Neutral Citation: [2024] UKFTT 00078 (TC)

Case Number: TC09043

FIRST-TIER TRIBUNAL
TAX CHAMBER

Decided on the papers

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

Procedure – HMRC application for stay behind another appeal – whether the decision in the other appeal will be of material assistance in resolving the issues in the present case – application allowed

Determined on: 29 December 2023
Judgment date: 22 January 2024

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL

Between

PAUL HUNT
JAMES HUNT
ROBERT DAVIS

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

DECISION

INTRODUCTION

1. These appeals ("**these appeals**") concern the application of the anti-avoidance legislation set out in Chapter 1, Part 13 Income Tax Act 2007, ("**ITA 2007**") namely the "transactions in securities" legislation to a reduction of capital of Golf Holdings Limited ("**GHL**") which took place on 22 April 2015 ("**the 2015 Capital Reduction**").

2. These appeals have not yet been set down for hearing. In an application dated 31 October 2023 HMRC have applied for a stay of these appeals ("**the stay application**") as there are two other appeals (which are related to each other and are being treated as conjoined) which are listed to be heard by the tribunal on 11 to 14 March 2024 ("**the earlier appeal**"). One of the issues in the earlier appeal turns on the definition of "relevant consideration" which is a fundamental issue, too, in these appeals.

3. The appellants in these appeals ("**these appellants**") oppose the stay application. They do so on various grounds which are set out in more detail below.

4. I am also asked to consider two applications made by these appellants. Firstly, they have applied for these appeals to be recategorised as complex. They have also applied for a direction that the tribunal reveals to them the names and representatives of the appellants in the earlier appeal. HMRC does not oppose either application. I shall issue directions on both of those matters shortly after the release of this decision.

THE LAW

5. The stay application touches briefly on the relevant law which does not appear to be challenged by these appellants in their grounds of opposition. I am indebted to Judge Brooks for his recent decision in *Newport City Council* ([2023] UKFTT 00914) in which he neatly encapsulates what I consider to be the relevant approach, which, although not binding on me, I gratefully adopt for the purposes of this decision. In that case, Judge Brooks says:

> "15. It is clear that the Tribunal has the power, under Rule 5(3)(j) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, to direct a stay of proceedings.
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> 16. There was broad agreement that the proper approach to be adopted by the Tribunal in a stay application such as the present was that confirmed by Lord Osborne, delivering the opinion of the Court of Session (Inner House), in *HMRC v RBS Deutschland Holdings GmbH* [2007] STC 814 who said, at [22]:
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> > "… As we would see it, a tribunal or court might sist [stay] proceedings against the wish of a party if it considered that a decision of another court would be of material assistance in resolving the issues before the tribunal or court in question and that it was expedient to do so".
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> 17. Such an approach has been adopted by this Tribunal eg in *Coast Telecom Ltd v HMRC* [2012] UKFTT 307 (TC) in which Judge Berner observed, at [21], that the "question is not whether the determination of another court **might** provide assistance, but whether it **will** provide material assistance" (emphasis added). Accordingly, it is necessary to consider whether the decision in *Cardiff* will provide material assistance in resolving the issues in Newport and whether it is expedient to direct a stay.
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> 18. In doing so, as when exercising any power under the Tribunal Procedure Rules, it is necessary to have regard to the overriding objective of the Rules (see Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009) to deal with the case "fairly and justly" which includes making directions which are proportionate to the importance of the

case, the complexity of issues, the anticipated costs and resources of the parties and avoiding delay so far as compatible with the proper consideration of the issues".

THE EARLIER APPEAL

6. In the earlier appeal, the appellants in that appeal ("**those appellants**") appeal against counteraction notices issued under section 698 ITA 2007, and assessments to income tax in relation to an own share purchase by Xercise 2 Limited of shares owned by those appellants, which took place in March 2015. Following an enquiry into those appellants' self-assessment returns for the tax year ended 5 April 2015, and the closure of those enquiries in October 2017, HMRC issued preliminary notifications to those appellants, under section 695 ITA 2007 in January 2021.

7. Following the statutory declarations procedure in section 696 ITA 2007 and applications to the tribunal under section 697 ITA 2007, counteraction notices under section 698 ITA 2007 were issued to those appellants on 31 March 2021. HMRC also issued notices of assessment to those appellants in relation to the tax year 2014/2015.

8. Those appellants appealed against the counteraction notices and the assessments in April 2021. Following statutory reviews of those decisions, which were upheld in October 2021, those appellants appealed to the tribunal in November and December 2021.

9. In both cases the grounds of appeal ("**the original grounds**") were stated to be as follows:

> "The grounds of appeal against the counteraction notice are several and centre on the following contentions:
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> a) The transaction in question did not constitute a transaction in securities by reason of being nothing other than a repayment of share capital and share premium.
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> b) If, contrary to what is thought, the transaction in question did constitute a transaction in securities, the consideration did not constitute "relevant consideration" as referred to in both subsection (2) (a) and (b) of section 684 of the Income Tax Act 2007 by reason of the express exclusion from such references by subsection (6) of assets which represent a return of sums paid by subscribers on the issue of securities, and
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> c) My main purpose, or one of my main purposes, in entering into the transaction in question was not to obtain an income tax advantage".

(It seems to me that the reference in the foregoing should be to section 685 but HMRC have taken no point on this).

10. Following applications, which were granted, for permission to amend their grounds of appeal, those appellants also appeal against the counteraction notices and the assessments on the following grounds ("**the additional grounds**"):

(1) "That the counteraction notices are defective for non-compliance with section 698(2) of the Income Tax Act 2007 given that the proforma notice issued to the taxpayers (which is clearly designed with section 698(2) in mind) has not been completed".

(2) "That the assessments are invalid as they fall outside the four-year time limit in TMA, section 34 and the conditions for extended time limits in section 36 are not met. The Appellants do not consider that any provision in ITA section 698 overrides the TMA time limits".

11. HMRC's statement of case deals with each of these grounds of appeal. In summary, as regards the original grounds:

(1) The transactions included own share purchases which fall within the definition of transactions in securities in section 684(2) ITA 2007.
(2) The consideration for the own share purchases constitutes relevant consideration within the meaning of section 685(4) ITA 2007. In particular, the consideration for those purchases were, or represented the value of assets which were available for distribution by way of dividend by the company or which would have been available apart from anything done by the company. The distributable reserves of the company stood at approximately £36 million as at 31 December 2014 and at approximately £46 million on 31 December 2015.
(3) The other appellants' reliance on the exemption in section 685(6) ITA 2007 is incorrect. That provision does not apply to UK limited companies. Furthermore, the consideration for the own share purchases did not represent a return of sums paid by subscribers on the issue of securities.
(4) The main purpose or one of the main purposes for the other appellants being party to the own share purchase was to obtain an income tax advantage. It is clear that such an advantage was obtained; the company had significant distributable reserves and those appellants would have been aware that had they extracted those reserves by way of distribution, that extraction would have attracted income tax; those appellants and their advisers were conscious of the benefits of extracting funds from the company in the form of capital in order to obtain an income tax benefit.

12. As regards the additional grounds, HMRC assert:

(1) The counteraction notice and the assessment were valid notwithstanding that certain parts of the schedule had not been completed. The adjustments to be made had been specified and are objectively clear from the notice read with the accompanying correspondence.
(2) The assessment was issued within 6 years of the relevant tax year but not within 4 years of that tax year. The time limit in section 34(1) TMA does not apply to assessments made under section 698 ITA 2007 as the former is expressly subject to any other provisions of the Taxes Acts allowing a longer period, and section 698(5) ITA 2007 allows such a longer period in the circumstances of the matters under appeal.

THESE APPEALS

13. Following a share for share exchange in 2002, GHL acquired (from these appellants) shares in three companies which became, therefore, subsidiaries of GHL. Following that acquisition, these appellants owned, respectively, A B and C shares in GHL.
14. In March 2010, there was a capital reduction in GHL, whereby one million shares were cancelled and £10 per share was repaid to these appellants. The 2015 Capital Reduction also resulted in a further one million shares being cancelled by GHL in exchange for cash payments of £10 per share to each of these appellants.
15. Approximately £7.8 million was payable to the first of these appellants and £1.1 million to each of the second and third of these appellants.
16. The consideration for the capital reduction was not actually paid to these appellants at that time, but was paid by instalments, the outstanding instalments being a debt owed by the company to these appellants.
17. As at 31 December 2014, GHL's balance sheet referred to called up share capital of approximately £2.6 million, a share premium account of approximately £24 million, and profit and loss of approximately £12 million. As at 31 December 2015, there was called up share capital of approximately £1.6 million, a share premium account of approximately £15 million, and a profit and loss account of approximately £12 million.
18. These appellants recorded their consideration as capital gains in their tax returns for the 2015/2016 tax year.

19. In June 2018 HMRC wrote to each of these appellants indicating that in their view the transactions in securities legislation might apply in relation to the 2015 Capital Reduction.

20. In December 2021, HMRC sent each of these appellants a notice under section 695 ITA 2007 indicating that section 684 ITA 2007 might apply. Following the statutory declaration and application to the tribunal procedures, on 4 April 2022 HMRC issued counteraction notices under section 698 ITA 2007 and assessments for the tax year 2015/2016 to each of these appellants.

21. These appellants have appealed against the counteraction notices and the assessments. In each case their grounds of appeal are identical and are stated to be:

> "The appeal is on the basis that HMRC contends that the circumstances are covered by section 685 ITA 2007. This is on the basis that Condition A is met because as a result of the transaction in securities, the Appellant received relevant consideration in connection with the distribution, transfer or realisation of assets of a close company. HMRC state that "relevant consideration" means consideration which is or represents the value of assets which are available for distribution by way of dividend. The balance sheet date of 31 December 2015 shows the Profit and Loss reserves as £12,110,974. HMRC therefore contend that amounts received represented assets otherwise available for distribution by way of dividend.
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> The Appellant appeals on the basis that the assets distributed or transferred by the company represented a return of sums contributed by subscribers, in the amount of [£xxx], and accordingly s685(6) ITA 2007 is in point.
>
> In the alternative, the Appellant appeals on the basis that, the consideration represented share capital and accordingly did not comprise, and did not represent the value of, assets available for distribution".

22. HMRC's statement of case sets out what they believe to be the issues in these appeals and their position on them.

23. As regards the former, it is HMRC's view that the dispute is limited to whether the amounts paid to these appellants pursuant to the 2015 Capital Reduction constituted "relevant consideration". And that these appellants contend that it did not on two bases. Firstly, it was not relevant consideration as it fell within section 685(6) ITA 2007. Alternatively, it did not represent the value of assets available for distribution within the meaning of section 685(4) ITA 2007.

24. HMRC do not consider that these appellants are disputing that there was a transaction in securities, nor that the main purpose or one of the main purposes of the 2015 Capital Reduction was to secure an income tax advantage.

25. HMRC's position is that the entire £10 million paid to these appellants pursuant to the 2015 Capital Reduction was relevant consideration. Given that GHL's balance sheet showed profits of approximately £12 million on both 31 December 2014 and 31 December 2015, GHL could have paid dividends of £10 million to these appellants at the time of the 2015 Capital Reduction. That £10 million, therefore, "is or represents the value of assets which are available for distribution by way of dividend by the company" which could have been paid to these appellants by way of a dividend and was thus relevant consideration.

26. Section 685(6) ITA 2007 has no impact. HMRC's view is that the effect of that subsection is that if a company is able to distribute, by way of dividend, sums which have been paid by subscribers for the issue of securities, then the amount which can be so distributed is not added to the cap under section 685(4)(a) ITA 2007. Section 685(6) ITA 2007 does not mean that any amount that might be said to constitute a return of share capital/premium, is not "relevant consideration".

THE STAY APPLICATION

27. In the stay application, HMRC apply for a stay of these appeals until 30 days after the final determination of the "**Relevant Consideration Issue**" in the earlier appeal. The

Relevant Consideration Issue is, essentially, the meaning of "relevant consideration" for the purposes of sections 685(4) ITA 2007 and the meaning and application of 685(6) ITA 2007. HMRC have also provided a draft direction which I am asked to endorse.

28. HMRC set out a number of reasons in favour of the stay.

(1) It is their view that the tribunal hearing the earlier appeal (and subsequently any higher court or tribunal on an appeal from that tribunal) will set out the relevant principles regarding the correct interpretation of relevant consideration. This might mean, depending on the interpretation, that these appeals are capable of resolution without litigation thus reducing time and cost.

(2) It would also avoid the possibility of there being a number of possibly conflicting decisions on the meaning of relevant consideration.

(3) The tribunal hearing these appeals will also have the benefit of the decision in the earlier appeal. This will be of material assistance in resolving these appeals.

(4) Neither party will be prejudiced by the stay.

THESE APPELLANTS' OBJECTIONS

29. These appellants put forward a number of objections to the stay application.

(1) HMRC have been granted an extension to serve their pleadings on the basis that they needed to consider how best to "group" cases which involved similar issues relating to the transactions in securities legislation. In the case of these appellants, matters have proceeded on the basis that it will be a free-standing appeal. And these appellants have incurred costs both financial and in terms of time in preparing their case including the preparation of witness statements.

(2) Furthermore, HMRC appear to be suggesting that the earlier appeal should be granted status of a lead case and are seeking to invoke the lead case mechanism in Tribunal Rule 18. They have had ample opportunity to make such an application before now. These appeals are now at listing stage, and HMRC have missed the boat.

(3) HMRC are cherry picking and choosing (presumably) the weakest case (from the taxpayer's perspective) to bring before the tribunal.

(4) HMRC have not divulged the identity of the parties or their representatives in the earlier appeal.

(5) It does not appear that the grounds of appeal in the earlier appeal are the same as in these appeals. These appellants appealed on the basis that the assets distributed or transferred by GHL represent a return of sums contributed by subscribers and are thus subject to section 685(6) ITA 2007. It does not appear from HMRC's stay application that the appellants in the earlier appeal have raised this point.

(6) These appellants have also appealed on the basis that the relevant consideration represented share capital and did not represent the value of assets available for distribution. It is not clear whether the appellants in the earlier appeal are relying on the same case law on this point.

(7) Even if the lead case mechanism is not adopted, the earlier appeal should be listed at such a time as to enable these appellants to be given the opportunity to make submissions in the earlier appeal.

HMRC'S RESPONSE

30. HMRC in their response to those objections make the following points.

(1) They are not seeking to invoke the lead case mechanism. In their view, however, the decision on the Relevant Consideration Issue in the earlier appeal will be of material assistance in these appeals.
(2) They are not cherry picking. Had these appellants' counsel been available on the dates which had originally been submitted, these appeals would have been listed to be heard in February 2024 and so would have been heard before the earlier appeal which is scheduled for March 2024.
(3) Both these appeals and the earlier appeal will require resolution of the same issues namely the meaning of relevant consideration in section 685(4) ITA 2007, and whether the safe harbour in section 685(6) ITA 2007 applies.
(4) I should reject these appellants' submission that they should be entitled to make submissions in the earlier appeal which should be listed to take that opportunity into account. The time estimate for the earlier appeal does not take into consideration any such submissions. If I were to allow this application there is a real risk of the earlier appeal having to be postponed or that appeal going part heard.

MY VIEW

31. I do not accept these appellants' submission that HMRC are cherry picking. I accept HMRC's submission that had it not been for the fact that these appellants' counsel, having originally indicated that he would be available, turned out to be unavailable for the scheduled dates in February 2024, these appeals would be heard before the earlier appeal.
32. Nor do I think there is anything in the submission that HMRC are attempting to invoke the lead case mechanism in Rule 18. They are clearly not seeking to do so. HMRC's contention is that determination of the Relevant Consideration Issue in the earlier appeal will be of material assistance to the trial judge to these appeals.
33. And in this I agree with them.
34. I appreciate these appellants' submission that it was not clear to them from the stay application, precisely what were the crucial issues which require determination in the earlier appeal. Hence their misgivings that a determination of the Relevant Consideration Issue may not be either relevant or of material assistance to these appeals.
35. It is for this reason that I have set out in considerable detail, both the grounds of appeal and HMRC's response thereto in their statement of case, in both appeals.
36. It is abundantly clear that central to both appeals is the question of whether the consideration paid by a company comprises relevant consideration within the meaning of section 685 (4) ITA 2007, and whether the provisions of section 685 (6) apply. In other words, the Relevant Consideration Issue. It is true that in these appeals, the consideration was paid by way of a capital reduction, whilst in the earlier appeal, the consideration was paid for an own share purchase. But I do not think that this deflects from the fact that the issues as to the meaning of those statutory provisions is something which will need to be considered in detail in the earlier appeal.
37. Indeed, I have to declare interest at this stage since I am listed to be the trial judge at the hearing of the earlier appeal. And from what I have read thus far, it is clear that the meaning of these statutory provisions is something on which I will be addressed and will therefore need to consider in detail.
38. The application of those provisions to the particular facts of each appeal will of course depend on the detailed facts which will become apparent after a forensic examination of those facts during the trial.
39. But I can see no material difference between the circumstances of the reduction of capital in these appeals and the own share purchase in the earlier appeal, especially when, in both cases, HMRC have set out the values attributable to share capital, share premium

account, and profit and loss, in, what is their view, the relevant accounts, and have pleaded that in those circumstances, both companies were in a position to have distributed the consideration by way of distribution which was subject to income tax.

40. The determination, therefore, of the meaning relevant consideration under section 685 (4) ITA 2007, and the operation of section 685(6) ITA 2007 in the earlier appeal will, in my view, provide material assistance to the trial judge in these appeals.

41. It is true that there are additional grounds of appeal in the earlier appeal which are not relevant to these appeals. In the earlier appeal, those appellants claim that they had no anti-avoidance motive, that the counteraction notices are defective, and that the assessments are out of time. And it is perfectly possible, theoretically, for those appellants to approach the earlier appeal by adducing evidence only on those points, and making submissions thereon, thus ignoring the relevant consideration issues. And so, I could determine the earlier appeal on those points without considering the Relevant Consideration Issue.

42. But I think the chances of this happening are infinitesimally small. Whilst I have not considered in detail where the burden of proof lies in establishing the Relevant Consideration Issue, I have no doubt that HMRC will address it head-on and therefore the evidential burden, at least, will swing to the appellant to show that in their circumstances, the consideration for the own share purchases does not constitute relevant consideration, but if it does then the safe harbour in section 685(6) applies to them. They will go on to say, I have no doubt, that they had no anti-avoidance motive and that even if there is no safe harbouring, the counteraction notices are invalid and out of time.

43. The other appellants are represented by counsel. I have no doubt that counsel will not put all their eggs in one basket and not argue the relevant consideration and safe harbour points. And as I say, I have no doubt that HMRC will deal with them head-on.

44. It is also theoretically possible that notwithstanding that the Relevant Consideration Issue is fully aired, I decide the earlier appeal on other grounds and do not deal at all with that issue in my decision. But again, I think the chances of this happening are infinitesimally small. I say this for two reasons. Firstly, the general approach of judges is to deal with all points which are fully argued before them, even if some turn out not to be relevant because the case is determined on other grounds. And this is the approach I would adopt in the earlier appeal even if I had not known about these appeals. Secondly, of course, now that I know that these appeals and others which may turn on the meaning of relevant consideration, I shall of course deal with the Relevant Consideration Issue, fully, in my decision in the earlier appeal.

45. In summary. In my view the Relevant Consideration Issue will be dealt with in evidence and submissions in the earlier appeal. Those appellants are represented by counsel. Other arguments will be advanced in the earlier appeal which are not relevant to these appeals. However central to both is the Relevant Consideration Issue. My decision in the earlier appeal will deal with that issue and will be of material assistance to the resolution of that issue in the circumstances of these appeals.

46. I agree with HMRC's submission that by staying these appeals, it avoids the possibility of multiple, and conflicting, first instance decisions which is in no one's interests.

47. I reject those appellants' submission that they should be entitled to be represented at the hearing of the earlier appeal and make submissions at that hearing. The listing of the earlier appeal has not countenanced any such representation and, as HMRC submit, permitting such an application might have a profound impact on the listing and the risk that it will go part heard. Furthermore, given that those appellants are being represented by experienced counsel, I have no doubt that their submissions will be eloquent and persuasive, and will cover most if not all of the bases which these appellants would also cover should they be permitted to make submissions.

DECISION

48. For the foregoing reasons I allow the stay application. I will amend the draft directions provided by HMRC and issue them, along with directions on the two applications made by these appellants shortly after release of this decision. However the essence of the stay directions will be that this appeal is stayed until the Relevant Consideration Issue in the Earlier Appeal has been finally determined.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

49. 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.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 22nd JANUARY 2024