TC01400

Appeal number: TC/2009/15541

CORPORATION TAX –s 343 TA – impact of Article 43 (now 49 TFEU) – non-member state transferee – could rights of member state transferor be relied on? No as non EU national involved –Was s 343TA applicable? No in circumstances as 75% test not met – Were provisions discriminatory? No section applied to all companies in the same way whether UK resident or not – Should Tribunal read 75% as 50% so position same for anti-avoidance purposes in s 768 TA? No, Parliament enacted 75%- Appeal dismissed

FIRST-TIER TRIBUNAL
TAX (Corporation Tax)

MINDPEARL AG **Appellant**

- and -

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

TRIBUNAL: ADRIAN SHIPWRIGHT (TRIBUNAL JUDGE)
HELEN FOLORUNSO (TRIBUNAL MEMBER)

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

Gavin Scott, Financial Controller, for the Appellant

Sarah Ford, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Mind Pearl AG ("Mindpearl") against amendments to Mindpearl's returns for 2001 and 2002. These amendments denied Mindpearl loss relief under section 343 Income and Corporation Taxes Act 1988 ("TA"). The notices of amendment were issued on 27 June 2005.

2. The losses in dispute amount to some £3,688,687.

The Issue

3. The issue here, in essence, is whether relief for the losses in dispute should be allowed, notwithstanding that the 75% requirement is not met, in the light of Article 43[1] of the EU Treaty (now Article 49 Treaty on the Functioning of the European Union). This is referred to as the "Article 43 Issue" in this decision i.e. can and does Article 43 apply?

4. This raises a number of questions including the following:

(1) Does section 343 TA treat companies incorporated or operating in the UK differently from those incorporated outside the UK as regards losses?

(2) Does the UK treat share transfers and business transfers involving losses differently?

(3) Is this discriminatory of itself?

(4) What is the proper comparator?

(5) Should section 343 TA be read as having a 50% requirement rather than the 75% test set out in the legislation?

5. The Article 43 Issue is the only issue considered in this decision. Mindpearl had sought to rely on other matters earlier but told us at the hearing that it was only concerned with Article 43 and, in particular, the rights of the transferor, rather than Mindpearl itself, under Article 43.

6. In addition, we were specifically told that Mindpearl only wished to argue the position under European Law. It did not wish to argue that in fact more than 75% of the trade before and after the transfer was under common ownership. Mindpearl specifically confirmed this to the Tribunal at the start of the hearing. Accordingly, the point was not argued before us and we did not consider it further.

7. We were also told that Mindpearl did not wish to rely on the arrangements between Switzerland and the European Union. Mindpearl specifically confirmed this to the Tribunal at the start of the hearing. Accordingly, the point was not argued before us and we did not consider it further.

8. We were further told that Mindpearl did not wish to rely on any double tax convention. Mindpearl specifically confirmed this to the Tribunal at the start of the hearing. Accordingly, the point was not argued before us and we did not consider it further.

The Law

The UK legislation

9. The legislation, in so far as is relevant here, is found in sections 337, 343 344, 393, 768 and 769 TA.

10. These provide (in so far as relevant):

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[1] We refer in this decision to article 43 as that was the provision in force at the time. Article 49 was referred to and included in the bundle for the purposes of this hearing. The effect of the article is not meant to have changed.

(1) 343 Company reconstructions without a change of ownership

"(1) Where, on a company ("the predecessor") ceasing to carry on a trade, another company ("the successor") begins to carry it on, and—

(*a*) on or at any time within two years after that event the trade or an interest amounting to not less than a three-fourths share in it belongs to the same persons as the trade or such an interest belonged to at some time within a year before that event; and

(*b*) the trade is not, within the period taken for the comparison under paragraph (*a*) above, carried on otherwise than by a company which is within the charge to tax in respect of it;

then the Corporation Tax Acts shall have effect subject to subsections (2) to (6) below.

In paragraphs (*a*) and (*b*) above references to the trade shall apply also to any other trade of which the activities comprise the activities of the first mentioned trade.

(2) The trade shall not be treated as permanently discontinued nor a new trade as set up and commenced for the purpose of the allowances and charges provided for by [the Capital Allowances Act (including enactments which under this Act are to be treated as contained in that Act); but—

(*a*) there shall be made to or on the successor in accordance with those Acts all such allowances and charges as would, if the predecessor had continued to carry on the trade, have fallen to be made to or on it; and

(*b*) the amount of any such allowance or charge shall be computed as if—

(i) the successor had been carrying on the trade since the predecessor began to do so, and

(ii) everything done to or by the predecessor had been done to or by the successor (but so that no sale or transfer which on the transfer of the trade is made to the successor by the predecessor of any assets in use for the purpose of the trade shall be treated as giving rise to any such allowance or charge).

The preceding provisions of this subsection shall not apply if the successor is a dual resident investing company (within the meaning of section 404) which begins to carry on the trade after 31st March 1987.

(3) ...subject to subsection (4) below and to any claim made by the predecessor under section 393A (1), the successor shall be entitled to relief under section 393(1), as for a loss sustained by the successor in carrying on the trade, for any amount for which the predecessor would have been entitled to ... relief if it had continued to carry on the trade.

(4) Where the amount of relevant liabilities exceeds the value of relevant assets, the successor shall be entitled to relief by virtue of subsection (3) above only if, and only to the extent that, the amount of that excess is less than the amount mentioned in that subsection.

This subsection does not apply where the predecessor ceased to carry on the trade or part of a trade before 19th March 1986 nor, in a case where subsection (7) below applies, in relation to any earlier event, within the meaning of that subsection, which occurred before that date (but without prejudice to its application in relation to any later event which occurred on or after that date).

(4A) Subsection (2A) of section 393A shall not apply to any loss which (but for this subsection) would fall within subsection (2B) of that section by virtue of the

predecessor's ceasing to carry on the trade, and subsection (7) of that section shall not apply for the computation of any such loss".

(2) 344 Company reconstructions: supplemental

"(1) For the purposes of section 343— …

(*c*) a trade or interest in a trade belonging to a company shall, where the result of so doing is that subsection (1) or (7) of section 343 has effect in relation to an event, be treated in any of the ways permitted by subsection (2) below.

(2) For the purposes of section 343, a trade or interest in a trade which belongs to a company engaged in carrying it on may be regarded—

(*a*) as belonging to the persons owning the ordinary share capital of the company and as belonging to them in proportion to the amount of their holdings of that capital, or

(*b*) in the case of a company which is a subsidiary company, as belonging to a company which is its parent company, or as belonging to the persons owning the ordinary share capital of that parent company, and as belonging to them in proportion to the amount of their holdings of that capital,

and any ordinary share capital owned by a company may, if any person or body of persons has the power to secure by means of the holding of shares or the possession of voting power in or in relation to any company, or by virtue of any power conferred by the articles of association or other document regulating any company, that the affairs of the company owning the share capital are conducted in accordance with his or their wishes, be regarded as owned by the person or body of persons having that power.

(3) For the purposes of subsection (2) above—

(*a*) references to ownership shall be construed as references to beneficial ownership;

(*b*) a company shall be deemed to be a subsidiary of another company if and so long as not less than three-quarters of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly and partly through another company or other companies;

(*c*) the amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies, shall be determined in accordance with section 838(5) to (10); and

(*d*) where any company is a subsidiary of another company, that other company shall be considered as its parent company unless both are subsidiaries of a third company.…"

(3) 337 Company beginning or ceasing to carry on trade

"(1) Where a company begins or ceases—

(*a*) to carry on a trade, or

(*b*) to be within the charge to corporation tax in respect of a trade, the company's income shall be computed as if that were the commencement or, as the case may be, the discontinuance of the trade, whether or not the trade is in fact commenced or discontinued.

(2) Subsection (1) applies to a Schedule A business or overseas property business as it applies to a trade".

(4) 393 Losses other than terminal losses

"(1) Where in any accounting period a company carrying on a trade incurs a loss in the trade, the loss shall be set off for the purposes of corporation tax against any trading income from the trade in succeeding accounting periods; and (so long as the company continues to carry on the trade) its trading income from the trade in any succeeding accounting period shall then be treated as reduced by the amount of the loss, or by so much of that amount as cannot, [under this subsection][1] or on a claim (if made) under [section 393A(1)][2] be relieved against income or profits of an earlier accounting period.

(2)– (6)...

(7) The amount of a loss incurred in a trade in an accounting period shall be computed for the purposes of this section in the same way as trading income from the trade in that period would have been computed.

(8) For the purposes of this section "trading income" means, in relation to any trade, the income which falls or would fall to be included in respect of the trade in the total profits of the company; but where—

(*a*) in an accounting period a company incurs a loss in a trade in respect of which it is within the charge to corporation tax under Case I or V of Schedule D, and

(*b*) in any later accounting period to which the loss or any part of it is carried forward under subsection (1) above relief in respect thereof cannot be given, or cannot wholly be given, because the amount of the trading income of the trade is insufficient,

any interest or dividends on investments which would fall to be taken into account as trading receipts in computing that trading income but for the fact that they have been subjected to tax under other provisions shall be treated for the purposes of subsection (1) above as if they were trading income of the trade.

(9) Where in an accounting period the charges on income paid by a company—

(*a*) exceed the amount of the profits against which they are deductible, and

(*b*) include payments made wholly and exclusively for the purposes of a trade carried on by the company,

then, up to the amount of that excess or of those payments, whichever is the less, the charges on income so paid shall in computing a loss for the purposes of subsection (1) above be deductible as if they were trading expenses of the trade.

(10) In this section references to a company carrying on a trade refer to the company carrying it on so as to be within the charge to corporation tax in respect of it.

(11) ..."

(5) 768 Change in ownership of company: disallowance of trading losses

"(1) If—

(*a*) within any period of three years there is both a change in the ownership of a company and (either earlier or later in that period, or at the same time) a major change in the nature or conduct of a trade carried on by the company, or

(*b*) at any time after the scale of the activities in a trade carried on by a company has become small or negligible, and before any considerable revival of the trade, there is a change in the ownership of the company,

no relief shall be given under section 393 by setting a loss incurred by the company in an accounting period beginning before the change of ownership against any income or other profits of an accounting period ending after the change of ownership.

(2) In applying this section to the accounting period in which the change of ownership occurs, the part ending with the change of ownership, and the part after, shall be treated as two separate accounting periods, and the profits or losses of the accounting period shall be apportioned to the two parts.

(3) The apportionment under subsection (2) above shall be on a time basis according to the respective lengths of those parts except that if it appears that that method would work unreasonably or unjustly such other method shall be used as appears just and reasonable.

(4) In subsection (1) above "major change in the nature or conduct of a trade" includes—

(*a*) a major change in the type of property dealt in, or services or facilities provided, in the trade; or

(*b*) a major change in customers, outlets or markets of the trade;

and this section applies even if the change is the result of a gradual process which began outside the period of three years mentioned in subsection (1)(*a*) above.

(5) In relation to any relief available under section 343 to a successor company, subsection (1) above shall apply as if any loss sustained by a predecessor company had been sustained by a successor company and as if the references to a trade included references to the trade as carried on by a predecessor company.

(6) Where relief in respect of a company's losses has been restricted under this section then, notwithstanding -section 577(3) of the Capital Allowances Act, in applying the provisions of that Act about balancing charges to the company by reference to any event after the change of ownership of the company, any allowance or deduction falling to be made in taxing the company's trade for any chargeable period before the change of ownership shall be disregarded unless the profits or gains of that chargeable period or of any subsequent chargeable period before the change of ownership were sufficient to give effect to the allowance or deduction.

(7) In applying subsection (6) above it shall be assumed that any profits or gains are applied in giving effect to any such allowance or deduction in preference to being set off against any loss which is not attributable to such an allowance or deduction.

(8) Where the operation of this section depends on circumstances or events at a time after the change of ownership (but not more than three years after), an assessment to give effect to the provisions of this section shall not be out of time if made within six years from that time, or the latest of those times.

(9) Any person in whose name any shares, stock or securities of a company are registered shall, if required by notice by an inspector given for the purposes of this section, state whether or not he is the beneficial owner of those shares or securities and, if not the beneficial owner of those shares or securities of any of them, shall furnish the name and address of the person or persons on whose behalf those shares, stock or securities are registered in his name".

(6) 769 Rules for ascertaining change in ownership of company

"(1) For the purposes of sections 767A, sections 767AA, 767C 768, 768A, 768B, 768C and 768D there is a change in the ownership of a company—

(*a*) if a single person acquires more than half the ordinary share capital of the company; or

(*b*) if two or more persons each acquire a holding of 5 per cent or more of the ordinary share capital of the company, and those holdings together amount to more than half the ordinary share capital of the company; or

(*c*) if two or more persons each acquire a holding of the ordinary share capital of the company, and the holdings together amount to more than half the ordinary share capital of the company, but disregarding a holding of less than 5 per cent unless it is an addition to an existing holding and the two holdings together amount to 5 per cent or more of the ordinary share capital of the company.

(2) In applying subsection (1) above—

(*a*) the circumstances at any two points of time with not more than three years between may be compared, and a holder at the later time may be regarded as having acquired whatever he did not hold at the earlier time, irrespective of what he has acquired or disposed of in between;

(*b*) to allow for any issue of shares or other reorganisation of capital, the comparison may be made in terms of percentage holdings of the total ordinary share capital at the respective times, so that a person whose percentage holding is greater at the later time may be regarded as having acquired a percentage holding equal to the increase;

(*c*) to decide for the purposes of subsection (1) (*b*) or (*c*) above if any person has acquired a holding of at least 5 per cent, or a holding which makes at least 5 per cent when added to an existing holding, acquisitions by, and holdings of, two or more persons who are connected persons within the meaning of section 839 shall be aggregated as if they were acquisitions by, and holdings of, one and the same person;

(*d*) any acquisition of shares under the will or on the intestacy of a deceased person[, and any gift of shares which][6] is unsolicited and made without regard to the provisions of sections 767A, 767AA, 768, 768A, 768B[, 768C and 768D], ..., shall be left out of account.

(2A) Where—

(*a*) persons, whether company members or not, possess extraordinary rights or powers under the articles of association or under any other document regulating the company, and

(*b*) because of that fact ownership of the ordinary share capital may not be an appropriate test of whether there has been a change in the ownership of the company,

then, in considering whether there has been a change in the ownership of the company for the purposes of section 767A, 767AA or 767C, holdings of all kinds of share capital, including preference shares, or of any particular category of share capital, or voting power or any other kind of special power may be taken into account instead of ordinary share capital.

(3) Where, because persons, whether company members or not, possess extraordinary rights or powers under the articles of association or under any other document regulating the company, ownership of the ordinary share capital may not be an appropriate test of whether there has been a major change in the persons for whose benefit the losses may ultimately enure, then, in considering whether there has been a

change in the ownership of the company for the purposes of section 768 or 768A or 768D, holdings of all kinds of share capital, including preference shares, or of any particular category of share capital, or voting power or any other special kind of power, may be taken into account instead of ordinary share capital.

(3A) Subsection (3) above shall apply for the purposes of sections 768B and 768C as if the reference to the benefit of losses were a reference to the benefit of deductions.

(4) Where section 768, 768A, 768B[, 768C or 768D has operated to restrict relief by reference to a change of ownership taking place at any time, no transaction or circumstances before that time shall be taken into account in determining whether there is any subsequent change of ownership.

(5) A change in the ownership of a company shall be disregarded for the purposes of sections 767A, 767AA, 767C, 768, 768A, 768B, 768C and 768D if—

(*a*) immediately before the change the company is the 75 per cent subsidiary of another company, and

(*b*) (although there is a change in the direct ownership of the company) that other company continues after the change to own the first-mentioned company as a 75 per cent subsidiary.

(6) If there is a change in the ownership of a company, including a change occurring by virtue of the application of this subsection but not a change which is to be disregarded under subsection (5) above, then—

(*a*) in a case falling within subsection (1) (*a*) above, the person mentioned in subsection (1) (*a*) shall be taken for the purposes of this section to acquire at the time of the change any relevant assets owned by the company;

(*b*) in a case falling within subsection (1)(*b*) above but not within subsection (1)(*a*) above, each of the persons mentioned in subsection (1)(*b*) shall be taken for the purposes of this section to acquire at the time of the change the appropriate proportion of any relevant assets owned by the company; and

(*c*) in any other case, each of the persons mentioned in paragraph (*c*) of subsection (1) above (other than any whose holding is disregarded under that paragraph) shall be taken for the purposes of this section to acquire at the time of the change the appropriate proportion of any relevant assets owned by the company.

(6A) In subsection (6) above—

"the appropriate proportion", in relation to one of two or more persons mentioned in subsection (1)(*b*) or (*c*) above, means a proportion corresponding to the proportion which the percentage of the ordinary share capital acquired by him bears to the percentage of that capital acquired by all those persons taken together; and

"relevant assets", in relation to a company, means—

(*a*) any ordinary share capital of another company, and

(*b*) any property or rights which under subsection (3) above may be taken into account instead of ordinary share capital of another company.

(6B) Notwithstanding that at any time a company ("the subsidiary company") is a 75 per cent subsidiary of another company ("the parent company") it shall not be treated at that time as such a subsidiary for the purposes of this section unless, additionally, at that time—

(*a*) the parent company would be beneficially entitled to not less than 75 per cent of any profits available for distribution to equity holders of the subsidiary company; and

(*b*) the parent company would be beneficially entitled to not less than 75 per cent of any assets of the subsidiary company available for distribution to its equity holders on a winding-up.

(6C) Schedule 18 shall apply for the purposes of subsection (6B) above as it applies for the purposes of section 413(7).

(7) For the purposes of this section—

(*a*) references to ownership shall be construed as references to beneficial ownership, and references to acquisition shall be construed accordingly;

(*b*), (*c*)...

(*d*) "shares" includes stock.

(8) If any acquisition of ordinary share capital or other property or rights taken into account in determining that there has been a change of ownership of a company was made in pursuance of a contract of sale or option or other contract, or the acquisition was made by a person holding such a contract, then the time when the change in the ownership of the company took place shall be determined as if the acquisition had been made when the contract was made with the holder or when the benefit of it was assigned to him so that, in the case of a person exercising an option to purchase shares, he shall be regarded as having purchased the shares when he acquired the option.

(9) Subsection (8) above shall not apply in relation to section 767A, 767AA or 767C".

European Provisions

11. The relevant European provisions at the time were Articles 43 and 56. These provide as set out below. We note that Mindpearl only sought to rely on Article 43 but have included Article 56 for the sake of completeness.

(1) Article 43

"Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.…"

(2) Article 48

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

(3) Article 56

"1. Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this Chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited".

(4) Article 57

"1. The provisions of Article 56 shall be without prejudice to the application to third countries of any restrictions which exist on 31 December 1992 under national or Community law adopted in respect of the movement of capital to or from third countries involving direct investment—including in real estate—establishment, the provision of financial services or the admission of securities to capital markets.

2. Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other Chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment—including investment in real estate—establishment, the provision of financial services or the admission of securities to capital markets. Unanimity shall be required for measures under this paragraph which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries".

(5) Article 58

"1. The provisions of Article 56 shall be without prejudice to the right of Member States—

(*a*) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(*b*) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56".

(6) Article 59

"Where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the ECB, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary".

(7) Article 60

"1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

2. Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decision taken by the Council".

Case Law

12. We were provided with copies of the decisions in the following cases, etc. which we have carefully considered:

Commissioning vs France C – 270/83

(a) *R vs IRC ex parte, Commerzbank* C – 330/91

(b) *Halliburton Services BV vs Staatssecretaris van Financien* CE – 1/93

(c) *Future Participations SA and Singer vs Administration des contributions* C – 250/95

(d) *ICI vs Colmer* C – 264/96

(e) *Compagnie de St Gobain vs Finanzamt Aachen* C – 307/97

(f) *Royal Bank of Scotland plc vs Ellinikon Dimosio* C – 311/97

(g) *CLT – UFA SA vs Finanzamt Koln-West* CE – 253/03

(h) *X Holding BV* C – 337/08

(i) *HMRC vs Philips Electronics UK Ltd* C – 18/11 [Notice of Reference for a preliminary ruling]

(j) *Philips Electronics UK Ltd vs HMRC* TC 00176

(k) *HMRC vs Marks & Spencer plc* [2010] STC 2470

(l) Paragraph 9 – 025: burden of proof dicey, Morrison Collins on the Conflict of Laws 14th edition

13. We were also provided during the course of the hearing with a copy of the reasoned order in *Stahlwerk Ergste Westig GmbH vs Finanzamt Düsseldorf – Mettann* C – 415/06. This concerned the use of losses for a permanent establishment in a non-member country. It decided that Article 43 "… may not be invoked in circumstances regarding such an establishment located in a non-member country". This is the mirror image the position under consideration.

The Evidence

Documents and Witnesses

14. We were provided with a bundle of documents. The documents were all admitted in evidence no objection having been taken to any of the documents.

15. No oral evidence was heard and no witness statements were produced.

Agreed Statement of Facts

16. There was also an Agreed Statement of Facts. This read as follows:

"[1.] The Taxpayer is a company incorporated under the laws of Switzerland and is registered in the United Kingdom as a foreign corporation under number FC 023461. The Taxpayer is owned 100% by Swissair AG which in turn is owned 100% by Swissair Group.

[2.] On or around 26 June 2001 the Taxpayer commenced trading in the UK through a UK branch located at Hythe House, 200 Shepherds Bush Road, London. The

Taxpayer operated a call centre for an alliance of airlines including Swissair ("the trade").

[3.] The trade was previously being carried on by Qualiflyer Group Customer Care Centres GmbH ("QCCC"), a company incorporated under the laws of Germany. QCCC was 100% owned by Qualiflyer Group Holdings GmbH ("QGH"), also a German registered company. QGH was owned 40% by Swissair AG, 20% by Sabena, 20% by AOM Minerve SA ("AOM") and 20% by Transportes Aereos Portugueses SA ("TAP"). Swissair AG was owned 100% by Swissair group, which also owned 49.5% of Sabena and 49% of AOM. Swissair Group's total shareholding in QGH through Swissair AG, Sabena and AOM therefore amounted to 59.7%.

[4.] On 1 August 2003 HMRC opened an enquiry into the Taxpayer's corporation tax return for its accounting period ended 31 December, 2001 in accordance with paragraph 24 (1) of Schedule 18 Finance Act 1998. Under cover of a letter dated 22 December, 2003, the Taxpayer submitted an amended return for 2001 in which it included a deduction for trading losses incurred in the trade when it had been carried on by QCCC. A similar deduction for such losses was included in the Taxpayer's 2002 corporation tax return, in which an enquiry was also opened. Both claims were based on section 343 TA.

[5.] On 6 May, 2005 HMRC issued Closure Notices for both the 2001 and 2002 accounting periods under Paragraph 32 (1) of Schedule 18. On 27 June 2005 the Inspector issued notices of amendment in accordance with paragraph 34 (2) of Schedule 18. The notices of amendment refused the Taxpayer a deduction in respect of the trading losses incurred in the trade when it had been carried on by QCCC under section 343 TA. The Taxpayer appeals against these notices".

The Facts

17. From the evidence we make the following findings of fact.

18. We find the matters set out in the Agreed Statement of Facts as facts in this case as requested by the parties.

The Submissions of the Parties

The Appellant's Submissions in outline

19. In essence, the Appellant contended that:

(1) Section 343 TA was discriminatory as it denied QCCC, a national of a member state, the ability to realise the economic value of the tax losses from the trade in question;

(2) Article 43 was therefore infringed as QCCC could not realise the losses by selling shares as easily as selling the business. Mindpearl was able, in effect, to rely on this infringement notwithstanding that QCCC was the party suffering the denial;

(3) Accordingly, section 343 TA should be read as if the required common ownership was 50% and not 75% so that the position was the same for the transfer of a trade and the transfer of shares;

(4) In this way QCCC's article 43 rights would be protected. It was QCCC's rights that Mindpearl sought to rely on;

(5) Accordingly, the appeal should be allowed.

20. Mindpearl relied, in particular, on *Philips* in support of this proposition and on *Halliburton.*

21. It was not sought to argue that Mindpearl's principal place of business was in the UK and Mindpearl accordingly itself had Article 43 rights. No argument on Article 56 was raised nor were any Double Tax Conventions.

HMRC's Submissions in outline

22. In essence, HMRC contended that:

(1) The conditions in section 343 TA for the losses to be available were not fulfilled with the consequences that the losses were not available to Mindpearl;

(2) The amendments to the returns were thus properly made as there was no loss relief;

(3) Article 43 does not apply here as it only applies to transactions between nationals of member states. Mindpearl is a Swiss company and thus not a national of a member state nor treated as one;

(4) Further for Article 43 to apply there needed to be discrimination. Here section 343 TA applied equally to companies incorporated in the UK and within the European Union and those incorporated outside the European Union. Accordingly, there was no discrimination;

(5) Mindpearl sought to use the wrong comparator. The position as regards transfers of trade was the same for UK incorporated and resident companies and those incorporated elsewhere. To compare the transfer of trades with the transfer of the shares in a company that retained the trade was not to compare like with like;

(6) Accordingly, the appeal should be dismissed.

Discussion

General

23. We reminded ourselves that it was for the Appellant to prove its appeal i.e. the onus was on Mindpearl to make out its case.

24. As noted above the issue for determination here was essentially "Does section 343 TA treat companies incorporated or operating in the UK differently from those incorporated outside the UK?

25. This raised five questions in particular which are considered next. These questions are:

(1) Does section 343 TA treat companies incorporated or operating in the UK differently from those incorporated outside the UK as regards losses?

(2) Does the UK treat share transfers and business transfers involving losses differently?

(3) Is this discriminatory of itself?

(4) What is the proper comparator?

(5) Should section 343 TA be read as having a 50% requirement rather than the 75% test set out in the legislation?

26. Before considering these questions we should consider the case of *Philips.*

The Philips case

27. The Appellant placed great reliance on this case. The Appellant suggested that it was binding on the Tribunal. The Tribunal reminded the Appellant that in our system one tribunal decision was not binding on another tribunal any more than one High Court decision was on another High Court decision.

28. The Tribunal also noted that the *Philips* case was on appeal and that a reference had been made.

29. The *Philips* case is interesting but is on different provisions in the Taxes Act and on different fact patterns. We are not concerned in this case with "link companies" in the context of Consortium relief. There is no equivalent of a link company involved here in such that a company in a member state other than the UK could not be a link company so as to allow Consortium relief.

30. The *Philips* case concerned the denial of Consortium relief because the relevant link companies were not resident in the UK. As noted above this is not the case here. Further, the *Philips* case concerned the use of losses between companies resident in the EU. This is not the case here. This is an important factual distinction in the context of Article 43 which allows the *Philips* case to be distinguished.

31. The First Tier Tribunal said at paragraph [17]:

> "We agree with Mr Milne that s 406(2) is a clear case of a restriction and any doubt about it was resolved by the ECJ in *Papillon* which is identical in all material respects to the situation of the link companies. In *Papillon* relief for losses between two French companies was restricted by the existence of an intermediate Dutch company; here group relief between a UK branch and a UK company is restricted by the existence of non-UK link companies".

32. It is also helpful to note what the First Tier Tribunal said about the outcome of the case. The Tribunal said at paragraph [60] headed " Result":

> "Our answers to the questions in the joint referral are accordingly as follows:
> "1. Whether, in light particularly of any applicable principles of EU law, section 406(2) ICTA 1988, or any other provision, applies so as to prevent consortium relief from being available on the basis that the relevant link companies (as that term is defined in section 406(1) ICTA 1988), being Koninklijke Philips Electronics NV and Philips GmbH, although resident at all times in an EU Member State, were not at any relevant time within the charge to UK corporation tax
> Answer. Section 406(2) contains a restriction that cannot be justified and so does not apply to prevent consortium relief from being available in these circumstances.
> 2. Whether, in light particularly of any applicable principles of EU law, section 403D ICTA 1988 (entitled 'Relief for or in respect of non-resident companies'), or any other provision, applies so as to prevent consortium relief from being available by reference to the prospect of those losses being utilised (as more fully spelt out in section 403D ICTA 1988, or such other relevant provision), in any period, for the purposes of Dutch corporate income tax or any other non-UK tax.
> Answer. Section 403D contains a restriction that cannot be justified and so does not apply to prevent consortium relief from being available in these circumstances. If we are wrong about justification there is a more proportional method of restricting the double use of losses in the form of the no possibilities test adopted in *Marks and Spencer* and s 403D should be interpreted so as to be in conformity with that test".

33. We agree with HMRC's argument that Article 43 does not apply here as it only applies to transactions between nationals of member states. Mindpearl is a Swiss

company and thus not a national of a member state nor treated as one[2]. Even if the rights of QCCC are to be relied on the conditions in Article 43 would need to be fulfilled. On its wording Article 43 provides that "…restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited".

34. Article 43 continues "Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State".

35. We remind ourselves that Mindpearl is not a "national" of any member state.

36. It seems to us that QCCC had established itself in another member state and could sell to a company established under the law of other member state and so benefit from Article 43. It is not the case in our view that a sale to a company established outside the EU falls within Article 43. We find that it does not apply here.

37. We have not considered the application or not of Article 56 as the Appellant did not wish to argue the point and we heard no argument on the point as noted above.

38. This would be sufficient to dispose of the case. However, in case we are wrong we now consider whether the UK provisions give rise to a discriminatory restriction.

Does section 343 TA treat companies incorporated or operating in the UK differently from those incorporated outside the UK?

39. Section 343 TA applies where on "a company ("the predecessor") ceasing to carry on a trade, another company ("the successor") begins to carry it on". This applies to any company, wherever incorporated and includes part of a trade.

40. There are also certain other conditions that need to be fulfilled. These include that "… on or at any time within two years after that event the trade or an interest amounting to not less than a three-fourths share in it belongs to the same persons as the trade".

41. Accordingly, if a company wherever incorporated begins to carry on a trade that was previously carried on by another company provided there is at least 75% common ownership before and after the first company is no longer carrying on the trade the losses that arose in the first companies period of trading that have not already been used may be carried forward and set against profits from the trade in the successor's period of "ownership" of the trade.

42. By section 832 (1) TA ""company" means, subject to subsection (2) below, any body corporate or unincorporated association but does not include a partnership, a local authority or a local authority association"[3]. There is no limit to companies incorporated in the UK or similar matter.

43. Accordingly, section 343 TA does not treat companies incorporated or operating in the UK differently from those incorporated outside the UK. We so find.

Does the UK treat share transfers and business transfers involving losses differently?

44. It is to be noted that the general position is that the UK has different requirements in respect of losses on change of ownership of shares or a trade and therefore depending on whether shares in the company with losses or the business with the losses is transferred there can be a different outcome.

45. There is a 50% common ownership requirement for losses not to be denied on a share transfer. Section 768 TA is essentially an anti-avoidance provision. It applies

[2] Mindpearl did not wish to rely on the arrangements between Switzerland and the EU as noted above.

[3] The restrictions in subsection (2) are not in point here.

equally to UK incorporated and non-UK incorporated companies and to EU incorporated and non-EU incorporated companies and the shares in them.

46. There is a 75% common ownership requirement for losses to be available on a business transfer. Again this applies equally to UK incorporated and non-UK incorporated companies and to EU incorporated and non-EU incorporated companies.

47. There is thus a difference for loss purposes between the transfer of shares in the transfer of the business. This does not depend on the place of incorporation, etc. of the company. The position as regards losses would be the same if they were a transfer of shares in a German incorporated company or a UK incorporated company. Equally the position would be the same if they were a transfer of the business.

Is this discriminatory?

48. Article 43 provides (inter alia) that "“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State”.

49. It is hard to see that when transfers of trades and transfers of shares are each treated in the same way whether UK incorporated or non UK incorporated companies are involved that there is a restriction which is discriminatory.

50. The transfers in each class are treated in the same way. This would be the case where the transfer is between nationals of member states. It is not the case here.

What is the proper comparator?

51. A transfer of a trade is not treated in the same way as a share transfer. However, this is true for UK only transfers.

52. In *Papillon* it was said at paragraph 27:

“In order to establish whether discrimination exists, the comparability of a Community situation with one which is purely domestic must be examined by taking into account the objective pursued by the national provisions at issue (see, to that effect, *Metallgesellschaft and Others*, paragraph 60, and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 38)”.

53. The Tribunal in *Philips* agreed with *Papillon* (see paragraph 17).

54. The Tribunal in *Philips* said (at paragraph 20) “We prefer Mr Milne's approach. While much of the analysis of the Advocate General in *Test Claimants in Class IV of the ACT Group Litigation* may not have been relevant to the ultimate decision, it is a useful distillation of the EU cases and explains clearly what is the correct comparison in particular circumstances. Mr Ewart is correct in saying that the reason for the distinction is that in each case the question is whether the situations are objectively the same, but this will lead one to the same result as the Advocate General's analysis so long as the comparison is made at the right level of generality.

55. It was also noted as being argued that in Advocate General Geelhoed's Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, Case C-374/04, [2007] STC 404 it was said:

“[55.] To repeat, where a restriction on freedom of establishment results purely from the co-existence of national tax administrations, disparities between national tax systems, or the division of tax jurisdiction between two tax systems (a quasi-restriction), this should not fall within the scope of art 43 EC. In contrast, 'true' restrictions, that is to say, restrictions to free movement of establishment going

beyond those resulting inevitably from the existence of national tax systems, fall under the art 43 EC prohibition unless justified. In the terminology used above, in order to fall under art 43 EC, disadvantageous tax treatment should follow from discrimination resulting from the rules of one jurisdiction, not disparity or division of tax jurisdiction between (two or more) member states' tax systems.

[56.] As I recalled above, the court has held that discrimination consists in the "application of different rules to comparable situations or in the application of the same rule to different situations".

56. This is also relevant here. It seems to us that comparable situations are treated in the same way here. The UK has different rules as to common ownership where there is a change in the ownership of a trade or shares which do not depend on place of establishment, etc. This is not a case of the "application of different rules to comparable situations or in the application of the same rule to different situations".

Should section 343 TA be read as having a 50% requirement rather than the 75% test set out in the legislation?

57. Parliament enacted a 75% (three fourths) requirement for business transfers notwithstanding that there is only a 50% requirement for share transfers. It is to be presumed that Parliament intended this to be the case and did so deliberately.

58. It is trite law that an act of Parliament is binding on this Tribunal. We happily acknowledge this to be the case.

59. An Act of Parliament is to be given its plain meaning unless there is a reason not to. Here Parliament is being clear and deliberate in enacting the different requirements for losses on transfers of shares and businesses.

60. Accordingly we can see no reason, and would not wish to, to do anything other than to apply the words of the Act of Parliament to the particular facts unless there were a compelling reason to do otherwise.

61. On the agreed facts the 75% (three fourths) requirement is not met on the transfer of the business. Accordingly, the requirements of section 343 TA are not met and so it does not permit the losses to be used.

62. We do not consider that section 343 TA treats UK incorporated and other companies differently. Consequently, we do not see that it can breach Article 43.

63. We therefore find against Mindpearl on the Article 43 Issue which is the only issue argued in this case.

Conclusion

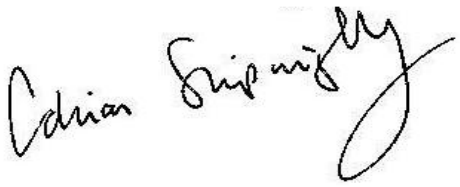
64. We have found that Article 43 is not applicable and even if it were was not breached and so have found against Mindpearl on the Article 43 issue which is the only issue argued in this case.

65. Accordingly, the Appeal is dismissed.

66. We make no order as to costs.

67. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later

than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.



ADRIAN SHIPWRIGHT

TRIBUNAL JUDGE
RELEASE DATE: 18 August 2011