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Appeal No: CA-2022-001975
Case No: UT/2021/000100
Appeal number: TC/2019/01157V

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Mrs Justice Smith and Tribunal Judge Richards
[2022] UKUT 00205 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2023

Before :

SIR GEOFFREY VOS, MASTER OF THE ROLLS
LORD JUSTICE SNOWDON
and
LADY JUSTICE WHIPPLE

BETWEEN:

DELINIAN LIMITED
(FORMERLY EUROMONEY INSTITUTIONAL INVESTOR PLC)
Original Appellant/Respondent

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Original Respondents/Appellants

- -
- -

David Ewart KC and Sadiya Choudhury (instructed by **the General Counsel and Solicitor for His Majesty's Revenue and Customs**) for the **His Majesty's Revenue and Customs (HMRC)**
Kevin Prosser KC (instructed by **KPMG LLP**) for the **Respondent (Euromoney)**

Hearing dates: 18 October 2023
- -

Approved Judgment

This judgment was handed down remotely at 10.00am on 3 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Geoffrey Vos, Master of the Rolls, Lord Justice Snowden and Lady Justice Whipple:

Introduction

1. This case concerns the proper scope of the capital gains tax and corporation tax provisions in sections 135 to 137 of the Taxation of Chargeable Gains Act 1992 (the TCGA).[1] Those provisions apply to exchanges of shares and to schemes of reconstruction. Section 137 expressly requires that the deferral of tax allowed by sections 135 and 136 only applies to an exchange that is "effected for bona fide commercial reasons and [which] does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax".

2. Euromoney agreed in principle to transfer its shares in Capital Data Limited (Capital Data) to Diamond Topco Limited (Diamond) for some US$80.44 million. Of that sum, some US$21 million consisted of cash and the remainder consisted of ordinary shares in Diamond. Euromoney later realised that it would be more tax efficient if it received the US$21 million in redeemable preference shares in Diamond instead of in cash. On that basis, Euromoney would pay no tax when it redeemed the preference shares more than 12 months later.[2] For that reason, Euromoney renegotiated its commercial deal with Diamond so that it exchanged its shares in Capital Data for a combination of ordinary and preference shares in Diamond.

3. When Euromoney submitted its tax return on the basis that section 135 applied to the exchange of Capital Data shares for ordinary and preference shares in Diamond, HMRC amended the return to include a liability to corporation tax on a chargeable gain (on the entire exchange) of some £10.5 million, and issued a closure notice.

4. Euromoney appealed to the Tax Chamber of the First-Tier Tribunal (Judge Kim Sukul), which allowed its appeal. The FTT decided (at [96]-[97]) that avoiding a liability to corporation tax on chargeable gains was one of the purposes of the arrangements as a whole because there was no commercial purpose for receiving consideration in the form of preference shares rather than cash. Because the preference share arrangements were not significant in the context of the arrangements as a whole, the FTT decided at [98] and [107] that avoiding a liability to corporation tax on chargeable gains was a purpose, but not one of the main purposes, of the arrangements.

5. The Upper Tribunal dismissed HMRC's appeal. It considered in detail the effect of the decision of Sir Andrew Morritt C in *Snell v. HMRC* [2007] STC 1279 (*Snell*). HMRC submitted to the Upper Tribunal (see [42(1)]) that the second limb of section 137(1) (i.e. whether an exchange formed part of "a scheme or arrangements" of which the main purpose, or one of the main purposes, was avoidance of tax) should be applied to **all** possible schemes or arrangements of which the exchange could be said to form part. The Upper Tribunal held at [44(2)] that the analysis of whether the main purpose or one of the main purposes of "a scheme or arrangements" was the avoidance of liability to tax required "an examination of the purpose or purposes of the totality of the scheme or arrangements". Since the FTT had held on the facts that the avoidance of tax was not

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1 All section numbers refer to the TCGA unless otherwise stated.

2 Under the substantial shareholdings exemption applicable under schedule 7AC of the TCGA where a company disposes of a substantial shareholding.

one of the main purposes of the arrangements as a whole, Euromoney succeeded. The result would obviously have been different if it were permissible, as HMRC contended it was, to look at the elements of the "scheme or arrangements" separately.

6. HMRC submitted to us that, on a proper analysis of *Coll v. HMRC* [2010] UKUT 114 (*Coll*) and *Snell*, the Upper Tribunal had wrongly upheld the FTT's erroneous enquiry into "the relative strengths of the commercial purposes behind the exchange and the tax avoidance purposes behind the other elements of the scheme". That was not an exercise which was required by section 137. Instead, HMRC submitted that the FTT and the Upper Tribunal ought to have looked separately at the element of the scheme that led to the preference shares replacing the cash. Had it done so, it would have had to conclude that the main purpose or one of the main purposes of that part of the scheme was tax avoidance.

7. Euromoney argued on the basis of its Respondent's Notice that, even if the FTT and the UT were wrong about the proper construction of section 137(1), they ought to have held that the word "avoidance" in that subsection was to be construed objectively as a course of conduct designed to defeat the evident intention of Parliament, as distinct from the acceptance of an offer of freedom from tax which Parliament has deliberately made (a distinction drawn by Lord Nolan at page 1079 in *IRC v. Willoughby* [1997] 1 WLR 1071; [1997] STC 995 (*Willoughby*)). On that basis, Euromoney contended that taking advantage of the substantial shareholdings exemption could not, in any event, be tax avoidance.

8. We have decided that, on the proper construction of section 137(1), it is necessary to consider whether the entire exchange of shares in question is (i) effected for bona fide commercial reasons, and (ii) forms part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax. In making that second inquiry, the scheme or arrangements that must be considered are **the whole** of the scheme or arrangements undertaken by the taxpayer in question, not a selected part or selected parts of them.

9. We have also decided that, in asking whether tax avoidance was the main purpose or a main purpose of the whole scheme or arrangements entered into by the taxpayer, the context is crucial. Sections 135-137 provide for the deferral of capital gains tax when shares are exchanged in certain circumstances. They do not provide an exemption from capital gains tax. Accordingly, the meaning of tax avoidance is clear from section 137(1) itself without the need to refer to *Willoughby*. If the scheme or arrangements lead to the non-payment of tax that would otherwise have had to be paid, even if deferred, then that is tax avoidance for the purposes of section 137(1).

10. This judgment will now deal with the essential (and undisputed) factual background, the main statutory provisions, a brief analysis of *Snell* and *Coll*, the reasons for the decisions of each of the FTT and the UT, and discussion of HMRC's single ground of appeal and Euromoney's Respondent's Notice.

Essential factual background

11. Euromoney owned shares in Capital Data and Capital Net Limited (Capital Net). Capital Data and Capital Net were vehicles for a joint venture between Euromoney and Dealogic Ltd (Dealogic).

12. Euromoney held A shares and Dealogic held B shares in Capital Data. Euromoney received a royalty of some 28% of turnover under a licence agreement, but received no dividend from its A shares in Capital Data. Dealogic, on the other hand, received a dividend from its B shares in Capital Data. Since Euromoney's A shares did not carry a dividend or profit distribution, they did not constitute a substantial shareholding[3] for the purpose of the substantial shareholdings exemption, which was therefore not available to Euromoney on a disposal of its A shares in Capital Data.

13. In September 2014, the Carlyle Group was negotiating to buy Dealogic's parent company. At the same time, the Carlyle Group negotiated an in principle agreement to acquire Euromoney's shares in both Capital Data and Capital Net for some US$85 million. Euromoney was to receive an issue of 15.5% of Diamond's shares (the maximum stake that the Carlyle Group would agree to sell) and US$26 million in cash.

14. Daily Mail and General Trust PLC (Daily Mail) owned the majority of Euromoney. On 17 October 2014, Mr William Flint, Daily Mail's director of tax, was informed of the terms that had been agreed in principle. Mr Flint emailed his thoughts as follows:

> I've been thinking: would it be feasible for [Dealogic] to issue us with US$26m of fixed rate pref shares instead of cash? That way all the capital gain on the [Capital Data] shares is rolled over into the 16% ords and $26m prefs; once a year has passed we can redeem/sell the prefs to Carlyle, and get [substantial shareholding exemption] on the prefs by virtue of us holding the 16% prefs (sic.), ie tax free as the rolled over gain is washed away.

15. On 4 November 2014, Mr Christopher Fordham, Euromoney's Group Managing Director, emailed as follows:

> The preference shares are the mechanism to avoid paying tax on the capital gain for the cash element of the transaction. In 18 months we convert the preference shares into cash and avoid paying 20% tax on the gain.

16. On 5 November 2014, Diamond agreed to acquire Euromoney's shares in Capital Data for US$80.44 million. The consideration was to be satisfied by the issue of 4,902,083 ordinary shares (with dividend and voting rights) and US$21,214,992 in redeemable preference shares in Diamond. The preference shares carried no dividend or voting rights but were redeemable at par at any time on or after 17 January 2016. At the same time, Euromoney agreed to sell its shares in Capital Net to Diamond for some US$4.56 million in cash.

17. Capital Data and Diamond then applied to HMRC for clearance for the transaction under section 138(1). On 19 December 2014, HMRC refused to grant clearance. HMRC were not satisfied that the exchange of shares satisfied the second limb of section 137(1).

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[3] Under [8] of Schedule 7AC of the TCGA and section 1119 of the Corporation Tax Act 2010.

18. On 18 December 2014, the exchange of Euromoney's shares in Capital Data for ordinary and preference shares in Diamond was completed. On 17 January 2016, Euromoney redeemed its preference shares in Capital Data for US$21,214,992 in cash. The redemption was exempt from corporation tax under the substantial shareholdings exemption.

19. Euromoney's tax return for the period ended 30 September 2015 was prepared on the basis that there was no chargeable gain on the disposal of its Capital Data shares. The transaction was said to be a share exchange for which deferral of tax was available under section 135. On 21 September 2018, HMRC amended Euromoney's tax return to include a liability for corporation tax on the entire gain of £10,483,731.87 afforded by the exchange.

The main relevant provisions of the TCGA

20. The scheme of the TCGA involves treating an exchange of shares in one company for shares in another company under section 135 as a company reorganisation of the first company's share capital under sections 126-131.

21. Section 127 provides that:

> Subject to sections 128 to 130, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired.

22. Section 128(3) provides that:

> Where on a reorganisation a person receives (or is deemed to receive), or becomes entitled to receive, any consideration, other than the new holding, for the disposal of an interest in the original shares … he shall be treated as if the new holding resulted from his having for that consideration disposed of an interest in the original shares (but without prejudice to the original shares and the new holding being treated in accordance with section 127 as the same asset).

23. Section 135 provides as follows under the heading "Exchange of securities for those in another company":

> (1) This section applies in the following circumstances where a company ("company B") issues shares or debentures to a person in exchange for shares in or debentures of another company ("company A").
>
> (2) The circumstances are:
>
> > Case 1: Where company B holds, or in consequence of the exchange will hold, more than 25% of the ordinary share capital of company A …
>
> (3) Where this section applies, sections 127 to 131 (share reorganisations etc) apply with the necessary adaptations as if company A and company B were the same company and the exchange were a reorganisation of its share capital.

…

(6) This section has effect subject to section 137(1) (exchange must be for bona fide commercial reasons and not part of tax avoidance scheme).

24. Section 137 provides as follows under the heading "Restriction on application of sections 135 and 136":

(1) Subject to subsection (2) below, and section 138, neither section 135 nor section 136 shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange, reconstruction or amalgamation in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.

(2) Subsection (1) above shall not affect the operation of section 135 or 136 in any case where the person to whom the shares or debentures are issued does not hold more than 5 per cent. of, or of any class of, the shares in or debentures of the second company mentioned in subsection (1) above.

Snell and *Coll*

25. The FTT, the UT and the parties placed considerable reliance on *Snell* and *Coll*. We mean no disrespect to those decisions when we say that they were both decisions at High Court and Upper Tribunal level mainly on their facts. The point argued in this case was not argued in those cases. Moreover, we doubt that the judges there were attempting a definitive exposition of the true construction of section 137(1).

26. Mr Snell owned 91% of the shares in Sovereign Rubber plc. On 21 December 1996 he agreed to sell his shares for £7.317 million payable as to £6.58 million in three classes of loan stock in the purchasing company, £537,000 in deferred consideration and £200,000 in costs. Mr Snell left the United Kingdom for good on 2 April 1997. On 8 July 1997, Mr Snell redeemed £5,630,000 worth of his loan stock in the purchasing company.

27. Mr Ewart, who appeared for HMRC in *Snell* as he did before us, identified Mr Snell's "scheme or arrangements" as "the issue of each of the loan stocks with the purpose of becoming non-resident and redeeming them while non-resident" (see [4] of the Special Commissioner's decision). Sir Andrew Morritt C described at [12] the test in the second limb of section 137(1) as "a non-avoidance test by reference to the scheme or arrangements as a whole". At [13], the Chancellor described the test in the second limb as involving the following issues of fact: "(1) was the exchange part of a scheme or arrangements and if so what were they? (2) did the purposes of such scheme or arrangements include the purpose of avoiding a liability to capital gains tax and if so was it a main purpose?"

28. Mr Snell was arguing that, if there were a possibility that he might remain resident, his main purpose cannot have been to avoid tax ([24]). HMRC were arguing, to the

contrary, that Mr Snell's purpose was relevant to the identification of the elements of the scheme or arrangements ([27]). At [28], the Chancellor decided as follows:

> I prefer the submissions for the Revenue. The ordinary meaning of the word 'scheme' is 'a plan of action devised in order to attain some end'. Similarly an arrangement is 'a structure or combination of things for a purpose', see for both meanings the Shorter Oxford English Dictionary. Accordingly unless Mr Snell had the purpose of becoming non-resident as at 21st December 1996 so as to link the acceptance of loan notes on that day with their redemption when non-resident after 5th April 1997 there cannot be a relevant scheme or arrangement for the purpose of s.137.

29. As a result, the inference that the Special Commissioners drew, namely that Mr Snell's main purpose was to avoid tax, could not be impugned. The Special Commissioners' reference to Mr Snell's purpose or intention was indeed directed "to the identification of the scheme" ([29]).

30. The Chancellor also expressed the view at [36] in *Snell* that Lord Nolan's dictum in *Willoughby* was not relevant to the construction of the second limb of section 137(1), because that section provided for a right of deferral to be lost if it were used "to avoid tax altogether".

31. In *Coll*, the question was similarly whether Mr and/or Mrs Coll intended to become non-resident at the time of the exchange of shares. At [8], the Upper Tribunal (Judges Avery Jones and Walters QC), accepted that there was no obligation on HMRC to identify the scheme or arrangements. The taxpayer had to show that there was no such scheme as satisfied section 137(1).

The reasons for the decisions of each of the FTT and the UT

32. The FTT made findings of fact about the circumstances in which Euromoney concluded the exchange transaction at [51]-[56]. It found that: (a) the potential tax saving was not important to Euromoney, (b) tax was not a main driver of the transaction which would have gone ahead whether or not tax could be saved, (c) it was Euromoney's intention to proceed with the cash deal if its request for preference shares had been refused, (d) Euromoney devoted limited resources to the tax aspects of the transaction, (e) the application to HMRC for clearance under section 138 did not hold up the transaction timetable, and (f) the exchange was completed without waiting for HMRC's response to that clearance application.

33. The FTT considered the two factual questions posed by the Chancellor in *Snell* ([27] above) at [72]-[92] and [93]-[116] respectively. It was common ground that the exchange in this case was part of a scheme or arrangements. There was disagreement as to what constituted the arrangements. The FTT decided at [92] that "in order to reflect the reality of the position and in accordance with the wording of the statute, the arrangements must be taken as a whole and not limited to the arrangements that concern only the preference shares". Euromoney characterised the arrangements as follows, summarised by the FTT at [74] and accepted by the FTT as correct at [80]:

> (1) Euromoney's arm's length disposal of its shareholdings in [Capital Data] and [Capital Net]; (2) Euromoney's receipt of (i) the equity holding in [Diamond], (ii) the

> preference shares in [Diamond], and (iii) $4.56 million cash; (3) Euromoney's plan to retain its equity holding in [Diamond] with a view to obtaining the benefit of the projected increase in value and (4) Euromoney's plan to hold the preference shares for over 12 months, until they qualified for [substantial shareholdings exemption], and then dispose of them for a further $21.2 million cash.

34. HMRC submitted that this characterisation was impugned by an inappropriate reliance at [81]-[85] on an analogy with *IRC v. Brebner* [1967] 2 AC 18 (*Brebner*). It is true that the FTT said at [81] that *Brebner* supported the view that the scheme or arrangements should be considered as a whole. It is notable, however, that HMRC had itself "accepted the proposition as set out in *Brebner*, that you must have regard to the scheme or arrangements as a whole rather than considering one element in isolation from the other elements" ([83]). Further, in *Snell* the Chancellor referred several times to the scheme or arrangements "as a whole", so the proposition finds support in that case too. We do not think that the FTT's analysis is impugned by its consideration of *Brebner*. If, however, it proceeded on the wrong legal basis, its decision would, of course, be wrong. We will come to that point in due course.

35. As we have already explained at [4] above, the FTT also decided that avoiding tax was one of the purposes of the arrangements as a whole, but was neither **a** nor **the** main purpose. That finding is not challenged. What is challenged is whether the FTT was right, as a matter of law, only to consider the "scheme or arrangements" **as a whole**.

36. The FTT rejected Euromoney's submission as to the relevance of Lord Nolan's dictum in *Willoughby*. It said at [112] that the relevant factor that determined whether Mr Snell's arrangements were ones, of which a main purpose was tax avoidance, was his subjective intention at the time of the transaction.

37. As we have said, the Upper Tribunal dismissed HMRC's appeal on the basis that the FTT had held on the facts that the avoidance of tax was not one of the main purposes of the arrangements as a whole. Much of the UT's decision revolves around the slightly different approach to the argument apparently adopted by HMRC in that forum. Accordingly, we do not find it necessary to set out the UT's approach in more detail. The UT also rejected HMRC's secondary contention that, even if the FTT had correctly identified the scheme or arrangements as embracing the whole, it had been wrong in law in its determination of the purposes of those arrangements. That secondary contention is not pursued before us. Moreover, the UT did not deal with the *Willoughby* point raised by Euromoney's Respondent's Notice.

Discussion of HMRC's Ground of Appeal

38. It was common ground before the FTT and before the UT, and before us, that the starting point under section 137(1) is to identify the "exchange, reconstruction or amalgamation in question"; in this case, of course, the exchange. It was also common ground at all stages that the "exchange" referred to was the entire transaction agreed, not a part or parts of it.

39. HMRC's central submission before us was that the "exchange" and "a scheme or arrangements" were qualitatively quite different.

40. The exchange was simply the share transactions agreed between the commercial parties. In this case, the exchange was the issue of ordinary and preference shares in Diamond in exchange for Euromoney's shares in Capital Data and Capital Net. It was neither necessary nor appropriate to consider the reasons or motives for the exchange when identifying the transaction itself. That analysis, one might note, works as well for a reconstruction or an amalgamation as it does for an exchange.

41. On the other hand, HMRC submitted, a "scheme or arrangements" are, as the Chancellor explained in *Snell*, respectively "a plan of action devised in order to attain some end" and "a structure or combination of things for a purpose" (see [28] above]). To identify the relevant scheme or arrangements, it is necessary to look at what was intended and why what was done was done in the way it was done. Purposes and motives are integral to the identification of the relevant scheme or arrangements. And crucially, one single exchange may form part of more than one, maybe many, schemes or arrangements. Because the exchange and the scheme are so dramatically different, HMRC submitted that it was not meaningful to suggest, as Euromoney did, that the exchange could not, on the normal use of language, "form part of" a smaller scheme. Size was irrelevant.

42. We think that the issue in this case is solely a matter of statutory construction. The words in section 137(1) to be construed are: "unless the exchange … in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is [tax] avoidance". They are not complicated words. We reach the same answer whether we consider a literal or a purposive construction.

43. There are plainly two limbs to the statutory test established by section 137(1). The first is to ask whether the exchange in question is effected for bona fide commercial reasons. The second is to ask whether the exchange in question forms part of a scheme or arrangements of which the main purpose, or one of the main purposes, is tax avoidance. We would not limit the commercial enquiry which the FTT must undertake under the first limb. The circumstances of an exchange may vary widely. The Chancellor suggested some parameters in [12] of *Snell*. We would simply say that the FTT should determine whether the exchange transaction is effected for bona fide commercial reasons, according to the natural meaning of those words. It cannot be controversial to comment that one can enter into a share exchange transaction for bona fide commercial reasons even if that transaction is wholly or partly tax driven. The "tax purpose" is the subject of inquiry under the second limb, not the first.

44. We come then to the central issue in the appeal. What does section 137(1) require in relation to the second limb? HMRC suggests that question is really how one should identify "a scheme or arrangements" from many candidate schemes or arrangements. Euromoney and the FTT and UT said, in effect, that there was only one such "scheme or arrangements" in each case. That was the whole of the scheme or arrangements undertaken of which the exchange formed part.

45. First, we think that the statute asks whether the exchange forms part of "a scheme or arrangements of which the main purpose, or one of the main purposes, is tax avoidance". It is not necessary to undertake a free-standing exercise to identify an appropriate or relevant scheme or arrangements from amongst many candidates. We repeat that the statute is looking for "a scheme or arrangements of which the main

purpose, or one of the main purposes, is [tax] avoidance". If there is one, of which the exchange forms part, the deferral of tax is not permitted.

46. Secondly, whilst it is true that an exchange is qualitatively different from a scheme or arrangements, that does not make it a natural use of language to describe an exchange as forming part of a tax avoiding part of an overall scheme or arrangements or even part of an exchange as forming part of a tax avoiding part of an overall scheme or arrangements. It is, conversely, a natural use of statutory language to ask whether an exchange (i.e. the entire exchange) forms part of a scheme or arrangements (i.e. the whole scheme or arrangements) of which the, or a, main purpose is tax avoidance. The "scheme" undoubtedly adds motives and intentions and plans to the "exchange", but the scheme cannot exclude a part of the exchange or a part of the scheme on the natural meaning of the requirement that the exchange "forms part of" the scheme.

47. Thirdly, we accept that HMRC is not required to identify or prove the scheme or arrangements that it says has as its main, or a main, purpose tax avoidance. But that does not mean that the FTT is required to sift through every permutation or combination of the elements of the scheme or arrangements to see if it can find one, which has as its main, or a main, purpose tax avoidance. If that were the proper construction of section 137(1), a taxpayer could find itself unable to avail itself of the statutory deferral if a tax avoidance motive, which might be minimal when viewed in light of the overall scheme, could be found for an insignificant part of the arrangements. The insignificant part of the arrangements would, in such a case, be capable of being characterised as "a scheme or arrangements" whose main, or a main, purpose was tax avoidance.

48. Fourthly, the example of this case makes the point. HMRC says that the scheme in question is just the replacement of the US$21 million with preference shares. HMRC contends that the emails show that that step was for tax avoidance purposes. Whilst that is true, it is not a natural use of language to say that the entire exchange of Euromoney's shares for the ordinary and preference shares in Diamond formed part of the scheme to replace the US$21 million cash payment originally agreed with preference shares to the same value. Commercially, the preference shares were different from cash and carried some different (probably greater) risks. But the statute is not asking the FTT to break down the negotiation of either an exchange or a scheme. It is simply asking whether the entire exchange agreed did or did not form part of an entire scheme or arrangements of which the, or a, main purpose was tax avoidance.

49. From a purposive point of view, section 137(1) is clearly providing for the situations in which taxpayers will not be permitted to defer their tax when they effect a share exchange. They are allowed to do so if the exchange is for bona fide commercial purposes **and** if the exchange does not form part of a scheme or arrangements of which the, or a, main purpose is tax avoidance. Put shortly, taxpayers can delay paying tax when they exchange shares, but not if the exchange forms part of an entire scheme which has a main purpose of tax avoidance. Put another way, section 137(1) envisages that there may be tax avoidance so long as that is not the sole or a main purpose of the scheme or arrangements. Parliament's purpose is clear from the language it used.

50. HMRC also contended that the FTT had made an erroneous enquiry into the relative strengths of the commercial purposes behind the exchange and the tax avoidance purposes behind the other elements of the scheme. But that is not what the FTT did. It examined the circumstances in which the transaction took place ([51]-[[56]). It noted

at [59] that it was common ground that the entire exchange of shares was effected for bona fide commercial reasons. It identified the entire exchange and the entire scheme that Euromoney had entered into ([74]) and then asked the two statutory questions separately as it was required to do. Having said what the answer to the first question was at [59], it asked whether the entire exchange had formed part of a scheme or arrangements of which the **main** purpose, or one of the **main** purposes, was tax avoidance. It answered that second question in the negative for the evidential reasons given at [98]-[107], which have not been challenged on this appeal.

51. We would dismiss HMRC's appeal.

Discussion of Euromoney's Respondent's Notice

52. We can deal briefly with Euromoney's argument that the FTT ought to have held that the word "avoidance" in section 137(1) was to be construed objectively as a course of conduct designed to defeat the evident intention of Parliament, as distinct from the acceptance of an offer of freedom from tax which Parliament has deliberately made (the *Willoughby* point). Euromoney submitted that taking advantage of the substantial shareholdings exemption was not tax avoidance, and that section 137 was not engaged because the second limb, with its reference to tax avoidance, never arose.

53. In our judgment, the Chancellor was right in *Snell* to place emphasis on the fact that the regime in sections 135-137 provides for the right to defer tax to be lost if it is used to avoid tax altogether. Parliament has said that, if the exchange of shares forms part of a scheme or arrangements of which even **a main purpose** is tax avoidance, the taxpayer loses the ability to rely on the deferral mechanism at all, and must pay all the tax at that stage. That is an entirely intelligible Parliamentary intention.

54. Lord Nolan in *Willoughby* was contrasting tax avoidance with the acceptance of a deliberate offer made by Parliament of freedom from tax. That was not the situation in this case. Euromoney's scheme or arrangements involved deferring tax in order later to take advantage of the substantial shareholdings exemption. That was to rely on a provision intended to defer tax to secure an outcome where no tax was paid. The meaning of tax avoidance in section 137(1) is clear without the need to refer to *Willoughby*. If the scheme or arrangements lead to the non-payment of tax that would otherwise have had to be paid, even if deferred, then that is tax avoidance for these purposes.

Conclusion

55. For the reasons we have given, we dismiss HMRC's appeal and Euromoney's cross-appeal as contained in its Respondent's Notice.