and [43].

95. I agree with Mr Firth that, given the absence of an express reference to “relevant times” such as appears in the tainted donation provisions, the language used in the Relevant Provisions is not apt to suggest that the existence of an association between the donor and the property transferor can be tested over a period of time. Instead, I agree that the question needs to be considered at a single point in time.

96. However, I disagree with Mr Firth in relation to the identity of that single point in time because, on my reading of the legislation, that is most naturally the moment at which the relevant property transfer is made and not the moment when the relevant donation is made. My reason for saying that is that it is the acquisition of the property from the donor or a person associated with the donor which brings the section into play in relation to a donation. It is at that moment that consideration needs to be given to the potential application of the provision and that is the mischief at which the provision is aimed. It therefore seems to me to be most logical for the association between the donor and the property transferor to be tested at the point when the relevant acquisition is made and it becomes necessary to consider whether the section applies.

97. I would add that this reasoning is also entirely consistent with the way I have approached Mr Firth’s second point in paragraphs 88 to 91 above. As I have noted in that context, in each of the three sections, it is necessary first to identify an acquisition of property from the donor or a person associated with the donor and then to ask if the donation was conditional on, associated with, or part of an arrangement involving, that acquisition. It is therefore entirely appropriate to test for association at the point of the acquisition rather than at the time the relevant donation is made.

98. It follows that, in my view, in the present case, whether or not the Newcom shares were acquired by Clydpriide from a person associated with the Appellant needs to be tested at the point when the SPA was executed and not at each (later) date when a donation was made.

99. I note that, although the decision in *Kellogg Brown & Root Holdings (UK) Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2010] EWCA Civ 118 (“*Kellogg Brown*”) was dealing with a slightly different issue – namely, whether connection for the purposes of Section 18 of the Taxation of Chargeable Gains Act 1992 should be determined at the time of the disposal agreement or the time when the disposal agreement becomes unconditional – this conclusion is entirely consistent with the reasoning adopted by the CA in that case at paragraphs [22] to [24].

100. In reaching this conclusion, I recognise that there might be an unusual situation where an arrangement is such that the property acquisition does not occur until a considerable period of time after the relevant donation has been made. However, I do not think that that unlikely possibility should negate what I consider to be the much more natural reading of the legislation. It certainly does not mean that that more natural reading should be discarded on the basis that it produces absurdity. In the vast majority of cases, if there is an arrangement involving a donation and an acquisition of property by the charity, then those two events are likely to be quite proximate. At the very least, if the acquisition of the property is planned to occur a long time after the donation has been made, the donor is highly likely to be aware, at the point of making the donation, that there might be a connection between it and the property transferor when the acquisition by the charity occurs.

101. In short, as Lord Sales put it in *PACCAR* at paragraph [43], a court should not “rely on the presumption against absurdity in order to substitute their view of what is reasonable for the policy chosen by the legislature, which may be reasonable in its own estimation”. In this case, it is not at all unreasonable for Parliament to have enacted a provision which required association to be tested when the property acquisition was made and this, in my view, is what Parliament has done.

The association between Venerate and the Appellant

Introduction

102. Mr Firth’s fourth point was actually a number of different points, all of them relating to the question of whether, on the facts in this case, Venerate was associated with the Appellant on and after the execution of the SPA. Mr Firth accepted that, prior to the execution of the SPA, Venerate and the Appellant were associated because the Appellant was Venerate’s 100% indirect subsidiary. However, he submitted that the connection between Venerate and the Appellant ceased at the time when the SPA was executed because:

- (1) it was at that point that Venerate ceased to have control of the Appellant and control of the Appellant passed to Clydpriide; and
- (2) Venerate and Clydpriide were at no point under common control.

103. As I have already trailed, quite a number of issues arose under this heading as follows:

- (1) first, given the conclusion I have reached that the time for determining whether or not Venerate and the Appellant were associated for the purposes of Section 193 was the moment when the SPA was executed and Clydpriide acquired beneficial ownership of the Newcom shares, it is necessary to consider whether Venerate and the Appellant were associated at that specific time by virtue of Venerate’s control of the Appellant and without regard to Clydpriide;
- (2) secondly, insofar as it is necessary to trace any association between Venerate and the Appellant through Clydpriide, it is necessary to identify whether the person or persons who are alleged to have controlled Clydpriide at any time had actual control of Clydpriide as specified in Section 450(2) (“actual control”) and/or were deemed to control Clydpriide at the relevant time (because of the rights and powers in relation to Clydpriide which, at

that time, were held by, or attributed to, him, her or them (as specified in Section 450(3)) (“deemed control”);

(3) thirdly, in addressing the second issue, it is necessary to identify the respective rights of actual control and the respective rights and powers of, on the one hand, the directors of Clydpriide and, on the other hand, the members of Clydpriide; and

(4) fourthly, it is necessary to consider whether the fact that Clydpriide is a charity – so that the directors and the members are subject to the constraints of the charities legislation in the manner in which they exercise their rights and powers and are subject to a fiduciary obligation to exercise their rights and powers in furtherance of the charitable objects of Clydpriide – affects the conclusions to be drawn in relation to the above issues.

The association between Venerate and the Appellant at the time when the SPA was executed

104. In the light of the conclusions set out in the sections which follow in relation to the other issues set out in paragraph 102 above, it is not strictly necessary for me to express a view on the first issue set out above. As I will go on to explain, I believe that Venerate and the Appellant were associated for the purposes of Section 201 at all relevant times and that their association did not cease by virtue of the acquisition of the Newcom shares by Clydpriide on the execution of the SPA. Nevertheless, since this was a point of dispute between the parties, I will set out my view on it.

105. Mr Firth submitted that, as Venerate and the Appellant ceased to be associated by virtue of the execution of the SPA, the two companies were not associated at the precise moment in time at which the SPA was executed. This was because, at that time, Clydpriide replaced Venerate as beneficial owner of the Newcom shares and Clydpriide was not associated with Venerate.

106. Mr Firth relied on the FTT decision in *HSP Financial Planning Ltd v The Commissioners for Her Majesty’s Revenue and Customs* [2011] UKFTT 106 (TC) (“HSP”) as support for this proposition. In that case, a deduction claimed by the appellant for the amortisation of goodwill it had acquired was not available unless, at the time the goodwill was acquired, the disponors of the goodwill were not related to the appellant. The acquisition of the goodwill had occurred under a sale agreement under which the disponors had disposed of the goodwill to the appellant in return for shares and the acquisition of the shares by the disponors pursuant to that agreement was the event which made the disponors related parties to the appellant. The FTT held that, as the transfer of the goodwill and the issue of the shares had taken place simultaneously, the disponors were related parties at the time of the acquisition. It did not matter that they were not related parties before the acquisition.

107. Mr Firth said that, by parity of reasoning, since Venerate ceased to be the beneficial owner of the Newcom shares when the SPA was executed, it was not associated with the Appellant at that time if that was the time relevant for testing association for the purposes of Section 201.

108. In response, Miss Hughes said that the decision in *HSP* related to legislation which had the purpose of disallowing amortisation for goodwill owned prior to 1 April 2002 that was then transferred to a related party so that it remained within the same economic ownership after the transfer. In that context, a purposive construction of the relevant legislation required that disponors becoming related parties by virtue of transferring goodwill in exchange for shares should be treated as related parties at the time of the acquisition. A wholly different purpose informed the enactment of Section 193, which was designed to prevent donations linked to the acquisition of property by the charity from the donor or a person associated with the donor from qualifying for relief. Moreover, the use of the preposition “from” in Section 193(1)

showed that, if the right time to test for association in the context of Section 193 was solely the time when Clydpriide acquired the Newcom shares, then the test should be applied immediately before the SPA was executed and the acquisition occurred.

109. I do not find this an easy question to answer. However, I am inclined to agree with Miss Hughes that, after taking into account:

- (1) my understanding of the purpose underlying Section 193 as I have articulated it in paragraphs 72 to 86 above; and
- (2) the preposition “from” in the section,

where a donation has been made which is conditional on, associated with, or part of an arrangement involving, the acquisition of property by a charity from a person who was associated with the donor immediately before the acquisition but ceased to be associated with the donor at the very point of acquisition, the better view is that the language used in the relevant limb of Section 193 should be regarded as having been satisfied. After all, the property acquired by the charity in that instance will have been property beneficially owned immediately before the acquisition by a person associated with the donor and that seems to me to be something which Parliament would have intended to fall within the scope of Section 339(3E) of the ICTA 1988.

110. That having been said, for the reasons I am about to rehearse, I do not think that the above is of great relevance in the present context because, in my view, Venerate continued to be associated with the Appellant even after the SPA was executed and Clydpriide acquired beneficial ownership of the Newcom shares.

The association between Venerate and the Appellant after the SPA was executed

Control of Clydpriide – actual control to be determined at member level or board level

111. In relation to the remaining issues set out in paragraph 102 above, the authorities make it clear that actual control of a company for the purposes of Section 450(2) lies with the company’s members and not with the company’s board – see *Steele v EVC International NV* [1996] STC 785 at 794-5, referring to earlier cases such as *IRC v BW Noble Ltd* 12 TC 911, *British-American Tobacco Ltd v IRC* 29 TC 49 and *J Bibby & Sons Ltd v IRC* 29 TC 167, where it was simply assumed that a company is controlled by its members. That is the case no matter how extensive the powers of the board may be in controlling the affairs of the company. It is customary for the members of a company to delegate to the board the power to manage the affairs of the company, whilst the members retain ultimate control of the company through their ability:

- (1) to appoint and remove directors; and
- (2) to change the articles.

112. In this case, the members of Clydpriide had the ability to remove the directors of the company although that was not by virtue of an express term to that effect in the articles. Instead, their power to remove the directors arose pursuant to the general power in Section 168 of the Companies Act 2006.

113. The members also had the right to amend the articles pursuant to Section 21 of the Companies Act 2006.

114. The members therefore had all of the rights which previous case law suggests are indicative of the members’ having actual control for the purposes of Section 450(2) with the possible exception of the right to appoint directors. I say “possible” exception because the relevant case law shows that the members of a company have an inherent power to appoint

directors unless, on a proper construction of the articles, that inherent power has been excluded – see *Worcester Corsetry Ltd v Witting* [1936] Ch 640 and *Clarke v Lakha* [2024] EWHC 51 (Ch) – and I heard no argument from the parties as to whether or not the articles in this case should be construed as having excluded that right.

115. Leaving that aside for the moment, there were some features governing the relationship between the members and the directors in this case which merit further consideration. In particular, as mentioned in paragraph 24(2) above:

- (1) other than the subscribers to the memorandum, no person could be admitted as a member unless he or she made an application to that effect and the board, at its absolute discretion, chose to admit him or her;
- (2) the board had the right to remove a member if, in the opinion of not less than seventy-five per cent. of the board, the member was acting in a manner prejudicial to the interests of the company and failed to remedy that conduct within one month of being required by the board to do so; and
- (3) the board had the right to appoint directors and, on an affirmative vote of not less than seventy-five per cent. of the board, remove a director.

116. In the period leading up to the hearing, when the Appellant was still maintaining that the members of the company were persons unrelated to the Faust family, the Respondents sought to rely on the above features as showing that actual control of the company for the purposes of Section 450(2) was vested in the board and not the members whereas, for its part, the Appellant maintained that actual control of the company for the purposes of Section 450(2) was vested in the members based on the case law referred to in paragraph 110 above (or, because of the impact on the rights of the members of the constraints of the charities legislation and the members' fiduciary obligation to exercise their rights and powers in relation to the company in furtherance of the charitable objects of the company, either that no-one had actual control of Clydpriide or that actual control of Clydpriide was vested in a combination of the members and the Charity Commissioners, taken together (as to which see further below)).

117. Of course, the respective arguments of the parties shifted somewhat after the revelation at the start of the hearing that LF and TF were in fact the only members of the company during the relevant period. That, of course, meant that members of the Faust family comprised a majority at both member and board level at all relevant times. Consequently, it became somewhat less pressing for the Respondents to succeed in persuading me that actual control of Clydpriide was vested in Clydpriide's board. Instead, their focus shifted into persuading me that actual control of Clydpriide was vested either in the board or in the members or in a combination of the board and the members, taken together. There was a corresponding shift in the position of the Appellant, which dispensed with the argument that actual control of Clydpriide was vested in the members and sought instead to persuade me that the impact on the rights of the members of the constraints of the charities legislation and the members' fiduciary obligation to exercise their rights and powers in relation to the company in furtherance of the charitable objects of the company meant that no-one had actual control of Clydpriide or that actual control of Clydpriide was vested in a combination of the members and the Charity Commissioners, taken together.

118. The above meant that the primary focus of the submissions at the hearing in relation to control of the company was less about the rights of the directors in relation to the company relative to the rights of the members in relation to the company than about the impact of the restrictions placed on the members referred to above on the members' ability to have actual control of the company. Nevertheless, before I address the latter question, I do need to address the logically prior question of whether the rights of the directors in relation to the company

relative to the rights of the members in relation to the company meant that it was the directors who had actual control of the company. In that regard, I do not think that the rights of the directors in relation to Clydpriide were such as to confer on them actual control of the company for the purposes of Section 450(2).

119. After all, the members, and only the members, had the right to amend the articles. They also had the right to remove the directors and possibly also the right to appoint the directors, albeit that the board had similar rights of removal and appointment of directors.

120. As for the rights of the directors in relation to the appointment and removal of members, I do not think that the ability of the directors to remove a member who committed an unremedied default was of particular significance given that:

(1) a member could always ensure that the contingency leading to the crystallisation of that right never arose; and

(2) it is commonly the case that a member in a company limited by shares can be required to forfeit his or her shares if he or she fails to pay a call on the shares.

121. Turning to the directors' unfettered right to refuse to approve the appointment of a new member, that did not give the directors a positive right to appoint new members. It merely enabled the directors to block the appointment, as a new member, of a person who applied to be a member. In addition, once appointed, the member in question was free to act without hindrance by the directors and could not be removed by the directors as long as he or she did not commit an unremedied breach.

122. Most critically of all, overlying the whole of this analysis, by virtue of their right to amend the articles, the members were in a position:

(1) to give themselves the right to appoint the directors insofar as the articles excluded that right; and

(2) to remove all or any of the powers of the directors referred to in paragraph 24(2) above.

123. Taking all of the above into account, I have concluded that, based on the applicable case law, as between the members and the board, it was the members rather than the board who had actual control of the company for the purposes of Section 450(2).

124. I reach that conclusion despite the fact that the evidence shows that:

(1) in practice, the affairs of the company were run by the board and the members played no role in that process. Indeed, as I have mentioned above, it was not until the first morning of the hearing that the Appellant's advisers conceded that the members of the company were LF and TF instead of persons unrelated to the Faust family as they had been contending throughout the dispute and, even then, when LF gave his evidence, he said that he was not aware that he and TF were actually members; and

(2) since there were only two members and the quorum for general meetings in the articles was three, in order to exercise their control, the members were reliant on those provisions in the articles which allowed inquorate meetings to be adjourned and reconstituted with a lower quorum.

125. The fact remains that, whilst this may be an extreme example of circumstances where, in practice, a company is run by its board with little engagement by its members, the members had ultimate control over the company through their ability to remove the directors and to change the articles, albeit subject to the caveats referred to above and despite the fact that they did not exercise the relevant rights or even, apparently, realise that they had them.

The limitations on the members' exercise of control

126. However, as I have already indicated, that is not the end of the discussion because Mr Firth submitted that, in this case, the fact that the rights and powers of the members were subject to:

- (1) the constraints imposed by the charities legislation; and
- (2) their fiduciary obligation, as members of a charity, to exercise their rights and powers in relation to the company in furtherance of the charitable objects of the company

meant that LF and TF, as the members of Clydpride, did not have control of Clydpride. Instead, he said, either no-one had control of Clydpride or control of Clydpride was vested in a combination of LF and TF and the Charity Commissioners, taken together.

127. Starting with actual control for the purposes of Section 450(2), Mr Firth said as follows:

- (1) the way in which the members of a company generally exercise actual control of the company is by virtue of two distinct rights and powers – the right to appoint and remove the directors of the company and the right to change the company's articles;
- (2) the members of a company which is not a charity are entirely free in the manner in which they exercise those rights and powers. They can:
 - (a) make whatever decisions they wish to make; and,
 - (b) in doing so, base their decisions on their own self-interest and without regard to the interests of the company or anyone else;
- (3) in contrast, the members of a charitable company such as Clydpride do not have the same freedom to exercise those rights and powers;
- (4) first, as a result of being subject to the constraints of the charities legislation, they are not free to make whatever decisions they wish to make. For instance:
 - (a) they are subject to the jurisdiction of the court as regards the administration of charities – see the SC in *The Children's Investment Fund Foundation (UK) v Attorney General* [2020] UKSC 33 ("*CIFF SC*") at paragraph [214];
 - (b) the consent of the Charity Commissioners is required for various specified changes to the company's articles of association and various specified transactions – see Sections 198 and 201 of the CA 2011; and
 - (c) the Charity Commissioners are also empowered to suspend or remove the directors of the company in various specified circumstances – see Sections 76 and 79 of the CA 2011;
- (5) secondly, they cannot base their decisions on their own self-interest and without regard to the interests of the company or anyone else because they have a fiduciary obligation to exercise their rights and powers as members in furtherance of the charitable objects of the company. As such, they are in a similar position to members of a company who hold their rights and powers in relation to the company on trust for other persons. The fact that Section 451(3) stated expressly that, where rights and powers were held on trust for other persons, the rights and powers were to be attributed to the other persons (and, by implication, were not to be regarded as being held by the trustee) and that the legislation contained no equivalent provision for rights and powers which were subject to a fiduciary obligation as to purpose suggested that, in the latter case, there was no-one to be treated as holding the relevant rights and powers; and

(6) the above two points meant that the members of Clydpriide did not have a free hand as to how they exercised their rights and powers as members. Notably, they were not able to vote on their own appointment as directors – see *CIFF SC* at paragraph [103].

128. Mr Firth said that similar points to those set out in paragraphs 127(3) to 127(6) above arose in relation to deemed control for the purposes of Section 450(3). Section 450(3)(b) referred to “the greater part of the voting power” in the subject company but did not specify the issues to which that voting power needed to relate. For example, it was possible to conceive of circumstances in which the members of a company had variable levels of voting power on different issues. Mr Firth submitted that, in that instance, the key issues to which the voting power needed to relate in applying Section 450(3)(b) were the right to appoint and remove the directors of the company and the right to change the company’s articles. Thus, precisely the same limitations as those set out at paragraphs 127(3) to 127(6) above in relation to actual control for the purposes of Section 450(2) arose in relation to the voting power in a charitable company for the purposes of Section 450(3)(b).

Discussion

Introduction

129. My starting point in addressing this question is to note that it would be surprising, to say the least, if:

- (1) the fact that the members of a charitable company are at all times subject to the constraints of the charities legislation and have a fiduciary obligation to exercise their rights and powers as members in furtherance of the charitable objects of the charitable company were to mean that no-one can ever be treated as controlling a charitable company or that a charitable company must always be regarded as being under the joint control of its members and the Charity Commissioners, taken together; or
- (2) Clydpriide, a company with only two members, both of whom at all relevant times were members of the Faust family and a board with a majority at all relevant times of members of the Faust family, were not to be treated as being controlled by one or more members of the Faust family for the purposes of Section 450.

130. Leaving the second of those points aside for the moment, Mr Firth’s proposition that the members alone did not have control of Clydpriide – whether actual or deemed – was founded on two distinct bases, as set out at paragraphs 127(4) and 127(5) above. It is worth observing at this point that, although both of those bases led, in Mr Firth’s submission, to the same conclusion – which is to say that the members of a charitable company alone do not have control of the charitable company for the purposes of Section 450 – they depend on slightly different reasoning.

131. The first basis – being subject to the constraints of the charities legislation (see paragraph 127(4) above) – depends for its efficacy on the proposition that the number of decisions which the members have the ability to make on an unencumbered basis by exercising their rights and powers are too limited to mean that the members have control of the company. In effect, they do not satisfy the test set out at paragraph 127(2)(a) above. The second basis is slightly different from that in that it depends for its efficacy on the proposition that, in exercising their rights and powers, the members are not free to act in their own self-interest and without regard to the interests of the company or anyone else but instead have a fiduciary obligation to act in furtherance of the charitable objects of the company. In effect, they do not satisfy the test set out at paragraph 127(2)(b) above. I will therefore deal with each of these points separately.

The constraints of the charities legislation

132. I do not agree with Mr Firth’s first basis.

133. Contrary to the assertion set out in paragraph 127(2)(a) above, the members of a company which is not a charity are not entirely free to exercise their rights and powers in relation to the company by making whatever decisions they wish to make in relation to the company. Every member of a company, no matter the sector in which the company operates, is required to comply with the laws and regulations to which that company is subject. For example, a member cannot exercise his or her rights and powers in a way which would lead the company to be in breach of the legislation applicable to companies in its jurisdiction of incorporation. In addition, there are limitations in common law which inevitably impinge on the decisions which the member is able to make.

134. Expanding the brief a little further, a number of companies operate in sectors other than the charity sector where they are required to comply with the laws and regulations applicable to that sector. For example, banks and other types of financial institutions are required to comply with the regulatory regime to which such entities are subject, public companies are required to comply with the rules of the exchange on which they are listed, and so on. Whilst the charity sector may be more highly regulated than most, the difference is one of degree and not of principle. What matters is not the extent to which the members are constrained by applicable law and regulation but the degree of control which the members are entitled to exercise within the parameters of the applicable law and regulation.

135. I therefore do not agree that the fact that the members of a charitable company are subject to the constraints of the charities legislation deprives the members of either actual control of the company for the purposes of Section 450(2) or the voting power in the company, and hence, deemed control for the purposes of Section 450(3).

Fiduciary obligation to act in furtherance of the charitable objects of the company

136. I am equally unpersuaded by the second basis for Mr Firth's submission.

137. My reason for saying that is that just because the members of a charitable company are required to exercise their rights and powers in relation to the company in a way that furthers the charitable objects of the company does not mean that they do not beneficially own those rights and powers. As Lady Arden made clear in *CIFF SC* at paragraph [50], the fiduciary duty owed by a member of a charitable company is owed not to the company itself but to the charitable objects of the company. Thus, the fiduciary obligation of the members of a charitable company in this regard is very different in nature from the fiduciary obligation owed by a person holding assets on trust for other persons. In the latter case, the trustee is not the beneficial owner of the asset (and hence the rights and powers attaching to the asset) in question. Instead, beneficial ownership belongs to the beneficiaries in accordance with the terms of the trust. In contrast, in the former case, despite his or her fiduciary obligation to act in furtherance of the charitable objects of the company, the member remains the beneficial owner of the rights and powers attaching to his or her membership interest.

138. The control legislation recognises this difference in nature between the two scenarios by:

- (1) in the case of membership interests held on trust for other persons, setting out specific rules for determining the persons who are to be treated as holding the rights and powers of the trustee. These depend on the nature of the particular trust – for example, whether it is a bare trust or a settlement; and
- (2) in the case of membership interests in a charitable company which are subject to the fiduciary obligation to further the charitable objects of the company, remaining silent.

139. In short, the existence of the fiduciary obligation to act in furtherance of the charitable objects of the company has no impact on the location of beneficial ownership of the rights and powers relating to the company. Beneficial ownership of those rights and powers remains with

the member. The fiduciary obligation merely informs and qualifies the basis on which the member can exercise those rights and powers which he or she holds.

140. I would add that the fiduciary obligation owed by the members of a charitable company to exercise their voting rights in furtherance of the charitable objects of the company are not very different from the constraints on the members of every company to comply with the principles of law and equity in exercising their rights and powers, for example, the rule preventing the oppression of minorities – see Lady Arden in *CIFF SC* at paragraphs [88] and [89]. So it is not entirely accurate to say that the members of a company which is not a charitable company have no fiduciary obligation constraining their ability to exercise their rights and powers in their own self-interest.

141. It seems to me that Mr Firth’s analogy between trusts for persons and a fiduciary obligation as to purpose overlooks the distinction I have drawn above. He seeks to extrapolate from the provisions that exist in the control legislation in relation to trusts for persons a general principle to the effect that a person who has any kind of fiduciary obligation as regards an interest in a company should not be treated as holding the rights and powers attaching to that interest. I do not think that any such general principle exists. Indeed, Lady Arden in *CIFF SC* at paragraph [37] counselled against the assumption that a person owing fiduciary duties in relation to the charitable objects of a charity was in the same position as a trustee owing fiduciary duties to a beneficiary under a private trust.

142. A recent and pertinent example of this point, which relates to a charitable trust, is to be found in the decision of the CA in *UBS v The Commissioners for Her Majesty’s Revenue and Customs* [2014] STC 2278 (“*UBS CA*”). In *UBS CA*, at paragraphs [90] to [102], the CA addressed the question of whether UBS had exercised control over Mourant, a company acting as the trustee of the charitable trust which held the majority of the voting shares in the subject company (ESIP). At paragraph [99], the CA referred to the following dicta from the Upper Tribunal (the “UT”) decision in the case:

“On the face of it, shareholder control of ESIP clearly resided with Mourant, not with the minority voting shareholder UBS. Equally, it would on the face of it have been a serious breach of Mourant’s fiduciary duties as a charity trustee to cede that control to its unrelated minority co-shareholder.”

143. It seems to me to be implicit in that extract that the UT was accepting that, despite Mourant’s fiduciary obligation as the trustee of the charitable trust holding the shares in ESIP, control of ESIP was nevertheless vested in Mourant. That was why the UT had to address the question of whether the rights and powers of UBS in relation to Mourant served to deprive Mourant of that control. The CA went on to agree with the UT on this question. (Although the SC in *UBS SC* reversed the decision of the CA in *UBS CA*, it did not address the issue described above.) If Mr Firth’s position on this point were to be correct, both the UT and the CA would have missed a point of some significance in relation to the question of control in dealing with that issue.

Prior case law on the meaning of the word “control”

144. Moreover, I do not see how the conclusion I have drawn in paragraphs 132 to 143 above is gainsaid by any of the authorities cited to me by Mr Firth in relation to the word “control” at the hearing. Those were:

- (1) *R (oao) Wang v Secretary of State for the Home Department* [2023] UKSC 21 (“*Wang*”);
- (2) *CIR v Lithgows* 39 TC 270 (“*Lithgows*”); and

(3) *Keighley v The Commissioners for His Majesty's Revenue and Customs* [2024] UKFTT 30 (TC) (“*Keighley*”).

145. In all three of the above cases, the restrictions on the ability to act of the person alleged to have control (the “putative controller”) went much further than the constraints placed on the members in the present case. For example:

(1) in *Wang*, the SC agreed with the Secretary of State that the putative controller did not have sufficient money under her control to qualify for leave to remain in the UK because she was required by the terms on which she had obtained the money in question to invest in a single specified company and therefore had “no real choice” as to the use of that money – see *Wang* at paragraphs [41] to [52];

(2) in *Lithgows*, the putative controller was a trustee who was one of three or four trustees holding the shares in the subject company and could therefore be prevented by his fellow trustees from implementing any of his wishes in relation to the subject company; and

(3) in *Keighley*, the restrictions placed on the putative controllers of the subject company were not quite as absolute as in *Lithgows* but the FTT nevertheless found that the restrictions placed on their ability by the shareholders’ agreement governing the subject company were considerable. The FTT described those restrictions as being “fundamental to the running of the company at both an operational and strategic level”.

146. In considering the potential relevance of each of the above cases, it is important to note that the mere existence of some limits on the exercise of freedom of choice does not automatically negate control. The SC in *Wang* at paragraph [41] said that, although control equated to having a real choice, the existence of some fetter over the exercise of a real choice was not inconsistent with having a real choice. The key thing to consider was the extent of the restrictions in question. In all three of the above cases, the restrictions placed on the putative controller’s or controllers’ exercise of control were considerably greater than the limits imposed on the exercise of control by the members in this case so that the facts in this case are readily distinguishable.

147. There is one other important point which I should make in relation to these three cases.

148. Of the three cases, neither *Lithgows* nor *Keighley* sheds any light on the meaning of the word “control” for the purposes of Section 450(2) for the simple reason that each of them related to a particular statutory definition of “control” – in *Lithgows*, Section 333(1) of the Income Tax Act 1952 and, in *Keighley*, Section 472 of the Corporation Tax Act 2009 – that, in each case, defined “control” as the power to secure that the affairs of the subject company were conducted in accordance with the putative controller’s wishes – which is to say language equivalent to that found in Section 1124.

149. Not only is that language different from the language in Section 450(2) but it refers expressly to the “wishes” of the putative controller, which is something that Section 450(2) does not. Indeed, in his analysis in *Lithgows*, Lord Guthrie placed particular emphasis on the word “wishes” when he considered the relevant definition in that case. As the word “wishes” does not appear in Section 450(2), *Lithgows* and *Keighley* are of no assistance in the present case.

150. *Wang* is potentially of greater relevance in relation to the meaning of the word “control” for the purposes of determining actual control under Section 450(2) because the legislation which was in issue in that case did not contain a definition of “control” so that the ordinary meaning of the word applied, as it does in Section 450(2). However, even so, the point at issue in *Wang* was control over money and not control over a company and it seems to me that the

focus in *Wang* on the existence of a real choice may not be apposite in the latter case. This is because the ability to exercise the voting power in a company is sufficient to confer control over the company regardless of the extent to which the persons entitled to exercise the voting power have a real choice as to how they exercise that power. Putting this another way, it might well be the case that focusing on the existence of a real choice as to how voting power is exercised results in an inappropriate focus on the wishes of the persons holding the voting power as opposed to the simple fact that the persons in question hold that voting power and can exercise it.

Conclusion in relation to the control of Clydpride

151. It will be seen from the above that I do not consider that the constraints of the charities legislation or the fiduciary obligation to which the members of a charitable company are subject serve to deprive the members of a charitable company of control over the charitable company. Whilst those matters will inevitably affect how the members of a charitable company exercise their control over the company, they merely establish certain parameters within which the members exercise their control as opposed to depriving the members of that control altogether.

152. That very point was made by the CA in the context of deemed control through voting power in *The Children's Investment Fund Foundation (UK) v Attorney General* [2017] EWHC 1379 (“*CIFF CA*”) at paragraphs [98] and [99], where the submission that the only member of a company did not possess the voting power in the company because of restrictions on the activities of the subject company which were similar to those I am addressing here was described as “convoluted” and duly rejected. Precisely the same reasoning informs the consideration of actual control in this context.

153. I am therefore of the view that, notwithstanding the constraints of the charities legislation and the fiduciary obligation of LF and TF, in their role as members, to act in furtherance of the charitable objects of the company:

- (1) LF and TF together had actual control of Clydpride within the meaning of Section 450(2), as expanded by Section 450(5); and
- (2) LF and TF together possessed the greater part of the voting power in Clydpride and therefore had deemed control of Clydpride within the meaning of Section 450(3), as expanded by Section 450(5).

The association between Venerate and the Appellant after the SPA was executed

154. Now that I have dealt with the issues relating to the control of Clydpride after the execution of the SPA, I will turn to address the question which is actually the one relevant to the potential application of Section 193 – namely, whether Venerate and the Appellant were associated for the purposes of Section 201 after the SPA was executed. It will be no surprise when I say that, given the conclusion I have reached in paragraph 153 above, my view is that the two companies were so associated and that there are a number of alternative routes to that conclusion. The paragraphs which follow set out just one or two of those alternative routes.

Control of Venerate

155. In relation to Venerate, it is common ground that:

- (1) EO was the settlor of the EO Settlement pursuant to Section 1169 and Section 467 of the Income Tax Act 2007 (the “ITA 2007”) because she was the person who made the EO Settlement;
- (2) EO was also the settlor of each Jersey Trust pursuant to Section 1169 and Section 467 of the ITA 2007 because each Jersey Trust was settled by the EO Settlement;

- (3) the trustees of the Jersey Trusts together had both actual control and deemed control of Venerate for the purposes of Section 450 because they were the sole shareholders in Venerate;
- (4) TF was an “associate” of the trustees of each Jersey Trust by virtue of Sections 448(1)(c) and 448(2)(b) because TF was the daughter of EO, who was the settlor of each Jersey Trust; and
- (5) therefore, TF had deemed control of Venerate for the purposes of Section 450(3) by virtue of Section 451(4)(d).

Control of the Appellant

156. It is common ground that, after Clydpride acquired the Newcom shares on the execution of the SPA, the person or persons together, if any, who had actual control of Clydpride at any time for the purposes of Section 450(2) also had actual control of the Appellant at that time for those purposes because he, she or they had indirect control of the Appellant, through Clydpride, for those purposes – see *Kellogg Brown* at paragraph [33]. Thus, in this case, LF and TF together had actual control of the Appellant for the purposes of Section 450(2).

157. In addition, TF alone had deemed control of the Appellant for the purposes of Section 450(3) because:

- (1) TF and LF were “associates” by virtue of Section 448(1)(a) and 448(2)(a);
- (2) TF and LF together had control of Clydpride as noted in paragraph 153 above; and
- (3) consequently, the voting rights and powers held by Clydpride in the Appellant fell to be attributed to TF by virtue of Section 451(4)(a).

(I should note that this attribution under Section 451(4)(a) was to TF individually by reference to the fact that LF and TF together controlled Clydpride and LF was an “associate” of TF. It was not an attribution to them both collectively. It was therefore different from the question which the CA left open in *Kellogg Brown* as to whether an attribution can be made under Section 451(4)(a) to a group of persons as opposed to a single person – see *Kellogg Brown* at paragraphs [31] to [35].)

The association between Venerate and the Appellant

158. Given:

- (1) my conclusion in paragraph 155 above that, at all relevant times, TF had control of Venerate; and
- (2) my conclusion in paragraphs 156 and 157 above that, after Clydpride acquired the Newcom shares on the execution of the SPA:
 - (a) LF and TF together had control of the Appellant; and
 - (b) TF individually had control of the Appellant,

it is plain that, even after Clydpride acquired the Newcom shares on the execution of the SPA, Venerate continued to be associated with the Appellant for the purposes of Section 201 because Venerate and the Appellant continued to be connected for the purposes of Section 1122.

159. I say that because:

- (1) Section 1122(2)(c) provides that two companies are connected if one person (A) has control of one company and A, together with persons connected with A, have control of the other company. In this case, since:
 - (a) TF had control of Venerate;

(b) as spouses, TF and LF were connected for the purposes of Section 1122 – see Section 1122(5); and

(c) TF, together with LF (a person connected with TF), had control of the Appellant,

Venerate and the Appellant were connected for the purposes of Section 1122(2)(c); and

(2) Section 1122(2)(a) provides that two companies are connected if the same person has control of both companies. In this case, since TF had control of both Venerate and the Appellant, Venerate and the Appellant were connected for the purposes of Section 1122(2)(a).

160. As I have already mentioned, there are a number of other routes to the same conclusion, which is not surprising given the extensive involvement of the Faust family in relation to each of Venerate, Clydpride and the Appellant and the broad terms of the applicable legislation, but it will be some relief to the reader to know that I do not propose to rehearse any of those other alternatives in this decision.

Final points in relation to control

161. Given the above conclusion, it is, strictly speaking, unnecessary for me to address two other points made by Mr Firth in relation to control, which related to the allocation of rights and powers to other persons and were as follows:

(1) first, he said that, since both of Sections 451(3) and 451(4) referred solely to the “rights and powers” held by a person and not to “control”, the attribution rules set out in those sections did not apply in determining actual control for the purposes of Section 450(2) but applied only in determining deemed control for the purposes of Section 450(3); and

(2) secondly, he said that the fact that the members of Clydpride had a fiduciary obligation to exercise their rights and powers in relation to the company in furtherance of the charitable objects of the company meant that the rights and powers of LF and TF as members of the company could not be attributed to any associate of LF and TF under Sections 451(4)(c) or 451(4)(d) in the same way that the rights and powers held by a trustee for other persons could not be attributed to any associate of the trustee.

162. Although I have not needed to address either of these submissions in reaching my conclusion that Venerate continued to be associated with the Appellant for the purposes of Section 201 even after Clydpride acquired the Newcom shares on the execution of the SPA, my views on them are as follows:

(1) I do not see why the fact that Sections 451(3) and 451(4) refer solely to “rights and powers” and not to “control” means that those sections do not apply in the context of actual control for the purposes of Section 450(2) to the extent that that actual control depends on the holding of rights and powers and is not simply de facto.

In *PGPH Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2017] UKFTT 782 (TC), the FTT said, at paragraph [151], that actual control pursuant to Section 450(2)(c) “probably” required a legal entitlement whereas actual control pursuant to Sections 450(2)(a) and 450(2)(b) did not. I agree. Going on from that observation, it must follow that, regardless of whether the relevant part of Section 450(2) requires it or not, if, in any particular case, the exercise, the ability to exercise, or the entitlement to acquire, actual control of a company for the purposes of Section 450(2) stems from rights and powers held by a person or persons, then I can see nothing in Sections 450(6) or 451(1) to suggest that the attribution rules in Sections 451(3) or 451(4)

cannot apply to those rights and powers and should be confined to the rights and powers to which reference is made in Section 450(3).

The whole of Section 451 is stated to apply for the purposes of the whole of Section 450. It must follow that what Section 451(3) and 451(4) have to say about the attribution of rights and powers must extend to the rights and powers giving rise to actual control for the purposes of Section 450(2) in the same way as they do to the rights and powers giving rise to deemed control for the purposes of Section 450(3). I am therefore not persuaded that rights and powers conferring direct or indirect control of a company on a person (A) for the purposes of Section 450(2) cannot be attributed to another person (B) in circumstances where the relationship between A and B is of one or more of the kinds mentioned in Sections 451(3) and 451(4); and

(2) I am also not persuaded that the mere fact that a person has a fiduciary obligation to exercise his or her rights and powers for a particular purpose prevents those rights and powers from being attributed to an associate of that person pursuant to Sections 451(4)(c) or 451(4)(d). This is essentially for the same reason as led me to my conclusion in paragraphs 136 to 143 above – the fiduciary obligation may inform or qualify the manner in which the person who is subject to the fiduciary obligation exercises the rights and powers but that person remains the beneficial owner of the rights and powers, with the result that the attribution rules in Sections 451(4)(c) and 451(4)(d) still apply.

In this regard, I again do not consider the analogy provided by Mr Firth between, on the one hand, a person holding rights and powers on trust for other persons as beneficial owners and, on the other hand, a person holding rights and powers beneficially itself but subject to a fiduciary obligation to exercise its rights and powers in furtherance of an object or purpose, to be an apt one. In the latter case, there is no reason why the attribution rules in Sections 451(4)(c) and 451(d) should not apply because the person holding the rights and powers holds those rights and powers beneficially itself. In the former case, beneficial ownership of the rights and powers are not vested in the person holding the rights and powers itself and therefore the control legislation needs to set out the rules in relation to the attribution of the rights and powers. The way in which it does this turns on the nature of the trust in question – for instance, different rules apply depending on whether the trust is a bare trust or a settlement.

DISPOSITION

163. For the reasons set out above, I allow the appeal.

164. Although the Appellant has succeeded in its appeal, I feel compelled to make a few observations about the way in which the Appellant has conducted this dispute, which, in my view, has fallen short in a number of respects.

165. In particular, it was not acceptable for the Appellant to maintain throughout what has been a lengthy dispute with the Respondents that the members of Clydpride were two individuals who were not connected with the Faust family and then concede on the first morning of the hearing that those members were, in fact, LF and TF. It can be seen from the paragraphs above that the identity of the members of Clydpride was not merely a matter of incidental detail. It was of fundamental significance to the question of whether the Appellant and Venerate were associated after Clydpride acquired the Newcom shares on the execution of the SPA and therefore potentially highly relevant to the outcome of the appeal. Moreover, discovering the identity of the members of Clydpride should not have been an onerous or time-consuming task. By maintaining for so long that the members of Clydpride were not connected to the Faust family and then conceding the reality so late, the Appellant wasted a considerable

amount of its own, and, more importantly, the Respondents', time. This information should have come to light much earlier than it did.

166. It was also unacceptable for the Appellant's representative, Brian White Limited:

- (1) to miss the deadline for filing the Appellant's skeleton argument before the hearing without contacting either the Respondents or the FTT in advance of its failure to explain the reasons for the delay and ask for an extension to the deadline; and
- (2) then to respond to the Respondents' complaint about that by saying breezily that the Appellant's representatives were too busy on other matters to meet the deadline and, in any event, the skeleton argument would be filed in sufficient time for the Respondents to address the arguments set out in it before the hearing.

The FTT's directions in every appeal (including this one) are not mere recommendations or "nice-to-haves". They are required to be taken seriously. In my view, in acting in the way it did, the Appellant's representative showed a lack of respect to the Respondents and to the FTT.

167. Finally, I would like to express my appreciation for the detailed and helpful submissions which were made to me by Mr Firth and Miss Hughes before and at the hearing.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

168. 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 "Tribunal Rules"). 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.

**Release date:
30 March 2026**

APPENDIX ONE
CASE MANAGEMENT DECISION

Introduction

1. This Appendix describes the case management decision which I made at the start of the hearing in relation to the Respondents' application to re-amend the SOC.

Background

2. The background to the decision was as follows.

3. On 27 February 2023, the Appellant notified its appeals against the three assessments to the FTT. The grounds of appeal related solely to the 193 Issue and did not include an allegation that any of the assessments was invalid under the discovery provisions.

4. On 10 October 2023, the Respondents filed their original statement of case. This related solely to the appeal against the assessment in respect of the 2018 AP and dealt solely with the 193 Issue.

5. On 11 March 2024, the Respondents filed the SOC. This too related solely to the appeal against the assessment in respect of the 2018 AP and dealt solely with the 193 Issue.

6. In accordance with the directions for the hearing of this appeal of 26 September 2025, the Appellant was required to serve its skeleton argument by no later than 19 January 2026. The Appellant failed to comply with the direction or to apply for an extension of time. Upon enquiry by the Respondents, the Appellant's representative informed the Respondents (and subsequently the FTT) that the skeleton would not be delivered until 17.00 on 26 January 2026, fourteen days prior to the hearing, which was "within the normal timescale", due to the fact that "[we] have numerous tribunals on" but that the Appellant had no objection to giving the Respondents a similar seven day extension for serving their skeleton argument – from 26 January 2026 to 2 February 2026.

7. At 17.01 on 26 January 2026, the Appellant filed its skeleton argument. In that skeleton argument, the Appellant submitted that one of the reasons why its appeal should be upheld was that the Respondents had failed to plead the validity of the assessments in the SOC, as they were required to do pursuant to the UT decision in *Burgess v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKUT 578 (TCC) at paragraphs [43], [44] and [63] to [68].

8. At 13.55 on 29 January 2026, the Respondents made an application to re-amend the SOC and to admit a witness statement from Officer Macdonald setting out the basis on which he had made the assessments. Almost all of the amendments to the SOC related to the Discovery Issue although there were also some other corrections.

9. On 2 February 2026, in response to that application, Judge Anne Fairpo of the FTT granted the application subject to any objection in writing from the Appellant within seven days and specified that, in the event of any such objection, the application would be addressed by me at the start of the hearing.

10. At 16.23 on 2 February 2026, the Respondents filed their skeleton argument.

11. On 9 February 2026, the Appellant wrote to the Respondents and the FTT objecting to the application. The primary focus of the Appellant's objection was the introduction into the SOC at such a late stage in the proceedings of references to the Discovery Issue.

The factors considered in relation to the decision

12. On considering the application by the Respondents and the Appellant's objection, I started by noting the points which were common ground. These were as follows:

- (1) under Rule 5 of the Tribunal Rules, the FTT is entitled to regulate its own procedure and this includes giving permission to a party to amend a document such as the SOC;
- (2) in deciding whether or not to exercise this power, the FTT must at all times take into account the overriding objective of the Tribunal Rules, as described in Rule 2 of those rules, which is to deal with cases fairly and justly. Rule 2(2) of the Tribunal Rules expressly provides that "[dealing] with a case fairly and justly includes –
 - (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
 - (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
 - (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
 - (d) using any special expertise of the Tribunal effectively; and
 - (e) avoiding delay, so far as compatible with proper consideration of the issues";
- (3) dealing with cases fairly and justly entails striking a balance between the injustice to the applicant if the application were to be denied and the injustice to the other party if the application were to be allowed;
- (4) the principles set out in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) should be taken into account in exercising the FTT's discretion even though the Civil Procedure Rules are technically inapplicable in the FTT; and
- (5) one of those principles is that the later an application is made, the higher the burden on the applicant to justify it. In particular, if allowing the application would require the hearing to be postponed or the case to go part-heard, then that is likely to mean that the application should be denied.

13. Turning then to the various factors to be taken into account in relation to the application, I considered that the following factors pointed in favour of denying the application:

- (1) the application had been made late and should have been made much earlier;
- (2) there had not been an acceptable explanation for the delay. The Respondents should have known that they needed to deal with the Discovery Issue in the SOC; and
- (3) a public body such as the Respondents should live up to the standards expected of it and should not be relieved from the consequences of its own mistakes.

14. On the other hand, I considered that the following factors pointed in favour of allowing the application:

- (1) the Appellant had not raised the Discovery Issue in its grounds of appeal or at any point prior to the submission of its skeleton argument on 26 January 2026, even though it had known at all relevant times that the Respondents considered that the discovery conditions had been satisfied and also knew that the 193 Issue would be wholly irrelevant if the Respondents could not plead that the discovery conditions were satisfied;
- (2) the Appellant had also chosen to disregard the directions by submitting its skeleton argument a week late on its own initiative without making an application to do so to the

FTT. This meant that, instead of having almost three weeks to deal with the Discovery Issue prior to the hearing, the Appellant had had only a little under two weeks;

(3) the Respondents had reacted quickly in making the application, given that they did so within three days of receiving the Appellant's skeleton argument;

(4) it was in the public interest for the correct amount of tax to be paid by every taxpayer – see Henderson J in *Tower MCashback LLP v The Commissioners for Her Majesty's Revenue and Customs* [2008] EWHC 2387 (Ch) at paragraphs [115] and [116], which was approved by the SC in the same case [2011] STC 1143 at paragraph [15]; and

(5) the prejudice which the Respondents would suffer if the application were to be refused was potentially much greater than the prejudice which the Appellant would suffer if the application were to be allowed. If the application were to be refused, the Respondents would not be able to plead that the discovery conditions were satisfied and therefore the appeal would necessarily succeed. In contrast, the prejudice to the Appellant was only that it might not have access to evidence that it could have obtained if the application had been made earlier. If this missing evidence were to be meaningful, it could either handicap the Appellant in dealing with the Discovery Issue at the hearing – assuming that we proceeded to deal with the Discovery Issue at the hearing – or cause the hearing to be postponed or the case to go part-heard, each of which would potentially be extremely prejudicial to the Appellant.

15. I also considered whether the strength or weakness of each party's case was a factor to be taken into account in addressing the application. I considered that it was ultimately a neutral factor given that:

(1) each party considered that its position in relation to the Discovery Issue was strong and that the other party's position in relation to that issue was weak; and

(2) without hearing the parties' submissions and the related evidence, it was impossible for me to reach a view on this question.

16. Taking all of the above into account, the point set out in paragraph 14(5) above seemed to me to be at the heart of the debate. In that regard, there was a significant dispute between the parties as to whether allowing the application would substantially handicap the Appellant in dealing with the Discovery Issue at the hearing – assuming that we proceeded to deal with the issue at the hearing – or require the hearing to be postponed or the case to go part-heard. This turned on whether:

(1) the evidence in the bundle, together with the new witness statement and the ability to cross-examine Officer Macdonald at the hearing; and

(2) the number of days for which the hearing had been listed

would be sufficient for the Discovery Issue to be addressed fairly and justly at the hearing without the hearing's having to be postponed or the case's having to go part-heard.

17. In relation to the sufficiency of the evidence, the Respondents, who bore the burden of proof in relation to the Discovery Issue, said that the relevant evidence would be sufficient whereas the Appellant said that it would not.

18. The Appellant had raised a number of issues of fact and law which it said it could not adequately deal with should the application be allowed and the Discovery Issue be dealt with at the hearing.

19. The questions of law were, in my view, of no moment. Leaving aside the point which I make in paragraphs 25 to 27 below, the Appellant had had almost two weeks to consider the

points of law and would have had almost three weeks to do so but for its own default in following the directions.

20. Therefore, the only question was whether the Appellant would be precluded from dealing properly with the issues of fact relevant to the Discovery Issue, if it had access only to the evidence in the bundle, the new witness statement and its ability to cross-examine Officer Macdonald.

21. On balance, my view was that the Appellant would not be so precluded.

22. For example, on the factual issue of whether the alleged error in the Appellant's return was brought about carelessly, it was common ground that the Appellant did not take advice on the potential application of Section 193 to these facts. The Respondents said that it was careless to fail to take advice and that, had advice been taken, the deduction would not have been claimed in the return. The Appellant said that it was not careless to fail to take advice and that, had advice been taken, the Appellant would still have claimed the deduction in the return. This was ultimately a matter for submissions. It was not clear to me what additional facts the Appellant would anticipate introducing given the nature of that dispute.

23. In relation to the sufficiency of the length of the hearing, the three days allowed for the hearing were, in my view, sufficient for the Discovery Issue to be fully addressed.

24. I therefore considered that the Appellant would be able to deal with the Discovery Issue at the hearing and that there would be no need to postpone the hearing or adjourn the case part-heard to deal with the Discovery Issue at a later date.

Conclusion

25. Each party in its submissions had sought to make much of the fact that the other party knew that there was a disagreement between them in relation to the Discovery Issue but did not include anything on the issue in its or their pleading. However, in my view, each party had known all along that the other party did not accept its position in relation to discovery. So far as the present application was concerned, the Appellant could hardly have thought that the Respondents had abandoned their position as to the validity of the assessments given that:

(1) the Respondents' position on that subject was set out clearly and extensively in the correspondence which preceded the issue of the assessments and in the review conclusion letter;

(2) the Respondents had never given any indication of having abandoned the point; and

(3) the time agreed by the parties for the determination of the appeal – three days – clearly envisaged that the 193 Issue was going to be addressed at the hearing and it would have been unnecessary to address the 193 Issue at the hearing if the assessments were invalid. In other words, the validity of the assessments was always going to be a necessary precursor to addressing the 193 Issue on the hearing of the appeal.

26. It is common ground that the onus was on the Respondents to include the Discovery Issue in the SOC rather than on the Appellant to include the Discovery Issue in the grounds of appeal. Accordingly, I took that into account in the factors set out in paragraphs 13 to 15 above. However, in my view, the omission of the Discovery Issue in the SOC was simply a mistake by the Respondents. The Appellant in its objection submissions had sought to impute to the Respondents the motive of hoping that, by failing to address the Discovery Issue in the SOC, it would be too late for the Appellant to raise the issue at the hearing. I did not agree with that. Apart from anything else, the Respondents could not have been sure that the hearing judge

would refuse the Appellant's application to amend its grounds of appeal to include the Discovery Issue.

27. In addition, the Respondents had taken steps to remedy their mistake as soon as it had been pointed out to them and had done so in circumstances where the Appellant had known all along that the Respondents did not agree with its views in relation to the Discovery Issue.

28. In conclusion, I accepted that this was a case where the position was finely balanced. However, taking all of the above into account, my decision was that, in accordance with the overriding objective of dealing with this appeal fairly and justly, for the reasons set out above:

- (1) the Respondents' application to re-amend the SOC should be allowed; and
- (2) the application by the Appellant for the hearing to be postponed or for the case to be part heard – which I inferred from the terms of the Appellant's submission to be the Appellant's potential response to my allowing the Respondents' application – should be denied.

APPENDIX TWO
STATUTORY PROVISIONS

1. In Chapter 1 of Part 6 of the CTA 2010:

(1) Section 189 provides that a company can claim relief for qualifying charitable donations made in an accounting period in calculating the corporation tax chargeable for that accounting period; and

(2) Section 190 provides that, for this purpose, qualifying charitable donations include “payments which are qualifying payments for the purposes of Chapter 2 (certain payments to charity)”.

2. Section 191, which is within Chapter 2 of Part 6 of the CTA 2010, then sets out six conditions which a donation needs to satisfy if it is to be a qualifying payment. It is common ground that the donations to which this appeal relates satisfied five of the six conditions. The only condition over which there is a dispute is Condition D in Section 191(5), which provides as follows:

“(5) Condition D is that the payment is not disqualified under section 193 (associated acquisition etc by the charity).”

3. Section 193 provides as follows:

“Associated acquisition etc

(1) A payment is disqualified under this section if—

(a) it is conditional on an acquisition of property by the charity from the company or a person associated with the company,

(b) it is associated with such an acquisition, or

(c) it is part of an arrangement involving such an acquisition.

(2) An acquisition by way of gift is to be ignored for the purposes of this section.”

4. It can be seen that the section requires, inter alia, the persons who are “associated” with the paying company to be identified.

5. To that end, Section 201 provides as follows:

“201 Associated persons

For the purposes of this Chapter a person is associated with a company if the person is connected with –

(a) the company, or

(b) a person connected with the company”.

6. Since Section 201 defines a person who is “associated” with the company by reference to connection, and there is no definition of connection within Part 6 of the CTA 2010 itself, the general definition set out in Sections 1122 and 1123 applies. These sections, in turn, depend on the definition of “control” in Sections 450 and 451 and related definitional provisions.

7. Sections 1122 and 1123 provide as follows:

“1122 “Connected” persons

(1) This section has effect for the purposes of the provisions of the Corporation Tax Acts which apply this section (or to which this section is applied).

(2) A company is connected with another company if—

(a) the same person has control of both companies,

(b) a person (“A”) has control of one company and persons connected with A have control of the other company,

(c) A has control of one company and A together with persons connected with A have control of the other company, or

(d) a group of two or more persons has control of both companies and the groups either consist of the same persons or could be so regarded if (in one or more cases) a member of either group were replaced by a person with whom the member is connected.

(3) A company is connected with another person (“A”) if—

(a) A has control of the company, or

(b) A together with persons connected with A have control of the company.

(4) In relation to a company, any two or more persons acting together to secure or exercise control of the company are connected with—

(a) one another, and

(b) any person acting on the directions of any of them to secure or exercise control of the company.

(5) An individual (“A”) is connected with another individual (“B”) if—

(a) A is B's spouse or civil partner,

(b) A is a relative of B,

(c) A is the spouse or civil partner of a relative of B,

(d) A is a relative of B's spouse or civil partner, or

(e) A is the spouse or civil partner of a relative of B's spouse or civil partner.

(6) A person, in the capacity as trustee of a settlement, is connected with—

(a) any individual who is a settlor in relation to the settlement,

(b) any person connected with such an individual,

- (c) any close company whose participators include the trustees of the settlement,
 - (d) any non-UK resident company which, if it were UK resident, would be a close company whose participators include the trustees of the settlement,
 - (e) any body corporate controlled (within the meaning of section 1124) by a company within paragraph (c) or (d),
 - (f) if the settlement is the principal settlement in relation to one or more sub-fund settlements, a person in the capacity as trustee of such a sub-fund settlement, and
 - (g) if the settlement is a sub-fund settlement in relation to a principal settlement, a person in the capacity as trustee of any other sub-fund settlements in relation to the principal settlement.
- (7) A person who is a partner in a partnership is connected with—
- (a) any partner in the partnership,
 - (b) the spouse or civil partner of any individual who is a partner in the partnership, and
 - (c) a relative of any individual who is a partner in the partnership.
- (8) But subsection (7) does not apply in relation to acquisitions or disposals of assets of the partnership pursuant to genuine commercial arrangements.

“1123 “Connected” persons: supplementary

(1) In section 1122 and this section—

“company” includes any body corporate or unincorporated association, but does not include a partnership (and see also subsection (2)),

“control” is to be read in accordance with sections 450 and 451 (except where otherwise indicated),

“principal settlement” has the meaning given by paragraph 1 of Schedule 4ZA to TCGA 1992,

“relative” means brother, sister, ancestor or lineal descendant,

“settlement” has the same meaning as in Chapter 5 of Part 5 of ITTOIA 2005 (see section 620 of that Act), and

“sub-fund settlement” has the meaning given by paragraph 1 of Schedule 4ZA to TCGA 1992.

(2) For the purposes of section 1122—

- (a) a unit trust scheme is treated as if it were a company, and
- (b) the rights of the unit holders are treated as if they were shares in the company.

(3) For the purposes of section 1122 “trustee”, in the case of a settlement in relation to which there would be no trustees apart from this subsection, means any person—

- (a) in whom the property comprised in the settlement is for the time being vested, or
- (b) in whom the management of that property is for the time being vested.

Section 466(4) of ITA 2007 (which applies for the purposes of the Corporation Tax Acts as a result of section 1169 below) does not apply for the purposes of this subsection.

(4) If any provision of section 1122 provides that a person (“A”) is connected with another person (“B”), it also follows that B is connected with A.”

8. It may be seen from those provisions that the definition of “control” in Sections 450 and 451 is of central importance to determining connection. Those sections provide as follows:

“450 “Control”

(1) This section applies for the purpose of this Part.

(2) A person (“P”) is treated as having control of a company (“C”) if P—

- (a) exercises,
- (b) is able to exercise, or
- (c) is entitled to acquire,

direct or indirect control over C's affairs.

(3) In particular, P is treated as having control of C if P possesses or is entitled to acquire—

- (a) the greater part of the share capital or issued share capital of C,
- (b) the greater part of the voting power in C,
- (c) so much of the issued share capital of C as would, on the assumption that the whole of the income of C were distributed among the participators, entitle P to receive the greater part of the amount so distributed, or
- (d) such rights as would entitle P, in the event of the winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participators.

(4) Any rights that P or any other person has as a loan creditor are to be disregarded for the purposes of the assumption in subsection (3)(c).

(5) If two or more persons together satisfy any of the conditions in subsections (2) and (3), they are treated as having control of C.

(6) See also section 451 (section 450: rights to be attributed etc).

451 Section 450: rights to be attributed etc

- (1) This section applies for the purposes of section 450.
- (2) A person is treated as entitled to acquire anything which the person—
 - (a) is entitled to acquire at a future date, or
 - (b) will at a future date be entitled to acquire.
- (3) If a person—
 - (a) possesses any rights or powers on behalf of another person (A), or
 - (b) may be required to exercise any rights or powers on A's direction or behalf, those rights or powers are to be attributed to A.
- (4) There may also be attributed to a person all the rights and powers—
 - (a) of any company of which the person has, or the person and associates of the person have, control,
 - (b) of any two or more companies within paragraph (a),
 - (c) of any associate of the person, or
 - (d) of any two or more associates of the person.
- (5) The rights and powers which may be attributed under subsection (4)—
 - (a) include those attributed to a company or associate under subsection (3), but
 - (b) do not include those attributed to an associate under subsection (4).
- (6) Such attributions are to be made under subsection (4) as will result in a company being treated as under the control of 5 or fewer participators if it can be so treated.”

9. The above provisions refer at various places to an “associate” of a person. For this purpose, an “associate” is defined in Section 448 as follows:

“448 “Associate”

- (1) In this Part “associate”, in relation to a person (“P”), means—
 - (a) any relative or partner of P,
 - (b) the trustees of any settlement in relation to which P is a settlor,
 - (c) the trustees of any settlement in relation to which any relative of P (living or dead) is or was a settlor,

(d) if P has an interest in any shares or obligations of a company which are subject to any trust, the trustees of any settlement concerned,

(e) if P—

(i) is a company, and

(ii) has an interest in any shares or obligations of a company which are subject to any trust, any other company which has an interest in those shares or obligations,

(f) if P has an interest in any shares or obligations of a company which are part of the estate of a deceased person, the personal representatives of the deceased, or

(g) if P—

(i) is a company, and

(ii) has an interest in any shares or obligations of a company which are part of the estate of a deceased person,
any other company which has an interest in those shares or obligations.

(2) In this section, “relative” means—

(a) a spouse or civil partner,

(b) a parent or remoter forebear,

(c) a child or remoter issue, or

(d) a brother or sister.”