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Case Number: TC09212

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2022/11578

CORPORATION TAX – loan relationships – disallowance of imported losses – whether loss referable to a time when the relationship was not subject to UK taxation – loss resulting from payment made on early redemption of loan notes – whether a loss includes an expense – section 237 Corporation Tax Act 2009

Heard on: 23-24 May 2024
Judgment date: 13 June 2024

Before

TRIBUNAL JUDGE ROBIN VOS

Between

UK CARE NO. 1 LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: **MR KEVIN PROSSER KC** and **MS ZIZHEN YANG** of counsel, instructed by Slaughter and May

For the Respondents: **MR MARK FELL KC** and **MR HARRY WINTER** of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal raises a relatively short, but important, point of statutory interpretation in connection with the loan relationship rules which are contained in Part 5 Corporation Tax Act 2009 ("CTA 2009"). I am told that there have been no previous decisions in relation to the relevant provision or its predecessor.

2. The statutory provision in question is s 327 CTA 2009 which is headed "Disallowance of imported losses etc.". Its effect is to disallow a loss in connection with a loan relationship to the extent that the loss is "referable" to a time when the company seeking to bring the loss into account would not have been subject to corporation tax on any profits from the loan relationship.

3. The appellant, UK Care No. 1 Limited (referred to by the parties as "UKC1") is a Guernsey company which acted as the issuer of certain loan notes secured by the UK care home business of the group headed by the British United Providence Association Limited (the "BUPA Group"). UKC1 was not, at that time, part of the BUPA Group.

4. In 2016, BUPA wanted to sell a number of the care homes which formed part of the security package. UKC1 was therefore acquired by the BUPA Group, became UK resident and then redeemed the loan notes. The redemption gave rise to an accounting loss of just over £150m, being the difference between the amount UKC1 had to pay to redeem the loan notes and the carrying value of the loan notes in its accounts. It brought into account a loan relationship debit in respect of this loss in its tax return for the period ending 31 December 2016.

5. HMRC opened an enquiry into UKC1's tax return. On 17 September 2021, HMRC issued a closure notice disallowing the whole of the loan relationship debit of just over £150m.

6. However, since then, HMRC's position has changed and they now only seek to disallow approximately £94m of the loan relationship debit, being the difference between the carrying value of the loan notes in UKC1's accounts on the date the company became UK resident and the fair value of the loan notes on that date. This is on the basis that this part of the loan relationship debit is referable to the time when UKC1 was non-UK resident (and therefore not within the charge to corporation tax).

7. HMRC now accept that the balance of the loan relationship debit, being just under £57m, is referable only to the early redemption of the loan notes (which took place after UKC1 had migrated to the UK) and does not therefore fall within s 327 CTA 2009.

8. UKC1's position is that no part of the loan relationship debit is referable to the time before it became UK resident so that s 327 CTA 2009 does not apply to it. It says that the fair value of the loan notes (or the fair value of its liability in respect of the loan notes) as at the date of migration to the UK is irrelevant for this purpose.

9. In addition, Mr Prosser and Ms Yang have put forward a new ground of appeal in their skeleton argument to the effect that s 327 CTA 2009 only applies to disallow a "loss" in connection with a loan relationship and that the debit in this case relates to an expense not a loss so that section does not apply to it. Although introduced at a late stage, HMRC did not object to this new ground of appeal.

THE FACTS IN MORE DETAIL

10. With one exception, which I will come on to, there is no dispute about the facts. The parties have helpfully put together a statement of agreed facts from which the following summary is taken.

11. UKC1 was incorporated in 1999. Although the BUPA Group held some non-voting shares, the voting shares and the equity interests in UKC1 were held by Guernsey trustees for the benefit of two charities. The directors of UKC1 were Guernsey residents, unconnected with the BUPA Group. UKC1 was, at this time, tax resident in Guernsey.

12. I do not need to describe the securitisation arrangements in detail. It is enough to note that UKC1 issued two tranches of loan notes with a total face value of £235m. The first tranche of £175m carried a fixed rate of interest of 6.3% a year and was due to mature on 1 October 2029. The second tranche had a face value of £60m and carried interest at 7.5% a year with a maturity date of 1 October 2031 (although could be redeemed without penalty on 1 October 2029). The notes were issued at a discount to their face value totalling £492,700 and so the gross amount raised by UKC1 was £234,507,300. There were however also transaction costs relating to the issue of the loan notes totalling £5,369,247 and so the net amount available to UKC1 was £229,138,053.

13. Under the terms of the loan notes, UKC1 had the ability to redeem the loan notes early on any interest payment date. However, in order to make the loan notes attractive to investors, the loan notes contained what is known as a "Spens" clause (also known as a "make whole" clause). The effect of the Spens clause was that, in order to redeem the loan notes, UKC1 would have to pay the higher of:

(1) the outstanding principal under the loan notes (i.e. £235m); and

(2) an amount calculated by reference to the gross redemption yield applicable to a specified "reference gilt", being 6% Treasury Stock 2028.

14. In order to understand the impact of this, it is necessary to look at how corporate loan notes which carry a fixed rate of interest are priced in the market.

15. The market values a loan note by calculating all the future cashflows under the loan note (both principal and interest) and then discounting the total cashflows using a discount rate (reflecting the fact that the cashflows will only be paid in the future) to arrive at a present value for the future cashflows.

16. For a corporate loan note, there are two elements to the discount rate. The first element is called the "risk free rate" which is a hypothetical rate of return which the market would expect to receive on an equivalent loan note where there is no material risk of default by the debtor. This varies over time as global interest rates change but is also affected by currency expectations and market dynamics such as supply and demand. Broadly speaking, however, if global interest rates fall, the risk free rate will also fall which will in turn reduce the discount rate. The lower the discount rate, the higher the present value of the future cashflows under the loan note.

17. The second element of the discount rate for a corporate loan note is known as the "credit spread". The credit spread reflects the perceived credit risk (compared to a loan note issued by the UK Government) that the loan notes in question will not pay out on time and in full. It is the addition of the credit spread to the discount rate which results in a corporate loan note being worth less than a UK gilt which is issued on equivalent terms as the discount rate for the corporate bond is higher.

18. If the financial strength of the borrower improves, the credit spread will reduce. This will in turn reduce the discount rate and so will increase the value of the future cashflows under the loan note. This means that the market value of the loan note will increase.

19. Returning to the effect of the Spens clause, the result is that the amount payable by UKC1 on early redemption of the loan notes would always be higher than the market value of the loan notes as, under the terms of the Spens clause, the discount rate which is used is set by reference solely to the risk free rate and takes no account of any credit spread. The discount rate is therefore lower than that used by the market in valuing the loan notes and so the value of the future cashflows under the loan note is higher.

20. In substance, the payment made by UKC1 on early redemption of the loan notes can therefore be split into two parts. The first part (equal to the market value of the loan notes) compensates investors for the future cashflows which they would have received under the terms of the loan notes had they remained in existence until maturity. The second part (being the balance of the redemption payment) is a penalty for early redemption**.**

21. It is important to note however that, under the terms of the loan notes, the payment made on early redemption is split differently. Where (as was the case) the redemption payment exceeds the outstanding principal, the payment is treated as a payment of the outstanding principal (in this case, £235m) with the balance being treated as a "premium". Looked at this way, the premium can then be split into two elements with the difference between the principal of the loan notes and their market value being compensation for the loss of future cashflows and the balance being the penalty for early redemption.

22. Turning to the early redemption of the loan notes this was, as I have said, triggered by BUPA's wish to sell some of the care homes which formed part of the security for the loan notes. In January 2016, the BUPA Group decided that the best way of going about this would be to redeem the loan notes early. Bearing in mind that the BUPA Group did not own UKC1 (it was owned by the Guernsey trustees for the benefit of charity), it determined that the steps needed to do this were as follows:

(1) Acquisition of the shares in UKC1 so that it became part of the BUPA Group. This took place on 15 February 2016 in consideration for a payment of £850,000 made by the BUPA Group to the Guernsey trustees.

(2) On 18 February 2016, two of the three Guernsey directors of UKC1 resigned and three senior executives of the BUPA Group were appointed in their place. The statement of agreed facts records that "this was important commercially, given the complexities and critical timing of the procedure for terminating the Securitisation".

(3) The following day, 19 February 2016 (referred to as the Migration Date), a UKC1 board meeting was held in London at which it was agreed that it made sense for UKC1 to be managed and controlled from the UK and that future board meetings would be held in the UK. It is agreed that UKC1 became resident in the UK for tax purposes (and therefore subject to corporation tax) from that date.

(4) The board of UKC1 met again on 24 February 2016 and resolved to redeem the loan notes. This involved also agreeing to issue further shares to the BUPA Group in order to provide UKC1 with the necessary funding to redeem the loan notes. The relevant redemption notice was given on 29 February 2016 for redemption on 1 April 2016.

23. The redemption amount under the Spens clause was £381,618,848 representing £235m of principal and a premium of £146,618,848. By comparison, the market value of the loan notes immediately before the Migration Date was £324,805,450. The difference of just under

£57 million was, in effect, the amount of the penalty paid by UKC1 in respect of its early redemption of the loan notes.

24. The treatment of the loan notes in the accounts of UKC1 is relevant to the questions which I have to determine. Under the relevant accounting standards, a company may account for financial liabilities such as the loan notes either on a fair value basis or an amortised cost basis.

25. Fair value, in effect, reflects market value. The fair value of the loan notes on issue was £234,507,300 (i.e. the face value less the initial discount). Immediately before the Migration Date, the fair value was £324,805,450. Had UKC1 used a fair value basis of accounting in respect of the loan notes, this would have been the carrying value for the loan notes at the time UKC1 became UK tax resident and so the loss on redemption would only have been the difference between this figure and the redemption price of £381,618,848 (approximately £57m).

26. As it is, UKC1 accounted for the loan notes on the amortised cost basis. The effect of this is that the liability represented by the loan notes was shown in the accounts of UKC1 at a figure which was based on their historic cost (issue price less transaction costs) but with the initial discount and the transaction costs being amortised (and thus (ignoring interest) increasing the carrying value of the liability represented by loan notes) over the life of the loan notes.

27. This means that, by the maturity date of the loan notes, the carrying value of the liability would be £235 million (the face value of the loan notes) so there would be neither a profit nor a loss when the principal of the loan notes was repaid on maturity.

28. The amortised cost at the time of issue was £229,138,053. Immediately before the Migration Date, the amortised cost was £230,901,609. The accounts of UKC1 showed an amortised cost for the loan notes on 31 March 2016 (the day before redemption) of £230,869,802. The loan relationship debit claimed by UKC1 was the difference between this figure (as opposed to the amortised cost at the Migration Date) and the redemption payment of £381,618,848, being £150,749,046.

29. The amount of the debit which HMRC say should be disallowed is the difference between the amortised cost of £230,901,609 at the Migration Date and the market value (or fair value) of the loan notes on that date which was £324,805,450, the difference being £93,903,841. The amount of the debit which HMRC accept should be allowed is the difference between this figure and the total claimed of £150,749,046 which comes to £56,845,205.

LOAN RELATIONSHIPS – LEGAL PRINCIPLES

30. The original regime relating to loan relationships was introduced by Finance Act 1996 ("FA 96"). However, the legislation is now found in Part 5 of CTA 2009.

31. I do not need to go into too much detail about how the loan relationships regime works. Suffice it to say that the legislation provides for profits and deficits from a company's loan relationships to be brought into account for corporation tax proposes; the amount of the profits and deficits being calculated using various credits and debits provided for by the legislation (see ss 292 and 296 CTA 2009). No distinction is made between profits or losses of an income nature or a capital nature (s 293(3) CTA 2009).

32. Amounts can only be brought into account if they relate to certain specified matters. In determining the amounts to be brought into account, generally accepted accounting principles are generally followed although there are some exceptions to this including, in particular,

where amortised cost accounting is used, an exception contained in s 327 CTA 2009, to which this appeal primarily relates. All of this is provided for by s 306 CTA 2009.

33. Section 306A CTA 2009 sets out the matters in respect of which amounts may be brought into account as credits or debits. This provides as follows:

> "(1) The matters in respect of which amounts are to be brought into account for the purposes of this Part in respect of a company's loan relationships are-
>
> (a) profits and losses of the company that arise to it from its loan relationships and related transactions (excluding interest and expenses),
>
> (b) interest under those relationships, and
>
> (c) expenses incurred by the company under or for the purposes of those relationships and transactions.
>
> (2) Expenses are only treated as incurred as mentioned in subsection (1) (c) if they are incurred directly-
>
> (a) in bringing any of those loan relationships into existence,
>
> (b) …
>
> (c) in making payments under any of those relationships or as a result of any of those transactions, or
>
> (d) in taking steps to ensure the receipt of payments under any of those relationships or in accordance with any of those transactions."

34. It is important to note that the legislation draws a distinction between profits and losses from a loan relationship and expenses incurred under or for the purposes of such a relationship as this forms the basis for the submission on behalf of UKC1 (which I will come on to) that the provisions of s 327 CTA 2009 do not apply to expenses.

35. Coming on to s 327 CTA 2009, this provides as follows:

> "**Disallowance of imported losses etc**
>
> (1) This section applies for an accounting period of a company ('the loss period') if—
>
> (a) apart from this section, a loss arising in connection with a loan relationship of the company would fall to be brought into account for the purposes of this Part, and
>
> (b) the loss is wholly or partly referable to a time when the relationship was not subject to United Kingdom taxation.
>
> (2) The amounts brought into account for the loss period for the purposes of this Part must be such as to secure that none of the loss referable to a time when the relationship was not so subject is treated for those purposes as arising in the loss period or any other accounting period of the company.
>
> (3) For the purposes of this section a loss is referable to a time when a relationship is not subject to United Kingdom taxation so far as, at the time to which the loss is referable, the company would not have been chargeable to corporation tax in the United Kingdom on any profits arising from the relationship.

> (4) If the company was not a party to the relationship at the time to which the loss is referable, subsection (3) applies as if the reference to the company were a reference to the person who at that time was in the same position as respects the relationship as is subsequently held by the company.
>
> (5) An amount which would be brought into account for the purposes of this Part in respect of any matter apart from this section is treated for the purposes of s 464(1) (amounts brought into account under this Part excluded from being otherwise brought into account) as if it were so brought into account.
>
> (6) Accordingly, that amount must not be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.
>
> (7) This section does not apply if fair value accounting is used."

36. As will be apparent from s 327(1), there are two conditions which must be satisfied in order for a loss to be disallowed. The first (s 327(1)(a)) is that there must be "a loss arising in connection with a loan relationship". The second (s 327(1)(b)) is that the loss (or part of it) must be "referable" to a time when the company claiming the loss would not have been chargeable to corporation tax had there been a profit (see s 327(3)). UKC1 submits that neither of these conditions are satisfied.

37. Whilst it is possible for a company which is not resident in the UK to be within the scope of UK corporation tax in relation to a loan relationship (for example if it is trading in the UK through a permanent establishment), given the facts of this appeal, I will, for simplicity, refer to a time when a company is not UK resident as shorthand for a time when it is not subject to corporation tax in respect of a loan relationship. On the basis that we are concerned with the position of a company which then becomes UK resident, I will refer to this time as the pre-migration period.

38. The only other point to note at this stage is that, in accordance with s 327(7), the section does not apply if fair value accounting is used. Both parties say that this sheds light on the meaning of the word "referable" in this context.

HOW TO DETERMINE WHAT A LOSS IS REFERABLE TO

39. Both parties agree that s 327 CTA 2009 should be interpreted purposively. Such an approach is not controversial (see *Rossendale BC v Hurstwood Properties (A) Limited* [2022] AC690 at [9/10]).

40. Both parties also agree that this means that, when considering whether a loss is referable to a time when a loan relationship was outside the scope of corporation tax, it is necessary to look at commercial reality.

41. As Mr Prosser put it on behalf of UKC1, the loss will only be disallowed if it existed or arose in a commercially meaningful sense prior to the company migrating to the UK. He notes that the heading of s 327 ("Disallowance of imported losses etc.") supports the proposition that the loss must exist or have arisen as a matter of commercial reality prior to the migration of the company to the UK as the loss could not otherwise be imported (referring to *R v Montila* [2004] UKHL 50 at [35] for the ability to take into account headings when interpreting legislation).

42. In agreeing with this approach, Mr Fell, appearing for HMRC, referred to the comments of the Chief Secretary to the Treasury, William Waldegrave when the original loan relationship legislation was being discussed. Mr Waldegrave noted that "the changes in the Bill will bring the tax system in line with commercial reality" (Hansard volume 269, 15 January 1996, columns 416-417).

43. In interpreting s 327, the parties agree on two further points. The first is that, as a matter of commercial reality, a loss may exist or have arisen before it is crystallised by some subsequent event such as a sale or the recognition of an impairment in the company's accounts.

44. The second point is that there is a distinction between referability and computation. The fact that a particular factor (such as the fair value of the loan notes at a particular point in time) may be an essential ingredient in computing whether a loss has arisen does not mean that the loss is necessarily referable to that matter.

45. I should mention that Mr Fell characterises s 327 as an anti-avoidance provision although Mr Prosser disputes this noting that the loan relationship legislation contains a separate section (chapter 15) dealing with "tax avoidance". However, neither party suggested that the approach to the interpretation of s 327 should be any different based on the fact that it either is, or is not, an anti-avoidance provision.

46. In my view, s 327 can, in broad terms, be considered as an anti-avoidance provision in the sense it is clearly intended to disallow a deduction for losses in connection with a loan relationship in circumstances where a profit would not have been within the scope of corporation tax.

47. I would, however, agree that the status of the section as an anti-avoidance provision should not in this case affect the approach to its interpretation. On the other hand, the purpose of the provision (to reflect commercial reality) is something which must be taken into account in determining the meaning of the words used.

48. Whilst asking the question whether a loss exists or has arisen at a particular time as a matter of commercial reality takes matters a little further, it is of course still necessary to determine when (or in what circumstances) it can be said that a loss has arisen or exists as a matter of commercial reality.

49. Mr Fell suggests that the test should be whether the loss can be explained commercially by reference to a pre-migration event or state of affairs. Mr Posser however criticises this as too wide noting for example that any loss, whenever occurring, which resulted from an application of the terms of the relevant loan notes would, on that basis, be referable to a pre-migration "state of affairs".

50. Mr Prosser, instead, puts forward a number or examples to illustrate how the test of commercial reality might be applied.

51. At one end of the scale, he suggests that, in circumstances where a borrower gets into financial difficulties and the lender subsequently moves to the UK and recognises an impairment of the loan or accepts less than par on an early settlement, thus realising a loss, the loss is clearly referable, as a matter of commercial reality, to the pre-migration financial difficulties of the borrower and so would be within the scope of s 327.

52. On the other hand, if the borrower's financial position improves after the lender has moved to the UK so that the loan is no longer impaired but the borrower then suffers a further setback as a result of which the value of the loan is impaired, Mr Prosser suggests that s 327 would not apply to the loss since, as a matter of commercial reality, the loss is referable to the

later financial difficulties of the borrower and is unaffected by the previous financial difficulties which occurred whilst the lender was offshore.

53. In a similar vein, Mr Posser submits that, where a borrower gets into financial difficulties after a lender has moved to the UK and the lender then incurs expenses in enforcing its rights, any loss represented by the expenses is clearly referable to the time after the lender has moved to the UK and so is not within the scope of s 327. In particular, he says that this conclusion is unaffected by the value of the loan at the time the lender moves to the UK.

54. So, for example, if the loan is worth less than par at the time the lender moves to the UK, this would not affect the lender's ability to claim a deduction for the losses represented by the expenses incurred in enforcing the loan. The reason Mr Posser gives for this is that the lender is not seeking to bring into account the loss in value of the loan itself at the time of migration but is instead bringing into account the expenses incurred in enforcing the loan.

55. Mr Fell does not disagree with this but submits that the position would be different if the lender was trying to bring into account a loss incurred as a result of the reduction in value of the loan.

56. Mr Posser takes two principles from these examples. The first is that it is important to focus on the particular loss which has been brought into account as his examples show that there can be a post-migration loss as well as a reduction in fair value arising at a time before migration without the first necessarily being referable to the second.

57. The second principle which Mr Posser seeks to draw from his examples is that the question whether or not a particular loss is referable to a time before the company migrated to the UK cannot be answered by reference to the fair value (or market value) of the loan as at the migration date. Instead, he suggests that the only relevance of the fair value of the loan as at the migration date is as a possible way of calculating the amount of any loss that is (based on other factors) found to be referable to a time before migration.

58. In support of the second principle, Mr Posser refers to s 327(7) which, as we have seen, prevents s 327 from applying where fair value accounting is used. His argument is that the drafter of the legislation was well aware of the existence of fair value accounting and so could have used this as the test for the application of s 327 but chose not to do so. This, he says, suggests that the test which the drafter has chosen (whether the loss is referable to a time before migration) should not be answered by reference to the fair value of a loan.

59. Mr Fell's position however is that, whilst there are circumstances (as shown by Mr Prosser's examples) in which fair value at the date of migration will not determine whether a subsequent loss is referable to a time before migration, this does not mean that fair value should be discarded as a tool in determining whether a loss existed or had arisen as a matter of commercial reality before migration.

60. As Mr Prosser did, Mr Fell also draws support for this from s 327(7), inferring that, as s 327 is disapplied where fair value accounting is used, it follows that the fair value of a loan at the date of migration may well be an important factor in deciding whether a subsequent loss is referable to a time before migration if amortised cost accounting is used.

61. In relation to this, Mr Fell gives an example based on an illustration in HMRC's manual at CFM33270. This involves a lender who purchased a loan note for £100,000 whilst non-resident and moved to the UK at a time when, due to movements in interest rates and the borrower's future prospects, the loan note is worth £90,000. The loan note is subsequently sold after the lender moves to the UK for £84,000, realising loss on sale of £16,000.

62. Mr Fell submits that the £10,000 of the loss which is reflected in the market value of the loan note at the date of migration would be disallowed as a result of s 327. Mr Fell goes on to say that, if it is right that, in these circumstances, the lender's loss is referable to the pre-migration change in value of the loan notes, there is in principle no reason why the same analysis should not apply to a borrower who migrates to the UK at a time when the fair value of the loan notes is in excess of the amortised cost and who then crystallises the loss by purchasing or redeeming the loan notes.

63. Mr Prosser's response to this is that there is a distinction to be drawn between a lender who holds loan notes as an investment and is likely to sell the loan notes before maturity in order to generate a profit and a borrower who has no intention of redeeming loan notes before maturity and does not therefore expect to realise any profit or loss (ignoring the payment of interest) in respect of any fluctuations in value during the life of the loan notes as the amount payable on maturity will be equal to the amortised cost of the loan notes.

64. Mr Prosser observes in this context that HMRC's own guidance contained in their manuals shortly after the original legislation was introduced in 1996 (CT 12631) observes that whilst s 327 applies to both debtor and creditor relationships, "Its application to debtor relationships is unlikely to arise in practice, although conceivable.". I note however that the manual does not explain when s 327 might be relevant to a borrower. It may for example be that HMRC did not have early redemptions in mind and were simply saying that a borrower is unlikely to suffer a loss in respect of the loan relationship.

65. Mr Prosser also suggests that similar principles should apply to a lender who acquires loan notes with the intention of holding them to maturity. In both cases, Mr Prosser's submission is that any fluctuation in value in the loan notes is commercially meaningless to someone who intends to hold the loan notes for their full term and that it follows from this that any pre-migration changes in value of the loan notes cannot give rise to a commercially meaningful loss for such a person.

66. In essence, what Mr Prosser is saying, is that the question whether a loss has arisen or exists at a particular time as a matter of commercial reality can only be answered by looking at the circumstances and intentions of the taxpayer in question. Commercial reality is therefore to be viewed from the point of view of the particular taxpayer and not as an abstract concept.

67. One objection to this analysis put forward by Mr Fell is that it, in effect, allows a taxpayer to choose when (and therefore where) a loss is booked as a taxpayer who wishes to realise their position can see whether, in commercial terms, an inbuilt loss already exists. If there is a loss, they can, on the basis of Mr Prosser's submissions, migrate to the UK, trigger the loss once UK resident and argue that the loss is referable only to the event which crystallised the loss (for example, a sale or redemption) and not to the factors which resulted in there being an unrealised loss based on the fair value of the loan notes at the time of migration. This would be the case even if the taxpayer had previously intended to hold the loan notes to maturity.

68. Given the purpose of the legislation, Mr Fell suggests that this cannot have been Parliament's intention and that the use of the deliberately wide word, "referable" was, in part, to avoid such a result.

69. A further objection made by Mr Prosser to the use of fair value in determining whether, as a matter of commercial reality, a loss exists or has arisen prior to migration to the UK is that, in his view, it must be possible to say at the time of migration whether the loss exists or has arisen. He suggests it is not enough that it is possible to identify with hindsight that a loss

had arisen following a subsequent decision to enter into a transaction which, as it turns out, resulted in a loss.

70. An additional point made by Mr Prosser in relation to the use of fair value as an indicator of whether a loss had arisen or existed in relation to the loan notes prior to migration is that fair value of course changes all of the time depending on market conditions. He suggests that it cannot be right to say that a loss arose every time the fair market value went above par or indeed that a profit arose every time fair market value dipped below par (as it did on a number of occasions during the pre-migration period).

71. However, Mr Fell argues that what is required is an assessment of the pre-migration period as a whole in order to determine whether, as a matter of commercial reality, a loss had arisen during that period to which the actual loss brought into account by the taxpayer company is referable. Looked at in this way, fluctuations in fair value above and below par are likely to be irrelevant with the focus being on the position immediately prior to migration.

72. Having considered the points made by both parties, I set out below my view of the general approach which I should take in considering whether any loss is referable to a pre-migration period for the purposes of s 327.

73. The first step is to identify the loss which is being brought into account. It is only by doing so that consideration can be given to the question as to whether that particular loss is referable to the pre-migration period.

74. The second step is then to consider whether that particular loss is referable to the pre-migration period.

75. In the light of the purpose of the loan relationship regime as a whole, and s 327 in particular, I accept that the loss can be taken to be referable to a time before migration only if, at that time, the loss existed or had arisen as a matter of commercial reality.

76. This does not however require the loss to have been triggered or crystallised prior to migration. An unrealised or unrecognised loss (as the parties acknowledge) is sufficient.

77. It is, in my view, clear from the wording of s 327, that the question of referability is an objective test. The question is whether an informed and independent third party would consider the loss to have arisen or existed in the pre-migration period and not whether the taxpayer had a subjective belief that a loss existed or had arisen. I accept Mr Fell's submission that, given the purpose of s 327, it is unlikely that Parliament intended that the application of that provision should depend on whether the taxpayer in question considered a loss to exist or to have arisen prior to migration.

78. Contrary to Mr Prosser's submission, I consider that the question as to whether the loss existed or had arisen in the pre-migration period must be answered with hindsight as it is only once the loss has been crystallised (and therefore identified) that the question as to whether that particular loss is referable to a time in the pre-migration period can be addressed.

79. It follows from this that the prior intention of the taxpayer company is irrelevant. By definition, the loss will have been crystallised and the task is to consider whether that particular loss is referable to a time in the pre-migration period in the sense that all or part of the loss existed or had arisen at that time as a matter of commercial reality. The fact that, absent a crystallisation event, the taxpayer company may not have considered a loss to have existed or arisen pre-migration cannot therefore be relevant.

80. Mr Prosser suggests that it makes no sense to treat an issuer of loan notes as having suffered a loss if its financial position improves (and therefore any credit spread reduces) any

more than it would make sense to treat a profit as having arisen where the financial position of an issuer deteriorated and therefore the credit spread increased.

81. I accept that, looked at from the perspective of an issuer who has no intention of redeeming the loan notes early, this may be right. However, as I have said, the commercial realities do not, in my view, depend on the subjective perception or intention of the particular taxpayer but instead must be judged objectively and with hindsight from the point of view of an independent but informed observer.

82. In considering (objectively and with the benefit of hindsight) whether the loss (or part of it) existed or had arisen as a matter of commercial reality, it is in my view appropriate to ask the question whether the loss (or the relevant part) would have arisen but for an expense which was incurred during the pre-migration period or some change or event occurring after the loan relationship came into existence but during the pre-migration period.

83. This could be as a result of a change in the prospects of the borrower, a change in market conditions such as interest rates, credit spreads and discount rates or it may be something else. I see no reason in principle to distinguish between changes to the financial position of the borrower on the one hand and changes in market conditions such as interest rates on the other. Both of them are, in principle, capable of having an impact on whether a loss will be triggered when a crystallisation event occurs.

84. This does not, in my view, confuse referability with computation. Whilst changes in discount rates are, of course, relevant to the calculation of the amount of any profit or loss (along with other factors such as the amount of the future cashflows and the time at which they are to be paid), it is the actual changes to factors such as interest rates (which in turn have an impact on the discount rate to be used) to which the loss may be referable.

85. To that extent, I agree with Mr Prosser that fair value at the Migration Date is primarily relevant to the calculation of the amount of any loss. But that does not mean that changes in the elements which form part of that calculation cannot mean that the loss had arisen or existed as a matter of commercial reality in the pre-migration period.

86. I accept that a deliberate decision has been taken not to use fair value at the date of migration as the trigger for the operation of s 327. As Mr Prosser points out, this is in contrast to the position where a company ceases to be UK resident, where s 333 CTA 2009 provides that the migrating company is treated as assigning the assets and liabilities representing its loan relationships for fair value consideration.

87. However, I accept Mr Fell's submission that it does not follow from this that the fair value of assets and liabilities representing a loan relationship (or at least changes to the factors which determine fair value) should play no part in determining whether a post-migration loss is referable to a pre-migration time.

88. In my view the fact that s 327(7) excludes the operation of s 327 where fair value accounting is used strongly supports the proposition that changes to the factors which are used to calculate fair value may well have a significant part to play in determining whether a loss is so referable as a matter of commercial reality.

89. However, as Mr Prosser's examples demonstrate, there will be circumstances where there is a loss based on fair value at the time of migration but, nonetheless, a subsequent loss realised by the relevant company post-migration is not referable to the loss which existed at the time of migration. It is no doubt for this reason that Parliament chose to use referability as the threshold for the application of s 327 rather than relying solely on fair value.

90. In applying the approach I have proposed, I cannot see that there is, as a matter of principle, any reason to distinguish between a borrower and a lender. It may be less likely that a borrower will in fact realise a loss or that certain lenders (such as those who intend to hold their instruments to maturity) will realise a loss but that is not, in itself, a reason for applying a different approach in circumstances where a loss has, in fact, arisen.

91. Whilst this is the approach which I consider to be appropriate in this particular case, I do not exclude the possibility that, in other cases, there may be other factors which might suggest that a different approach should be adopted or that other principles may be relevant.

92. Having set out the approach which, in my view should be applied, I turn now to consider the actual loss.

THE LOSS AND REFERABILITY

93. In terms of identifying the loss, in this case the loss arose as a result of the UKC1's decision to redeem the loan notes early. That decision was taken on 24 February 2016 (post-migration) and the actual redemption took place on 1 April 2016.

94. The effect of the Spens clause was that UKC1 had to make a payment of £381,618,848 in order to redeem the loan notes. This comprised the principal of the loan notes (being £235 million) and a premium of £146,618,848. This gave rise to a loss of £150,749,046 for accounting purposes as the carrying value of the loan notes on the amortised cost basis on 31 March 2016 (the day before redemption) was £230,869,802.

95. Mr Prosser notes that there were three elements to the loss. The first two elements relate to the difference between the carrying value of the loan notes (approximately £231 million and their face value of £235 million). This reflects the original discount and the issue costs when the loan notes were issued which had not been fully amortised at the time of redemption.

96. The balance of the loss is a premium which results from the Spens clause. The premium itself can be broken down into two elements. The first is a compensation element designed to compensate noteholders for the loss of the future cashflows and is, when added to the principal of the loan notes, equal to their fair value or market value at the Migration Date. The balance of the premium is a penalty for early redemption and represents the difference between the market value of the loan notes and what their value would be if there were no credit risk associated with the borrower.

97. It is common ground that the penalty element of the loss (being approximately £57 million) is referable only to the decision to redeem the loan notes early and not to anything else. As this decision was taken after migration, s 327 does not apply to it. The question is whether all or part of the balance of the loss represented by the unamortised discount/costs and the compensatory element of the premium (together totalling £93,903,841) was referable to a time before migration.

98. UKC1 says that none of the loss was referable to the pre-migration period. Mr Prosser put forward two separate arguments in relation to this. The first is that, as a matter of commercial reality, no loss had arisen or existed prior to migration. The second is that, in any event, the loss is referable to matters which, but for the early redemption, would occur in the future, being the amortisation of the remaining discount/issue costs and UKC1's obligation to make future payments of interest and principal.

99. As far as the unamortised discount and costs are concerned, Mr Prosser submits that these were turned into a loss as a result of the early redemption of the loan notes and must therefore be referable to the early redemption itself and not to anything which took place prior to migration.

100. In relation to the compensatory element of the premium, Mr Prosser argues that this is, in effect, compensation for the non-receipt of future interest. It is therefore referable either to the decision to redeem or, more generally, to the future interest payments which would otherwise have had to be made.

101. On the other hand, Mr Fell submits that all of these elements of the loss are referable to pre-migration changes in global interest rates, credit spreads and market conditions reflected in the fair value of the loan notes at the date of migration.

102. Based on the approach I propose above, the question I need to answer is whether the loss existed or had arisen as a matter of commercial reality prior to UKC1's migration to the UK.

103. As Mr Fell submits, the redemption payment which UKC1 was required to make in order to redeem the loan notes is calculated in exactly the same way as the fair value or market value of the loan notes is calculated by working out the present value of the future cashflows based on a discount rate. The only difference between the calculation of fair value and the calculation of the redemption payment is that, in the case of the redemption payment, the discount rate is reduced by eliminating the credit spread (and so ignoring the credit risk of the issuer) which reduces the discount rate and therefore increases the required payment on redemption.

104. Looking at the matter objectively, in my view, an informed observer would therefore conclude that, with the exception of the element which related to the unamortised issue costs (as to which, see further below), the element of the loss representing the difference between the amortised cost carrying value of the loan notes and the market value at the Migration Date already existed or had arisen as a matter of commercial reality in the pre-migration period as it reflected changes in the market (such as interest rates and credit spreads) during that period. Whilst that loss had not been crystallised (as no decision to redeem the loan notes early had been taken by UKC1), it already existed as a matter of commercial reality.

105. Mr Prosser submits that it is wrong to look at the fair value of the loan notes in determining whether a loss had arisen or had existed as a matter of commercial reality prior to the Migration Date. This is because, as a practical matter, UKC1 could not acquire loan notes on the open market at fair value as, under the terms of the loan notes, UKC1 was prohibited from acquiring loan notes on the open market for a price in excess of the outstanding principal amount. At the relevant time (and for some years before that), the loan notes had been trading at a price significantly in excess of the outstanding principal amount. In practice, therefore, the only way of eliminating the loan notes was to redeem them early.

106. Whilst I accept all of this, it does not follow that market movements which affected the fair market value of the loan notes are irrelevant in determining whether, as a matter of commercial reality, a loss existed or had arisen in the pre-migration period. It seems to me that the fact that UKC1 could not crystallise that loss by acquiring loan notes on the market as opposed to redeeming them early makes no difference to this.

107. In principle, the situation is no different to that of a lender who migrates to the UK holding loan notes standing at a loss but which the lender has no immediate intention to sell. However, after coming to the UK, the lender decides to sell the loan notes and realises the loss. To the extent that the loss reflects factors (such as the creditworthiness of the borrower or movements in interest rates) resulting in the decrease in value of the loan notes up to the date of migration, that loss already existed as a matter of commercial reality.

108. As I have said, Mr Prosser objects that a loss cannot exist as a matter of commercial reality in the abstract. Instead, it is necessary to look at the intentions and purposes of the

relevant taxpayer. On this basis, he suggests that, in the context of an issuer who has no intention of redeeming early or a borrower who intends to hold loan notes to maturity, any fluctuation in value of the loan notes during the time which they are held is a matter of commercial indifference and so no profit or loss can exist as a matter of commercial reality.

109. I have already explained the reasons why I do not accept this. There is nothing in s 327 which suggests that the intentions or purposes of the taxpayer are a relevant consideration. The question posed is an objective one. The task is to determine whether the loss which has in fact been realised (irrespective of what the taxpayer's past intentions may have been) is referable to a particular time. It would make no sense to conclude that the loss cannot be referable to the pre-migration period simply because the taxpayer had no intention of realising the loss during that period.

110. Mr Prosser invited me to make findings in relation to the intentions of UKC1 in case this should be relevant to the analysis of whether any part of the losses was referable to the pre-migration period. I hesitate to do so as, given my conclusions, the point is not relevant. As I mentioned at the hearing, an Appeal Court would be in just as good a position to make findings in relation to this point should it be necessary to do so given that I am working on the basis of agreed facts and documentary evidence and have heard no witness evidence.

111. I will, however, address the point briefly in case it may be helpful to the parties.

112. Mr Prosser notes that it is the intentions of UKC1 alone (and not any member of the BUPA Group) which are relevant (see *Barclays Bank plc v HMRC* [2024] UKFTT 00246 (TC) at [168]). He submits that there was no intention on the part of UKC1 to redeem the loan notes early until the board meeting held on 24 February 2016 when the decision to redeem was taken.

113. Mr Fell, on the other hand, notes that the BUPA Group had clearly decided in January 2016 that the loan notes should be redeemed and had devised a plan in order to enable this to happen. As part of this, the BUPA Group acquired the shares in UKC1 on 15 February 2016 and the directors of the company were changed on 18 February 2016 with senior executives of the BUPA Group being appointed in place of two of the three previous Guernsey directors. UKC1 became UK resident on 19 February 2016 and the formal decision to redeem was taken on 24 February 2016.

114. Mr Fell submits that, in the light of these facts, the only reasonable inference is that UKC1 formed an intention to redeem the loan notes prior to its migration on 19 February 2016.

115. In the absence of evidence from the relevant directors it is difficult to reach a properly informed view as to what the intentions of UKC1 might have been immediately prior to its migration to the UK. However, I conclude that, based on the evidence available, it is more likely than not that UKC1 did indeed intend to redeem the loan notes prior to the date of migration to the UK. My reasons for this are as follows:

(1) There would be no reason for UKC1 to have migrated to the UK had it not intended to redeem the loan notes. It is difficult to see how this would have been in the interests of the company assuming there were good reasons why it was set up in Guernsey to start with. It has not been suggested that there was any other reason for the migration.

(2) Prior to migration, the BUPA Group had control of UKC1 and three of the four board members were representatives of the BUPA Group. A large part of the reason for appointing BUPA Group executives to the board resulted from "the complexities and critical timing of the procedure for terminating the Securitisation".

(3) The proposal to redeem the loan notes was discussed at the board meeting on 19 February 2016 (the date of migration). It is clear from the minutes of that meeting that significant preparatory work had already been undertaken including the preparation of a redemption request letter. It might be thought surprising that this document would have been prepared without the knowledge and agreement of UKC1.

(4) It is perhaps notable that the only directors who participated in the board meetings on 19 February 2016 and 24 February 2016 were the BUPA Group representatives (and not the remaining Guernsey director). It might on this basis be thought that their intentions represented the intentions of UKC1. Given that they were appointed prior to migration and given that the BUPA Group had already formed an intention to redeem the loan notes, this intention can arguably be attributed to UKC1 at the latest when they were appointed on 18 February 2016, the day before migration.

116. Mr Prosser objects that UKC1 could not have formed an intention to redeem the loan notes prior to the formal decision to do so given that, as a matter of economic reality, it could not redeem the loan notes without a significant injection of capital from its new parent company. However, this would not prevent UKC1 from having an intention to redeem the loan notes subject to receiving such an injection of capital. In addition, the minutes of the meeting on 19 February 2016 show that a draft subscription agreement had been prepared in advance of that meeting and therefore in advance of migration. This would not therefore, in my view, have prevented UKC1 from forming an intention to redeem the loan notes prior to migration.

117. Leaving aside the question of intention which, as I have said, I do not consider to be relevant, it follows from what I have already said that the decision to redeem the loan notes early therefore simply crystallised losses which already existed as a matter of commercial reality at the date of migration with the exception of the penalty element of the premium (which only came into existence as a result of the decision to redeem early). The whole of the remaining amount (subject to what I say below about the unamortised issue expenses) is therefore referable to the pre-migration period.

118. As Mr Fell submits, it was the changes to market conditions including interest rates and credit spreads which gave rise to this element of the loss and to which the loss is referable. This is not to confuse calculation and referability. Of course, the changes to market conditions resulted in a change to the discount rate which is a key element in the calculation of the fair value of the loan notes and therefore the amount of the loss. However, just because something is part of the calculation of the loss does not mean that the loss cannot also be referable to that particular factor.

119. This can be illustrated by Mr Prosser's submission that the compensatory element of the premium is referable to the future interest payments which UKC1 would have had to make had it not redeemed the loan notes earlier. Mr Prosser makes the point that, had UKC1 remained UK resident and not redeemed the loan notes it would have been entitled to a corporation tax deduction for the interest payments which it made. In a world of commercial reality and where no distinction is to be drawn between capital payments and income payments, he submits that it would be odd in these circumstances for what is, in effect, a capitalisation of the future interest payments not to be deductible.

120. However, even if Mr Prosser were right in this submission, the future interest payments are just as much part of the calculation of the loss as the discount rate and so would be vulnerable to the same objection.

121. As it is, I do not in any event accept that the compensatory element of the premium is referable to the future interest payments despite Mr Prosser's suggestion that this part of the premium could be seen as an acceleration of the payment of interest.

122. The reason for this is that, as Mr Prosser accepted, whether or not any compensation was due depended entirely on the discount rate. If market conditions had not changed at all since the loan notes were issued, the compensatory element of the premium would have been nil even though the entitlement to future interest payments would have been removed as a result of the redemption of the loan notes.

123. Looked at in this way, it is even clearer that the loss is, as a matter of commercial reality, referable to the pre-migration changes in market conditions and not to the post-migration obligations which would have remained had the loan notes not been redeemed early.

124. As I have said, Mr Prosser breaks down the part of the loss which HMRC seek to disallow into three separate elements, being the compensatory element of the premium, the unamortised issue costs and the unamortised discount on issue. Given what I have said, this can only assist UKC1 if any of those three elements of the loss is not referable to the changes in market conditions occurring during the pre-migration period.

125. I accept that this is the case in relation to the unamortised element of the initial transaction costs. The reason for this is that the fair value of the loan notes on issue was £234,507,300 (being the face value less the issue discount). Any change in market conditions giving rise to the existence of a loss in the pre-migration period does not therefore reflect any part of the loss referable to the issue expenses (although it does reflect the part of the loss referable to the unamortised issue discount).

126. Mr Prosser submits that this element of the loss is referable to the fact that these costs had not been fully amortised, something which would only happen in the future and only if the loan notes had not been redeemed early.

127. However, in my view, the element of the loss attributable to the unamortised issue costs existed from day one as reflected by the fact that the initial fair value of the loan notes took no account of those expenses. As a matter of commercial reality, there was therefore a loss on day one represented by the amount of those expenses.

128. Like the remainder of the loss, this element of the loss may have been triggered or crystallised by the decision to redeem but it was a loss that already existed as the expenses had been incurred. The expenses were incurred in the pre-migration period and so that part of the loss is referable to that time. As the question of referability must be approached with hindsight, the fact that those costs would have been amortised in the future had the loan notes not been redeemed is, in my view, irrelevant.

129. Applying the approach I have proposed, it can clearly be seen that it is the pre-migration change in market conditions together with the incurring of expenses in the pre-migration period which has given rise to the non-penalty element of the loss. Without those expenses and changes, no loss would have arisen despite the removal of the obligation to make the future payments of interest and principal.

130. For the reasons I have explained, my conclusion is that the part of the loss which does not relate to the penalty (£93,903,841) is referable to a time prior to UKC1's migration to the UK. I therefore need to go on and consider UKC1's alternative argument.

SECTION 327 CTA 2009 AND EXPENSES

131. This part of UKC1's case was ably presented by Ms Yang. In outline, her submission is that the debit brought into account by UKC1 is an expense (and not a loss) and that s 327 CTA 2009 does not therefore apply as it is only concerned with losses.

132. In order to make good her submission, Ms Yang referred to a draft of the original legislation which became contained in FA 96 and to the explanatory notes to that draft legislation, referring to the comments of the Supreme Court in *Regina (O) v Secretary of State for the Home Department* [2023] AC 255 as authority for the ability of the Tribunal to take such materials into account.

133. Whilst emphasising at [29] that the words of the statute (set in their context) is the primary source from which the meaning of legislation must be ascertained and at [30] that "external aids to interpretation therefore must play a secondary role", Lord Hodge accepted that such external aids may reveal context which is relevant in assisting the Court to ascertain the meaning of a statute whether or not there is ambiguity or uncertainty. He warned however that "none of these external aids displace the meaning as conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity".

134. Whilst agreeing with Lord Hodge, Lady Arden went further, suggesting at [64] that "pre-legislative material may, depending on the circumstances, go further than simply providing the background or context for the statutory provision in question. It may influence its meaning." It appears that, in particular, Lady Arden had in mind the possibility that a review of such materials might reveal an ambiguity which was not immediately apparent from the words used (see paragraphs [65] and [76]).

135. Ms Yang notes that s 306A(1) CTA 2009, as we have seen, draws a clear distinction between a loss on the one hand and an expense on the other. In contrast, s 327 refers only to a loss and does not make any mention of expenses.

136. Ms Yang accepts that s 306A(1)(a), when referring to losses, includes the words "excluding interest or expenses" which suggests that an expense may be a loss for this purpose as there would otherwise be no need to exclude expenses.

137. However, turning to the draft legislation which was published in November 1995, Ms Yang notes that the wording for what is now s 306A(1)(a) did not exclude "interest or expenses" when referring to the ability to bring into account losses and still made separate provision for bringing certain expenses into account. She submits that this shows that a loss and an expense are two different things and so the reference to a loss in s 327 cannot have been intended to include an expense.

138. Ms Yang also refers to two other statutory provisions forming part of the loan relationship rules which draw a distinction between a loss and an expense, being s 446 CTA 2009 and s 455D CTA 2009.

139. Whilst these provisions do draw a distinction between a loss on the one hand and an expense on the other, they do not explain why Parliament specifically excluded expenses from the ambit of losses in s 306A(1)(a).

140. Ms Yang's explanation for this is that there was a concern that taxpayers might try and argue that an expense was in fact a loss "arising from its loan relationships" and so circumvent the more limited provision for the deduction of expenses contained in s 306(A)(1)(c) and (2) which only allow certain specified expenses to give rise to deductions. The specific exclusion of "expenses" in s 306A(1)(a) was therefore, she says, just for the avoidance of doubt.

141. It would of course have been open to Parliament to specifically exclude expenses from the ambit of s 327 had it intended to do so. Ms Yang's explanation for the fact that this was not felt necessary is that, whilst the clarification in s 306A was necessary to prevent avoidance, this was not necessary in relation to s 327 as the effect of that section is simply to deny a deduction in circumstances where it would otherwise be available. There would therefore be no reason for a taxpayer to try and argue that a loss included an expense for the purposes of s 327.

142. Attractively though this proposition was presented, I cannot accept it. The clear inference from s 306A(1)(a) is that a loss can include an expense as it would otherwise be unnecessary to exclude expenses from the scope of losses. The history of the legislation clearly shows that this was appreciated by Parliament, as a result of which the words "excluding interest and expenses" were inserted into the predecessor to s 306(A)(1)(a).

143. However, Parliament did not see fit to make any change to s 327. This cannot in my view be explained by the fact that a taxpayer would not seek to argue for the purposes of s 327 that a loss included an expense (as it would be to the taxpayer's detriment to do so) given that the legislation has to be operated both by taxpayers and HMRC. If Parliament had been concerned to ensure that an expense did not fall within the term "loss" for the purposes of s 327 CTA 2009, it might have been expected to say so specifically given that it had recognised the point.

144. As Mr Fell points out, the clear purpose of distinguishing between losses and expenses in s 306A is to limit the class of expenses in respect of which amounts can be brought into account for the purposes of the loan relationship rules. The wording of that section suggests that an expense may otherwise give rise to a loss for this purpose. So, even if the word "loss" has the same meaning in s 327 as in s 306A, it is, in my view, wide enough to include an expense.

145. Mr Fell also made the point that unlike s 306A(1)(a), which refers to losses which arise "from" a loan relationship, s 327 is wider in that it refers to a loss which arises "in connection with" a loan relationship. He submits that a loss in connection with a loan relationship must encompass something more than a loss arising from a loan relationship and that an expense can fairly be said to be a loss in connection with a loan relationship even if it were not a loss from a loan relationship.

146. Ms Yang suggests that the reason for the difference in wording is that, when the legislation was originally introduced in 1996, there was no equivalent to what is now s 293 CTA 2009 which defines a profit or loss from a loan relationship as including a profit or loss from a related transaction. She suggests that the reason s 327 refers to a loss "in connection with" a loan relationship is that it was intended to include a loss arising from a related transaction. There is, however, no support for this in the materials to which I was referred.

147. The other provisions of s 327 also support an interpretation of the phrase "loss in connection with a loan relationship" in s 327 which includes all of the matters in respect of which amounts can be brought into account for the purposes of s 306A and not just "losses" within the meaning of that section.

148. For example, s 306(2) refers to "amounts" brought into account rather than a "loss" brought into account. In addition, s 327(5) refers to an amount which would be brought into account but for s 327 "in respect of any matter". That must be a reference back to s 306A(1) which identifies "the matters in respect of which amounts are to be brought into account" and includes not only losses but also interest and expenses.

149. Therefore, even if the redemption payment is an expense, in my view, it is still a loss arising in connection with a loan relationship as that expression is used in s 327(1).

150. These conclusions are perhaps not surprising given that it is difficult to conceive of any policy reason why Parliament would deny a deduction for a loss which was referable to a pre-migration period but would allow a deduction in respect of an expense which was found to be referable to a pre-migration period.

151. I should mention that Mr Fell referred to the use of the word "loss" in ss 307 and 308 CTA 2009. The reference to "loss" in those sections, however, clearly relates to accounting losses resulting from the bringing into account of credits and debits under normal accounting principles and does not really shed any light on the meaning of the term "loss" either in s 306A or s 327. I do accept, however, as submitted by Mr Fell, that these sections show that the word "loss" is used in different contexts in different parts of the legislation and so it would not be surprising if that word had a different (and wider) meaning in s 327 than in s 306A.

152. My conclusion, therefore, is that the redemption payment gives rise to "a loss arising in connection with a loan relationship" for the purposes of s 327(1)(a) CTA 2009.

DECISION

153. For the reasons I have explained, out of the loss of £150,749,046 which UKC1 seeks to bring into account, the sum of £56,845,205 should be allowed and the appeal is successful to that extent.

154. However, the balance of £93,903,841 is referable to a time when UKC1 was not UK resident and is therefore correctly disallowed under the provisions of s 327 CTA 2009.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

155. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 13th JUNE 2024