PROCEDURE – automated notices requiring returns – effect of s103 Finance Act 2020 – effect of s12D TMA 1970 – validity of notices of enquiry under s9A TMA 1970

CAPITAL GAINS TAX – entrepreneurs' relief – s165A(3) TCGA 1992 – company involved in property development and investment property – nature and extent of activities – whether a trading company

INCOME TAX – remittance basis – business investment relief – whether dividend left outstanding on loan account correctly treated as an investment

INCOME TAX – transactions in securities – whether main purpose or one of the main purposes of person being a party was to obtain an income tax advantage

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal numbers: UT-2020-000395
UT-2020-000396

BETWEEN

ASSEM ALLAM **Appellant**

-and-

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

TRIBUNAL: MR JUSTICE EDWIN JOHNSON
JUDGE JONATHAN CANNAN

Sitting in public at the Rolls Building, Fetter Lane, London EC4A 1NL on 14 and 15 October 2021

Philip Ridgway instructed by Jacksons Chartered Accountants for the Appellant

Sadiya Choudhury instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FTT") released on 12 May 2020 ("the Decision"). The Decision had been re-released following a review by the FTT of an earlier decision dated 15 January 2020, but nothing turns on that for present purposes.

2. There were three appeals before the FTT arising out of dealings by Dr Assem Allam ("Dr Allam") in relation to the shares of Allam Developments Limited ("ADL") and in relation to Allam Marine Limited ("AML"). Dr Allam challenges the decision of the FTT in relation to two of those appeals. HM Revenue & Customs ("HMRC") challenge the decision of the FTT in the third appeal.

3. In the first appeal, Dr Allam challenged a decision of HMRC that he was not entitled to entrepreneurs' relief for capital gains tax ("CGT") purposes on a disposal of shares in ADL. The FTT dismissed Dr Allam's appeal and he appeals to this tribunal with permission of the FTT ("the First Appeal").

4. In the second appeal, Dr Allam challenged a decision of HMRC that he was liable to income tax on income and gains remitted to the UK on the withdrawal of what is commonly referred to as "business investment relief". The FTT dismissed Dr Allam's appeal and he appeals against part of that decision to this tribunal with permission of the FTT ("the Second Appeal").

5. In the third appeal, Dr Allam challenged a decision of HMRC to issue a counteraction notice under the "transaction in securities" provisions in connection with the same disposal of shares in ADL as mentioned in the First Appeal. The FTT allowed Dr Allam's appeal and HMRC appeals to this tribunal with permission of the FTT ("the Third Appeal").

6. The three appeals arise out of Dr Allam's ownership and dealings with various companies in which he is interested. The FTT heard evidence from Dr Allam, his son Ehab Allam who was a director of some of the companies and Mr Mark Jackson of Jacksons Chartered Accountants, the companies' accountant. We shall deal with the three appeals and the FTT's findings of fact in relation to each appeal separately.

7. We shall also deal separately with aspects of the First Appeal and the Second Appeal concerning the validity of the closure notices issued by HMRC which were under appeal to the FTT ("the Notices Appeal"). It is convenient to deal with the Notices Appeal first.

8. All references to legislative provisions in this decision are to the provisions in force at the relevant times.

THE NOTICES APPEAL

9. The First Appeal is an appeal against a closure notice issued on 8 April 2016 at the conclusion of an enquiry into Dr Allam's tax return for the year 2011-12. Dr Allam filed that return on 13 November 2012 in response to an automated notice to file a return sent to him by HMRC. The enquiry was opened on 5 November 2013.

10. The Second Appeal is against a closure notice also issued on 8 April 2016 at the conclusion of an enquiry into Dr Allam's tax return for the year 2013-14. Dr Allam filed that return on 8 August 2014 in response to an automated notice to file a return sent to him by HMRC. The enquiry was opened on 14 November 2014.

11. The scheme of the Taxes Management Act 1970 ("TMA 1970") relevant for present purposes involves various stages which may be summarised as follows:

(1) HMRC issue a notice under s 8 TMA 1970 requiring a taxpayer to make a tax return for a specific tax year;

(2) The taxpayer makes the return in response to a notice;

(3) HMRC may open an enquiry into the return under s 9A TMA 1970; and

(4) HMRC close the enquiry by issuing a closure notice under s 28A TMA 1970 stating that in the officer's opinion no amendment is required or amending the return to give effect to his conclusions. The closure notice engages the review and appeal provisions of TMA 1970.

12. The obligation on a taxpayer to deliver a return to HMRC derives from s 8 TMA 1970 which provides as follows:

> 8(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board —
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, …

13. The powers of HMRC to enquire into a return derive from s 9A TMA 1970 which provides as follows:

> 9A(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry") –
>
> (a) to the person whose return it is ("the taxpayer"),
> (b) within the time allowed.

14. An enquiry is completed when a closure notice is issued under s 28A TMA 1970 which provides as follows:

> 28A(1) An enquiry under section 9A(1) of this Act is completed when an officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions. In this section *"the taxpayer"* means the person to whom notice of enquiry was given.
>
> (2) A closure notice must either –
>
> (a) state that in the officer's opinion no amendment of the return is required, or
> (b) make the amendments of the return required to give effect to his conclusions.
>
> (3) A closure notice takes effect when it is issued.

15. Dr Allam's argument before the FTT was that the notices of enquiry which commenced the enquiries and the subsequent closure notices were invalid. It was argued that Dr Allam's returns for 2011-12 and 2013-14 were made in response to automated notices purporting to be issued under s 8 TMA 1970 but which had not been issued by "an actual officer". The automated notices were therefore invalid. As such, Dr Allam's returns were not made in response to notices under s 8 and HMRC had no power to enquire into the returns or to issue closure notices. The returns were to be treated as what are called "voluntary returns". Further, the defective notices were not cured by s 12D TMA 1970, which we consider below.

16. It is common ground that the parties' arguments before the FTT as to the validity of the closure notices were addressed solely to what was called the "Section 12D Issue". That issue only arose if the automated notices requiring Dr Allam to file returns were invalid. The parties did not address arguments as to whether the automated notices were invalid because they were

awaiting a decision of the Upper Tribunal in the case of *HM Revenue & Customs v Rogers and Shaw* [2019] UKUT 0406 (TCC) (*"Rogers & Shaw"*). However, in the period between the parties' oral submissions on the Section 12D Issue and the decision of the FTT, the Upper Tribunal released its decision in *Rogers & Shaw*.

17. In *Rogers & Shaw* the Upper Tribunal held that s 8(1) did not require the officer giving the notice to be identified in the notice. It was sufficient that the notice was given under the authority of an officer of HMRC. The Upper Tribunal allowed HMRC's appeal and went on to remake the decision. For that purpose it permitted HMRC to adduce evidence of the automated process by which notices requiring returns were issued. It considered that evidence at [57] as follows:

> 57. … The taxpayers also argued that HMRC's evidence did not even demonstrate that HMRC officers generally had authorised the giving of section 8 notices (since the actual selection exercise was performed by computer and hard copy notices were physically despatched by Communisis). We reject those submissions. HMRC officers decided on applicable criteria and taxpayers meeting those criteria received section 8 notices. The fact that a computer performed the task of identifying taxpayers who met the criteria does not alter the conclusion that HMRC officers authorised the giving of notices to taxpayers who were so identified. Nor does it matter that Communisis physically sent out hard copy section 8 notices. The legislation does not require officers personally to place stamped letters in post-boxes. It is enough that officers have decided the criteria to be satisfied for a taxpayer to receive a section 8 notice leaving the implementation of that decision to administrative staff and contractors.

18. The FTT referred to *Rogers & Shaw* in the Decision and determined this aspect of Dr Allam's appeal at [29] and [30]:

> 29. We are bound by the decision of the Upper Tribunal in *Rogers and Shaw* and, in any event, we agree with it. On the basis of that decision, unless there is some other defect in the notice, a return made in response to an automated notice, such as those made by Dr Allam in this case, remains a return made under s8 TMA and the Section 12D issue does not arise. Dr Allam has not raised any other concern about the notices which were issued to him.
>
> 30. On that basis, and for these reasons, we dismiss this ground of appeal.

19. Notwithstanding that conclusion, the FTT went on to consider the Section 12D Issue although it only arose if the enquiry notices were invalid. It said that it would have dismissed Dr Allam's appeal based on its analysis of the Section 12D Issue.

20. We are satisfied from what we have been told that the FTT was wrong to determine this aspect of the First and Second Appeals on the basis of *Rogers & Shaw*. The FTT had heard no submissions from the parties on *Rogers & Shaw*. Dr Allam would have been entitled to put HMRC to proof that HMRC's automated systems had operated in the manner described by the Upper Tribunal in *Rogers & Shaw* at the time he was sent notices requiring him to make returns for 2011-12 and 2013-14. Similarly, HMRC would have been entitled to adduce such evidence to establish their case that a valid notice had been served.

21. However, the law has moved on since the Upper Tribunal's decision in *Rogers & Shaw*, at least to some extent and with retrospective effect. Section 103 Finance Act 2020 ("FA 2020") now provides as follows:

> 103(1) Anything capable of being done by an officer of Revenue and Customs by virtue of a function conferred by or under an enactment relating to taxation may be done by HMRC (whether by means involving the use of a computer or otherwise).
>
> (2) Accordingly, it follows that HMRC may (among other things)—
>
> (a) give a notice under section 8, 8A or 12AA of TMA 1970 (notice to file personal, trustee or partnership return);

(b) amend a return under section 9ZB of that Act (correction of personal or trustee return);

(c) make an assessment to tax in accordance with section 30A of that Act (assessing procedure);

(d) make a determination under section 100 of that Act (determination of penalties);

(e) give a notice under paragraph 3 of Schedule 18 to FA 1998 (notice to file company tax return);

(f) make a determination under paragraph 2 or 3 of Schedule 14 to FA 2003 (SDLT: determination of penalties).

(3) Anything done by HMRC in accordance with subsection (1) has the same effect as it would have if done by an officer of Revenue and Customs (or, where the function is conferred on an officer of a particular kind, an officer of that kind).

(4) In this section—

"HMRC" means Her Majesty's Revenue and Customs;

references to an officer of Revenue and Customs include an officer of a particular kind, such as an officer authorised for the purposes of an enactment.

(5) This section is treated as always having been in force.

(6) However, this section does not apply in relation to anything mentioned in subsection (1) done by HMRC if—

(a) before 11 March 2020, a court or tribunal determined that the relevant act was of no effect because it was not done by an officer of Revenue and Customs (or an officer of a particular kind), and
(b) at the beginning of 11 March 2020, the order of the court or tribunal giving effect to that determination had not been set aside or overturned on appeal.

22. HMRC say that the effect of s 103 is that the automated notices requiring returns from Dr Allam are valid, without the need to adduce evidence of the kind which was before the Upper Tribunal in *Rogers & Shaw*. If that is right, then the Section 12D Issue does not arise.

23. It is convenient at this stage to refer to s 12D TMA 1970. It concerns what are known as "voluntary returns", in the sense of returns that are not made in response to a notice under s 8 TMA 1970. In principle it applies to returns made by a taxpayer on a purely voluntary basis as well as returns made by a taxpayer who believes there is an obligation to make a return because a valid section 8 notice has been received, but subsequently identifies that the notice requiring a return was invalid for some reason.

24. The scheme of the TMA 1970 did not make any provision for voluntary returns until the introduction of s 12D in Finance Act 2019 ("FA 2019"). However, it was common ground that in practice a taxpayer might make a purely voluntary return for a number of reasons such as:

(1) To notify a tax liability which the taxpayer knows is due and payable;

(2) To make a claim for repayment of tax.

25. In the case of *Patel & Patel v HM Revenue & Customs* [2018] UKFTT 0185 (TC) ("*Patel & Patel*"), the taxpayers had wanted to register for self-assessment but had been unable to do so and therefore sent in paper returns in the standard format. HMRC processed them, purported to open enquiries into the returns and issued closure notices which the taxpayers appealed. The FTT held by way of preliminary issue that where a taxpayer made a voluntary return which was not in response to a notice under s 8 TMA 1970, HMRC had no power to enquire into that

return under s 9A TMA 1970. The FTT's decision was released on 5 April 2018 and at [81] the FTT recorded its conclusion as follows:

> 81. Notwithstanding the skilful submissions of Ms Nathan, I have concluded that the voluntary returns made by the appellants were not returns made under s.8(1) TMA, with the result that an enquiry could not be opened under s.9A TMA.

26. Section 12D was introduced by FA 2019 which received Royal Assent on 12 February 2019. It provides as follows:

> (1) This section applies where —
>
> (a) a person delivers a purported return ("the relevant return") under section 8, 8A or 12AA ("the relevant section") for a year of assessment or other period ("the relevant period"),
>
> (b) no notice under the relevant section has been given to the person in respect of the relevant period, and
>
> (c) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.
>
> (2) For the purposes of the Taxes Acts —
>
> (a) treat a relevant notice as having been given to the person on the day the relevant return was delivered, and
>
> (b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).
>
> (3) *"Relevant notice"* means —
>
> (a) in relation to section 8 or 8A, a notice under that section in respect of the relevant period;
>
> (b) …
>
> (4) In subsection (1)(a) *"purported return"* means anything that —
>
> (a) is in a form, and is delivered in a way, that a corresponding return could have been made and delivered had a relevant notice been given, and
>
> (b) purports to be a return under the relevant section.
>
> (5) Nothing in this section affects sections 34 to 36 or any other provisions of the Taxes Acts specifying a period for the making or delivering of any assessment (including self-assessment) to income tax or capital gains tax.

27. As the FTT observed at [20] and [21], the effect of s 12D is to treat returns not made in response to an enquiry notice under s 8 as having been made pursuant to such a notice. It also has retrospective effect in certain circumstances by virtue of s 87(3),(4) FA 2019 which provide as follows:

> 87(3) The amendments made by this section are treated as always having been in force.
>
> (4) However, those amendments do not apply in relation to a purported return delivered by a person if, before 29 October 2018 —
>
> (a) the person made an appeal under the Taxes Acts, or a claim for judicial review, and
>
> (b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, 8A or 12AA of TMA 1970 or paragraph 3 of Schedule 18 to FA 1998 because no relevant notice was given.

The grounds of appeal

28. Dr Allam has permission to appeal on the ground that the FTT erred in law in concluding that the closure notices were valid. In particular, he contends in his grounds of appeal as follows:

> (1) The FTT was wrong to apply *Rogers & Shaw* in the absence of evidence from HMRC as to the process by which the s 8 notices were issued to Dr Allam; and
>
> (2) The effect of s 12D is to validate Dr Allam's returns. It does not validate HMRC's enquiry notices into those returns or their closure notices at the end of the enquiries.

29. We are satisfied as we have said that the FTT was wrong to dismiss these aspects of the First and Second Appeals solely by reference to the decision of the Upper Tribunal in *Rogers & Shaw*.

30. However, HMRC say that the position has been regularised with retrospective effect by the introduction of s 103 FA 2020. Ms Choudhury, on behalf of HMRC submitted that automated notices issued by HMRC requiring a taxpayer to file a return are valid without any requirement to establish that an officer of HMRC had decided the criteria to be satisfied for a taxpayer to receive a notice. Hence, the evidence required by the Upper Tribunal in *Rogers & Shaw* is no longer required where it is accepted or proved that it was HMRC which had issued the notice. If the notices were valid, it follows that the enquiry notices and closure notices issued by HMRC were also valid and it is not necessary for HMRC to rely on s 12D.

The effect of s 103 FA 2019

31. Dr Allam's case is that s 103 does not permit the entire process of issuing notices requiring a return to be automated without the involvement of an officer of HMRC. Mr Ridgway on behalf of Dr Allam relied upon the meaning of "Her Majesty's Revenue and Customs" set out in s 4 Commissioners for Revenue and Customs Act 2005 which provides as follows:

> 4(1) The Commissioners and the officers of Revenue and Customs may together be referred to as Her Majesty's Revenue and Customs.
>
> …
>
> (3) In Schedule 1 to the Interpretation Act 1978 (defined expressions) at the appropriate place Insert —
>
> "*"Her Majesty's Revenue and Customs"* has the meaning given by section 4 of the Commissioners for Revenue and Customs Act 2005."

32. Mr Ridgway submitted that the reference to "HMRC" in s 103(1) was not to some "amorphous concept" but to the "Commissioners and officers" of HMRC, which were "human resources". As such, he submitted that the purpose of s 103 was to ensure that functions required to be carried out by officers of HMRC, such as giving notices requiring a taxpayer to make a return, could be carried out by Commissioners as well as officers. Section 103(1) simply confirmed that automated processes could be used, which was the decision in *Rogers & Shaw*. It did not remove the requirement in *Rogers & Shaw* for oversight of the automated process by an officer.

33. In support of that construction, Mr Ridgway relied upon the retrospective effect of s 103. He submitted that on HMRC's construction, an automated notice which HMRC could not establish was issued under the supervision of an officer would be retrospectively validated.

This could have the effect of retrospectively validating penalties for non-compliance which would be inconsistent with the person's convention rights under the Human Rights Act 1998. Mr Ridgway did not elaborate on this argument. In any event, we reject it. The mere fact a provision is retrospective and might in theory give rise to a penalty does not mean that it is in breach of convention rights, or that we should construe it narrowly in order to avoid such a possibility. Any unfairness that might result in a particular case can be dealt with either by HMRC's exercise of discretion not to issue a penalty or by the FTT on an appeal against a penalty.

34. As we understood Mr Ridgway's submissions, he also relied upon the fact that a taxpayer is required to make his return to the officer specified in the notice. Other provisions in TMA 1970 require matters such as appeals to be notified to the officer giving a notice. A taxpayer could not comply with those provisions if the identity of the officer was not known to the taxpayer. If the only effect of s 103 is to ensure that the actions of officers may be performed by Commissioners, then it remained possible to identify the officer or Commissioner who supervised the automated process and the taxpayer could make his return to that officer.

35. We were referred to a number of FTT decisions which have considered the construction of s 103, some of which are on appeal to the Upper Tribunal. It is not necessary for us to refer to those decisions.

36. We are satisfied that Parliament intended to validate all the notices referred to in s 103(2) where they are issued by HMRC as a department, including such notices issued using a computer. That is the ordinary and natural meaning of the words used in s 103(3). The reference to HMRC in this context is plainly to HMRC as a department. It is difficult to see what useful purpose Mr Ridgway's narrow construction would serve. There has been no suggestion that individual Commissioners have exercised the functions of officers of HMRC in circumstances where there has been doubt as to their power to do so. If, as Mr Ridgway submits, Parliament simply intended to authorise individual Commissioners to carry out the statutory functions of officers of HMRC then it would have said so in much more straightforward language. It would not have used the term "HMRC" in s 103(1) before going on to define HMRC as "Her Majesty's Revenue and Customs". It would simply have referred to "a Commissioner of Her Majesty's Revenue and Customs".

37. In so far as necessary, we are entitled to take into account the Explanatory Notes to the Finance Bill 2020 to the extent that they cast light on the objective setting or contextual scene in which the provision was enacted and the mischief at which it is aimed. Having said that, it is not permissible to rely on a reference in the Explanatory Notes to the intended scope of the statutory language in support of that construction (see *R (Westminster City Council) v National Asylum Service* [2002] UKHL 38 at [5] and [6]).

38. The Explanatory Notes for the clause which became s 103 state as follows:

> 8. HMRC has historically used automated processes to carry out repetitive, labour intensive administrative tasks, including issuing certain statutory notices. This reduces costs and creates efficiencies.
>
> 9. To avoid any doubt, this clause confirms that the rules already in place work as they are widely understood to work and as they have been applied historically over many years.
>
> 10. It makes clear that any function capable of being done by an individual officer may be done by HMRC, using a computer or other means, with the same legal effect.
>
> 11. Action resulting from, and as a consequence of, automated notices can therefore take place without ambiguity.

> 12. The clause will help to ensure that the tax system applies fairly to all and that taxpayers will have certainty over their tax affairs.

39. If we were in any doubt about the effect of s 103, the Explanatory Note would resolve that doubt. The context in which it was enacted was to confirm HMRC's administrative practices and to give certainty to taxpayers who receive a notice from HMRC that they should treat the notice as valid. It was not in the context of ensuring that individual Commissioners could perform actions required to be performed by officers.

40. Dr Allam does not suggest that the carve out from retrospective effect in s 103(6) had any application to the facts of this case. He also accepts that the automated notices served pursuant to s 8 TMA 1970 were sent to him by HMRC. In the circumstances, we are satisfied that the notices were valid, albeit for different reasons than the FTT. The FTT could not apply s 103 because it had not been enacted, but we must apply it because it has retrospective effect.

41. It is therefore not strictly necessary for us to consider the Section 12D Issue but, having heard full argument on the issue, we shall set out our views.

The Section 12D Issue

42. If the notices requiring a return were invalid, then it is common ground that s 12D applies retrospectively to validate the notices and the returns made by Dr Allam pursuant to those notices. The question is whether s 12D also has the effect of retrospectively validating the notices of enquiry issued pursuant to s 9A TMA 1970 and the closure notices issued pursuant to s 28A TMA 1970.

43. The FTT considered the Section 12D Issue at [32] – [77] of the Decision. It concluded that s 12D did have the effect of retrospectively validating the notices of enquiry and the closure notices. In particular:

> (1) The purpose of s 12D was clear. It was to codify a previous policy of HMRC to treat voluntary returns as valid and as having been made pursuant to a notice under s 8 TMA 1970. The Explanatory Notes to the Finance (No 3) Bill 2018 and extracts from Hansard did not assist in resolving the issue (see [43] and [47].
>
> (2) Section 12D was expressed to apply "for the purposes of the Taxes Act" and by s 87(3) FA 2019 was treated as always having been in force. It was clearly designed to give certainty to taxpayers and HMRC that the process of assessment encompassing enquiry notices and closure notices in relation to voluntary returns would be respected (see [55] – [60]).
>
> (3) It was a deeming provision and its scope fell to be construed in accordance with the decision in *Marshall v Kerr* [1994] STC 638. Validation of the enquiry notices and closure notices inevitably flowed from the deemed state of affairs (see [62]).
>
> (4) This interpretation did not give rise to any injustice or absurdity (see [63] – [75]).

44. The submissions before us were in large measure a rehearsal of the submissions made to the FTT. For the reasons which follow we are satisfied that there was no error of law in the FTT's conclusion.

45. The effect of a deeming provision was authoritatively stated by Peter Gibson J as he then was in *Marshall v Kerr* [1993] STC 360 at 366d and endorsed by the House of Lords in that case as follows:

> For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction

> should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

46. It was common ground that s 12D deems a voluntary return as having been made and delivered pursuant to a s 8 notice given to the taxpayer on the date the voluntary return was delivered. Mr Ridgway submitted that the only consequences and incidents inevitably flowing from that deemed state of affairs where the section applied retrospectively were certain protections arising for the taxpayer from having filed a return. For example, protections given to the taxpayer under para 21(1) Schedule 36 Finance Act 2008 and under s 29(3) TMA 1970. Section 12D did not have the effect of deeming an enquiry notice issued on receipt of a voluntary return as having been validly issued. Only once the return had been validated by s12D could HMRC then issue an enquiry notice, subject to the time limits for doing so which generally run from the date the return is lodged. If Parliament had intended to retrospectively deem as valid an enquiry notice into what was at the time an invalid return, then it would have done so in terms.

47. Mr Ridgway also noted that s 12D(2) is engaged when HMRC treats the relevant return as having been made and delivered pursuant to a s 8 notice, and that there has never been any obligation on HMRC to accept a voluntary return. He submitted that this demonstrates why extending the deeming effect to cover a notice of enquiry would require clear language.

48. We were referred to the Explanatory Notes to the relevant clause in Finance (No 3) Bill 2018. The Bill was introduced following the decision of the FTT in *Patel & Patel*. The Explanatory Note records the following background:

> 23. Some tax returns are delivered each year 'voluntarily' to HMRC by taxpayers, i.e. they are delivered before HMRC has given a statutory notice requiring the return to be delivered. HMRC has historically operated a policy of accepting such voluntary returns and has charged or repaid tax based on them, opened enquiries into them if necessary, and generally has treated them as valid tax returns for all purposes. If HMRC did not accept voluntary returns it would have to ignore the information sent and formally ask taxpayers to resend the same information, which would cause delays and inconvenience both to taxpayers and HMRC.
>
> 24. In April 2018 the First-tier Tribunal ruled that this policy was not supported by the law. HMRC has appealed this decision. If this finding were to be upheld by a higher court it could mean that all voluntary returns, and the steps taken by HMRC or taxpayers in reliance on them, were invalid.

49. Mr Ridgway submitted that there was no hint in the Explanatory Note that the provision was retrospectively validating HMRC's enquiries into such returns. We disagree. The Note describes HMRC's historical policy of accepting voluntary returns, charging or repaying tax based on such returns and opening enquiries into them as necessary. It was that policy which the FTT in *Patel & Patel* called into question when it held that the voluntary returns in that case were not made under s.8(1) TMA 1970, with the result that the enquiry notice and subsequent closure notice were invalid.

50. Against that background and giving the words used by Parliament their ordinary and natural meaning the intention behind s 12D is clear. A voluntary return is deemed to be made in response to a s 8 notice for the purposes of the Taxes Acts, which includes TMA 1970. TMA 1970 sets out a statutory scheme involving the various stages we have described above. In light of that background it would be strange if Parliament was intending to limit the effect of the deeming provision to the first and second stages, whilst ignoring subsequent stages. HMRC's policy described in the Explanatory Note included not only HMRC treating voluntary returns

as valid for the purpose of identifying the taxpayer's liability to tax or right to a tax refund, but also for the purposes of opening enquiries into such returns. The concerns which led to the provision being enacted included not only the fact that voluntary returns may be invalid, but also steps taken by HMRC or taxpayers in reliance on those returns being treated as valid.

51. Section 12D(1) defines the circumstances in which the section applies. It is notable that s 12D(1)(c) provides that the section only applies where HMRC "treats" the relevant return as being a return made and delivered pursuant to a notice under s 8. The question arises as to how HMRC might treat a return as being so made. The answer is clear in the context of TMA 1970. HMRC will treat a return as having been made pursuant to a notice where, if they are satisfied with the return, they seek to collect tax showing as due or make a repayment of tax showing as due; if they are not satisfied with the return they will treat it as valid by opening an enquiry into the return under s 9A. If that is how HMRC treat a return as being made pursuant to a notice, then the section clearly anticipates that the notice of enquiry will be deemed to be valid.

52. The definition of a "purported return" in s 12D(4) supports this construction. It is a return in a form and delivered in a way that a return would have been made and delivered if a notice had been served and purports to be a return under s 8. There is no reason why Parliament would not have intended such a return to be treated as a valid return for all purposes, including for the purpose of enquiries opened by HMRC prior to the enactment of s 12D.

53. Mr Ridgway submitted that s 12D was introduced in order to protect a taxpayer who had submitted a voluntary return. It is true that s 12D does provide certain protections to taxpayers. For example, para 21(1) Schedule 36 Finance Act 2008 provides that subject to certain exclusions a taxpayer may not be served with an information notice under Schedule 36 for a tax year in respect of which a return has been made. One of the exclusions is where a notice of enquiry has been opened and has not been completed.

54. Another example is s 29(3) TMA 1970 which provides that a taxpayer who has delivered a return under s 8 cannot be the subject of a discovery assessment for a loss of tax unless certain conditions are satisfied, including a condition by reference to the time at which an officer of HMRC ceased to be entitled to give a notice of enquiry.

55. It seems to us that both these examples serve to emphasise the scheme of the TMA 1970 and the stages described above. They illustrate that one of the purposes of the amendment was to provide certainty and protection to taxpayers, which is not disputed by HMRC. However, they do not suggest that the provision was not also to validate steps taken by HMRC on the basis of the return.

56. Indeed, we note that s 87(4) FA 2019 restricts the extent to which s 12D operates retrospectively. The effect of s 87(4) is that s 12D does not apply if, before 29 October 2018 a person had made an appeal or commenced a claim for judicial review and had relied on a ground that the purported return was not valid because no s 8 notice had been given. It seems to us that provision is aimed at a case such as *Patel & Patel* where a closure notice was being challenged prior to the statutory amendment on the basis that the return was not a valid return. On Mr Ridgway's construction, the amendment would not affect *Patel v Patel* because the notice of enquiry and the closure notice in that case would not have been validated by s 12D. It seems to us that s 87(4) would not be required if the only effect of s 12D was to validate a voluntary return in order to protect the position of the taxpayer.

57. Mr Ridgway also sought to rely on Hansard debates in relation to the Finance (No 3) Bill 2018. We do not consider that material is admissible on this point of statutory interpretation. Firstly, because we do not consider that there is any ambiguity in s 12D. Secondly, the material does not address the specific issue in this appeal. We add that if, contrary to our view, this

material had been admissible, it seems to us to contain nothing to support Mr Ridgway's argument as to the limited effect of s 12D.

58. Mr Ridgway submitted that HMRC's construction leads to various absurdities which Parliament cannot have intended, including in connection with s 87(4) FA 2019 and limitations on the retrospective application of s 12D. He gave various hypothetical examples.

59. Firstly, he observed that a taxpayer who made a "late" return in response to an invalid notice would be in a better position than a taxpayer who made such a return on time. The FTT considered a similar example at [65] of the Decision. We agree with the FTT's reasoning at [66] – [68] as to why this is an anomaly rather than an absurdity and does not justify the narrow construction put forward by Mr Ridgway. In particular, it assumes that a taxpayer who makes a late return in response to an invalid notice is to be treated as having made a late return. The whole point of the provision is that it applies to purely voluntary returns as well as returns made in response to invalid notices. There is no absurdity in treating all such returns in the same way.

60. Secondly, Mr Ridgway suggested that HMRC's construction would give HMRC a "perverse incentive" to keep an enquiry open until after 29 October 2018 so as to preclude a taxpayer from taking advantage of the restriction on retrospectivity in s 87(4) FA 2019. We do not accept that is an absurdity associated with HMRC's construction. Parliament is entitled to expect that HMRC will not act improperly.

61. Thirdly, it was said that a taxpayer may have taken a point prior to 29 October 2018 that an enquiry was invalid in an appeal against a Schedule 36 notice. Where a return has been made, HMRC can only issue an information notice in certain circumstances, including where there is an open enquiry. Mr Ridgway suggested that such an appeal would have been upheld, but that HMRC could now effectively re-issue an information notice and the taxpayer would have no right of appeal if HMRC's construction is correct. However, it seems to us that the taxpayer in appropriate circumstances would have a remedy if there was some form of abuse of process, either before the FTT or by way of judicial review. HMRC's construction does not lead to any absurdity.

62. Fourthly, it was said that the period for which a taxpayer was required to keep statutory records is in certain circumstances defined by reference to whether a return has been submitted and whether an enquiry into that return has been opened (see s 12B TMA 1970). If an enquiry was retrospectively validated, then a taxpayer could find itself in breach of that obligation and liable to a penalty of up to £3,000. Again, it seems to us that this is more theoretical than real. Any liability to a penalty would be subject to HMRC's discretion to assess a penalty and the possibility of an appeal to the FTT against such a penalty.

63. Mr Ridgway also submitted that HMRC's construction rendered s 87(5) – (8) nugatory. These provisions give the Treasury power to make amendments of relevant tax legislation as they consider appropriate in consequence of the introduction of s 12D. We do not see this power as being rendered nugatory. There may be any number of areas where the Treasury might consider amendment of relevant tax legislation appropriate. Indeed, the Treasury might consider exercising that power if problems ever arose in the areas where Mr Ridgway has suggested that HMRC's construction leads to absurdities.

64. If and to the extent that anomalies arise, they fall far short of being fairly described as absurdities and do not justify a departure from the plain meaning and effect of s 12D. They are in any event subject to the Treasury's power to make appropriate amendments to the legislation.

65. Mr Ridgway submitted in his skeleton argument that HMRC's construction of s12D would be inconsistent with the human rights certificate given to what became Finance Act

2019. That argument was not pursued either before the FTT or in oral submissions before us and we need not address it further.

66. For all the reasons given above we are satisfied that the FTT was right to treat HMRC's enquiries into Dr Allam's returns for 2011-12 and 2013-14 as valid enquiries. We base this conclusion on our decision as to the effect of s 103 FA 2020. Even if however s 103 had not been available, we would still have agreed with the FTT on this point because, for the reasons which we have set out, we consider that the FTT were right on the Section 12D Issue. We do not think that Section 12D had only the limited deeming effect contended for by Mr Ridgway.

67. The Notices Appeal therefore fails. With this decision in place, we shall now consider the substantive issues in the First Appeal and the Second Appeal.

THE FIRST APPEAL

68. At all material times AML carried on the principal activity of an industrial and marine engineering business. Its shares were held by Dr Allam and his wife Mrs Fatima Allam. Some 57% of the shares were owned by Dr Allam and some 43% of the shares were owned by Mrs Allam.

69. In 2010, Dr Allam and Mrs Allam were seeking to acquire Hull City Football Club. The acquisition was effected through a new holding company called Allamhouse Limited ("Allamhouse"). The shares of Dr Allam and Mrs Allam in AML were transferred to Allamhouse in consideration for an issue of shares by Allamhouse to Dr Allam and Mrs Allam in the same proportion as their shareholdings in AML.

70. Dr Allam also owned all the issued share capital in ADL, whose business involved property development and property investment. The nature of ADL's activities is relevant to Dr Allam's entitlement to entrepreneurs' relief and we consider the FTT's findings of fact in this regard in more detail below. The key transaction for the purposes of the First Appeal is a sale by Dr Allam of the entire share capital of ADL to AML on 26 July 2011 for a consideration of £4,500,000 (subsequently adjusted to £4,950,000) paid by AML in cash. The parties accept that this adjusted figure was the market value of the ADL shares at the time of the transaction.

71. Dr Allam reported a capital gain of £4,925,000 on the disposal of his shares in ADL on his tax return for 2011-12. He was entitled to relief for capital losses carried forward and also claimed entrepreneurs' relief. HMRC opened an enquiry into the return by notice dated 5 November 2013. As a result of the enquiry, HMRC considered that Dr Allam was not entitled to entrepreneurs' relief and issued a closure notice on 8 April 2016 denying the claim to entrepreneurs' relief.

72. Dr Allam contended before the FTT that even if his arguments as to the validity of the closure notice were wrong, he was entitled to entrepreneurs' relief.

73. The FTT held that Dr Allam was not entitled to entrepreneurs' relief. In this section we consider the legal framework governing entrepreneurs' relief, the FTT's findings of fact relevant to Dr Allam's entitlement, the FTT's decision and Dr Allam's grounds of appeal against that decision.

Entrepreneurs' relief – legal framework

74. The FTT set out the statutory framework at [108] – [115]. Essentially, entrepreneurs' relief operates to reduce the rate of CGT on qualifying business disposals, which includes a material disposal of business assets within s 169I Taxation of Chargeable Gains Act 1992 ("TCGA 1992"). A disposal of shares in a company will be a material disposal of business assets where it satisfies Condition A or Condition B in s 169I. Those conditions are defined as follows:

(6) Condition A is that, throughout the period of 1 year ending with the date of the disposal –

> (a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and
> (b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

(7) Condition B is that the conditions in paragraphs (a) and (b) of subsection (6) are met throughout the period of 1 year ending with the date on which the company –

> (a) ceases to be a trading company without continuing to be or becoming a member of a trading group, or
> (b) ceases to be a member of a trading group without continuing to be or becoming a trading company,

and that date is within the period of 3 years ending with the date of the disposal.

75. We are concerned with Condition A, although Condition B also featured in Mr Ridgway's submissions. There was no dispute that ADL was Dr Allam's personal company and that Dr Allam was an employee of ADL in the period of one year ending with the date of disposal. The issue between the parties before the FTT was whether ADL was a "trading company". The definition of "trading company" for these purposes is found in s 165A(3) TCGA 1992:

> (3) "Trading company" means a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities.
>
> (4) For the purposes of subsection (3) above "trading activities" means activities carried on by the company –
>
> (a) in the course of, or for the purposes of, a trade being carried on by it,
>
> (b) for the purposes of a trade that it is preparing to carry on,
>
> (c) with a view to its acquiring or starting to carry on a trade, or
>
> (d) with a view to its acquiring a significant interest in the share capital of another company …

76. "Trade" is defined in s 165A(14) to include anything which is a trade, profession or vocation within the meaning of the Income Tax Acts.

77. The issue before the FTT and on this appeal is whether the activities of ADL included, to a substantial extent, activities other than trading activities. In addition to the statutory provisions, the FTT also made reference to certain HMRC guidance as to how the words "to a substantial extent" should be construed. HMRC's guidance was to the effect that substantial in this context means more than 20%. The guidance also suggested factors which might be taken into account in measuring whether a company's non-trading activities were substantial. It was suggested that relevant factors should be weighed and considered "in the round".

The FTT's findings of fact

78. There was no dispute that ADL carried on trading activities in the form of property development. The FTT made findings of fact relevant to whether the activities of ADL to a substantial extent involved non-trading activities at [117] – [143]. We summarise those findings in the following paragraphs.

79. ADL had two directors, Dr Allam and his son Mr Ehab Allam. It was involved in holding, developing and leasing properties in and around the city of Hull. The FTT identified 5 groups of properties as follows:

(1) *Melton* – This site was acquired by ADL in 2007 and comprised a factory and offices leased to AML at an annual rent of £379,000. A small part of the site comprised offices leased to a third party at an annual rent of £3,500. The market value of the site was some £4.4m.

(2) *Riverside Properties* – This site was acquired by ADL in the 1990's and was leased to AML as its main factory and offices up to 2007 when AML relocated to the Melton site. There was some development of the site, but from 2007 onwards it was leased to AML as additional factory and office space at an annual rent of £72,000. The directors intended the site for residential development, although planning permission had not been obtained. Part of the site was acquired separately with a view to residential development. Planning permission had not been obtained but some of the buildings on that part of the site were demolished. It is leased to a third party for storage at an annual rent of £17,000. The value of the site occupied by AML was £550,000. The value of the remainder was £650,000.

(3) *Cannon Street* – This site was a factory and related car parking facility acquired by ADL in 2008 and leased back to the vendor at an annual rent of £127,500. ADL intended to obtain planning permission for residential development. Several applications were made, unsuccessfully. The value of the site was some £1.5m.

(4) *Lime Street Car Park* – This was a collection of sites acquired in 2006 and 2007. Warehouse buildings were demolished and the site was developed into a pay and display car park in 2010 and 2011. There was no evidence as to who operated the car park, but it was let out at an annual rent of £106,000. The value of the car park land was some £775,000. Buildings on adjacent sites were also demolished. The value of that land was some £465,000.

(5) *Other properties* – There are a variety of other properties let to tenants but these are relatively minor and did not affect the decision of the FTT.

80. The annual rents and market values found by the FTT, as set out in an Appendix to the Decision, were as at 31 December 2011.

81. The FTT considered ADL's accounts for the years ended 31 December 2010 and 2011. ADL's turnover in 2011 was £730,218 which was made up almost entirely of the rental incomes described above. Administrative expenses amounted to £50,246 and interest payable was £86,612, giving a profit on ordinary activities of £593,360. The administrative expenses included legal and professional costs of £32,469 which were attributable to development work on the Lime Street Car Park site and planning applications in relation to other sites.

82. ADL's balance sheet as at 31 December 2011 showed fixed assets of £8,871,964 which was the value of the properties described above together with some capitalised expenditure relating to planning costs on Lime Street Car Park and Cannon Street. This was an increase over 2010 of some £227,000. The properties were described as "property investments" in the accounts.

83. The main liabilities in ADL's accounts were long term mortgages, amounting to some £4.8m at 31 December 2011. There were short term liabilities of some £1.9m made up of payments due under mortgages and amounts due to other group undertakings.

84. Mr Ehab Allam spent approximately 20-30% of his working week dealing with ADL business. The bulk of that, some 90-95%, was spent on development matters. Dr Allam spent only one or two hours a week on ADL business, largely dealing with banks on financing matters.

The FTT's decision

85. The FTT made various general observations as to the meaning of the term "trading company" in the context of entrepreneurs' relief at [149] – [159]. In particular:

> 150. In some respects, the definition of a "trading company" in s165A(3) is relatively broad. The concepts of "trade" and "trading activity" as defined in s165A are not limited to the activities of trading itself. They extend to activities for the purposes of a trade or for the purposes of a trade that the company is preparing to carry on and even to activities involved in acquiring a trade, starting to carry on a trade or acquiring an interest in another company which is itself trading. Against that background, it is clear that an over-analytical approach is not appropriate. The relief is in this respect intended to be relatively broad; it is intended to extend to disposals of shares in companies that are fundamentally trading or preparing to trade and should not be denied simply because the activities of the company extend to activities which are not activities of the trade themselves but are perhaps preparatory to or ancillary to the carrying on of a trade.
>
> 151. As Mr Gordon [then acting for Dr Allam] points out, any company that carries on some "trading activities" (as defined) will meet the first part of the definition. It is the second part of the definition (which begins with the words "whose activities do not include…") which provides an important limitation on the relief. In our view, the clear purpose of that limitation is to ensure that, whilst the relevant company need not be engaged in exclusively trading activities, the relief should not be available for disposals of shares in companies which have non-trading activities which are of real importance when viewed in the context of the company's activities as a whole.
>
> 153. The definition of a "trading company" refers to the "activities" of the company. This suggests that the focus should be on what the company actually does and a narrow reading of that term might suggest that we should have regard primarily to the active steps that a company takes in furtherance of its business. However, in our view, we should guard against placing too restrictive an interpretation on the term. As we have set out above, in our view, the limitation on the definition of a trading company is designed to ensure that relief is not given for transfers of shares in companies which are not engaged fundamentally in trading activity. That purpose would be defeated if the limitation did not encompass the holding of investments where the holding of investments is substantial in the context of the activities of the company as a whole. If that were not the case it would be possible for relief to be obtained on a sale of shares in a company which has a relatively small but active trading business (or which was perhaps preparing to trade) but which also holds a substantial investment portfolio generating significant income which requires little active management. In our view, that would run contrary to the purpose of the relief.
>
> ***"to a substantial extent"***
>
> 154. Both parties pressed upon us various glosses on the words "to a substantial extent" and both referred to the guidance from the HMRC's manuals which we have set out at [116] above.
>
> …
>
> 157. …We do not find any of these glosses particularly helpful. The legislation itself does not elaborate further on the meaning of the phrase "to a substantial extent". We must apply those words giving them their ordinary and natural meaning in their statutory context. That context is that of a relief which is intended to apply to shares in companies which are carrying on trading activities (read broadly in the sense required by s165A(14)) but to guard against the use of that relief to reduce the tax on assets which are used for other purposes. Against that background, in

our view, "substantial" should be taken to mean of material or real importance in the context of the activities of the company as a whole.

86. In relation to HMRC's guidance the FTT said this:

> 159. As regards, the HMRC guidance, we can understand that it is useful for HMRC staff to have some practical guidance to assist them in the application of the legislation, but there is no sanction in the legislation for the application of a strict numerical threshold. Furthermore, although the guidance accepts that the factors to which it refers should not be regarded as individual tests and they are just factors which may point one way or another and which need to be weighed up in the context of the individual case, we would counsel against any form of exclusive list. It is not permissible to substitute another test for the test dictated by the legislation. The question for us must be whether or not the activities of ADL include non-trading activities to a substantial extent. We must assess that question in the context of the facts and circumstances of the case as a whole and so by reference to the activities of the company as a whole.

87. At [160] – [170] the FTT went on to apply these principles to the facts as found. It considered that ADL was carrying on some trading activities in the form of property development, in particular at the Lime Street Car Park site. It also regarded demolition work and applications for planning permission at some of the sites as being in preparation for development and therefore amounting to trading activities. On the other hand, in relation to rental income it said this:

> 163. Many of the properties are, however, let to produce rental income. As we have mentioned above, we acknowledge that the activity of holding property and collecting rent is a largely passive activity, but given the purpose of this provision, in our view, we have to take into account those elements as activities in themselves. This is not trading activity and we must take that activity into account.
>
> …
>
> 165. …we also take into account that some of the rental income is of a temporary nature. For example, the company re-let the buy-to-let 5 Spyvee Street [part of the Lime Street Car Park site] for one year during the relevant period, but was still considering demolishing the buildings on that site. In a similar way, the company has engaged in several attempts to obtain planning permission for the Cannon Street site. We regard that activity (i.e. seeking planning permission) as trading (or preparing to trade). We also have regard to the fact that the company has sought planning permission for the site in the weight that we give to the non-trading rental income from it. However, the fact remains that this site has not been developed for many years, that the rental income remains significant and that several of the leases have been renewed on full repairing terms.
>
> 166. Furthermore, even though there has been some development activity on the former AML site at 10-12 Lime Street [part of the Riverside Properties site] and that development was undertaken in a manner which might assist the future development of the site for apartments and flats, we also take into account the fact that, by the time of the relevant period, the site had been let to AML for four years and had previously been let to AML for many years without any significant development being undertaken. There must come a point at which, it is appropriate to discount the development activity (or the preparation for it) that has been undertaken in the light of the continued use of the property to derive rental income.

88. The FTT went on to reach a conclusion that ADL's activities were to a substantial extent non-trading activities. In doing so, it stated as follows:

> 167. Having taken all of these factors into account, we have come to the view that ADL was carrying on activities which "to a substantial extent were not trading activities".

168. The company's main source of income over the relevant period is rental income from its properties. The company's most significant income stream is derived from the Melton site, which is let to AML. That site is also by some margin the company's most valuable asset.

169. In our view, although the company was clearly carrying on some trading activity or activity in preparation for trading, the proportion of the income of the company which comprises non-trading rental income and the proportion of its asset base which are devoted to properties which are let simply for their rental income demonstrate that its property investment and rental activities have real importance and cannot be ignored. Those activities are not trading activities and they have to be regarded as "substantial" in the context of the activities of the company as a whole.

Grounds of appeal

89. The grounds on which Dr Allam was granted permission to appeal by the FTT may be summarised as follows:

(1) The FTT was wrong as a matter of law to take into account investment income from "passive activity" in determining whether the activities of ADL included non-trading activities to a substantial extent. The test focuses on activities and what the company actually does. Passive investment income is not the result of any activity; and

(2) In determining whether non-trading activities were substantial, the FTT was wrong to base its conclusions on the relative values of ADL's assets shown in its balance sheet and to ignore unrealised development value generated by the development activities.

90. Both parties accept that the FTT gave the right meaning to the word "substantial" at [157] of the decision. We agree with the FTT that in this context substantial should be "taken to mean of material or real importance in the context of the activities of the company as a whole". Both parties agreed and we agree that the test is qualitative and quantitative. It is necessary to look at both the nature of the activities and to measure in some way the extent of those activities. Further, the company's activities must be looked at as a whole. It is not appropriate to apply any sort of numerical threshold as suggested by HMRC's guidance.

91. HMRC's guidance suggests that it is useful to consider the following factors:

(1) The income from trading and non-trading activities;

(2) The value of trading and non-trading assets;

(3) Expenses incurred and time spent by officers and employees of the company in trading and non-trading activities;

92. The guidance suggests that these factors should all be looked at in the context of the company's history and all factors should be weighed in a balancing exercise. It invites a similar approach to that applied in determining whether company shares are business property for Inheritance Tax purposes, described by the Special Commissioner in *Farmer v IRC* [1999] STC (SCD) 321; namely, looking at all relevant factors "in the round". The test for business property relief is whether the company's business "consisted mainly of making or holding investments". The guidance does not suggest that the test for entrepreneurs' relief is the same.

93. The FTT did not refer to *Farmer*, save in a quote from HMRC's guidance. We consider it was correct not to do so. As the FTT said, it is not helpful to put a gloss on the words of the statute. What is substantial in the context of trading and non-trading activities should be given its ordinary and natural meaning. Application of the test involves identifying the trading and non-trading activities and then considering how best to measure the non-trading activities to see whether they are substantial in the context of the company's activities as a whole. The real issue between the parties in this appeal is how one measures the extent of an activity.

94. Mr Ridgway submits that the FTT failed to focus on the activities of ADL, and what ADL was actually doing. If it had done so, it would have found that the relative asset values of ADL and the sources of its income were not a measure of its activities, specifically its non-trading activities. He submits that the holding of assets and the receipt of rental income are not in themselves activities, or at best involve very little activity. He submitted that where property is let on a long lease with a tenant's repairing covenant, very little activity is involved on the part of ADL. For example, the Melton site involved little or no activity beyond collecting rents from AML and the small third party rents.

95. Mr Ridgway criticised the FTT's reference at [153] that the relief was not intended to be available in respect of companies with a small but active trading business but which also hold a substantial investment portfolio generating significant income requiring little active management. He also criticised the reference at [157] to guarding against the use of the relief to reduce the tax on assets which are used for non-trading purposes. He submitted that the FTT had failed to focus on actual activities and had instead focused on the assets held and the income produced by those assets.

96. Mr Ridgway's submissions proceeded on the footing that the activities of a company are confined to the actions of its directors and employees; in other words actual human activities. We do not accept that activities in this context are to be construed so narrowly. We accept that the reference to "activities" in s 165A(3) is in the sense of what the company actually does, but the question of what the company actually does must be looked at in commercial terms. In that sense, trading is an activity, but so too is holding an investment property and receiving rents. That is what the FTT meant when it described the activity of holding property and collecting rent as a "passive activity". There may be little action required on the part of directors and employees in such an activity, but it remains an activity in commercial terms. In ordinary language a company might be described as having a principal activity as a holding company. There may be little if any activity on the part of directors and employees as such, but it remains the company's principal activity, even if it also engages in other commercial activities.

97. Mr Ridgway submitted that the FTT had confused the carrying on of business with the activities involved in the carrying on of a business. He criticised the use by the FTT of the words "passive activity", as an oxymoron. He pointed out that an activity (meaning something which is active), cannot, by definition, be passive.

98. We do not accept this submission. While the use of the expression "passive activity" may not have been the best way of describing activities such as holding property and collecting rent, we agree with the essential point which was being made by the FTT at [163]. That essential point was that, in considering the activities of a company, the test is a holistic one. The test is not confined to physical human activity, but requires an overall consideration of what it is that the relevant company does.

99. We were referred to the Privy Council case of *American Leaf Blending Co v Director-General of Inland Revenue* [1979] AC 676. In that case, the Malaysian taxpayer abandoned a tobacco business in which it incurred losses and let out its warehouse and factory premises. There were five successive lettings of the premises. It claimed to set off the losses against its rental income on the basis that the rental income was derived from a source consisting of a business. Their Lordships noted at 684B that "business" is a wider concept that "trade", and at 684D stated:

> The carrying on of a "business", no doubt, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between. In the instant case, however, there was evidence before the special commissioners of activity in and about the letting of its premises by the

> company during each of the five years that had elapsed since it closed down its former tobacco business. There were three successive lettings of the warehouse negotiated with different tenants; there was the removal of the machinery from the factory area … [and] there was the negotiation of a letting to a single tenant of both the factory area and the warehouse.

100. We do not derive any assistance from this authority. It considers activity in the sense of what amounts to a business and not in any technical sense. It was not concerned with construing the word "activity". Similarly, we do not derive any assistance from the judgment of Lawrence Collins J in *HM Revenue & Customs v Salaried Persons Pensions Loans Limited* [2006] EWHC 763 (Ch), another case on which Mr Ridgway relied, which involved the availability of small companies relief for corporation tax.

101. In our view, the question of what amounts to an activity in the context of a company is a straightforward question. It is what the company does in commercial terms. The question of how to measure the extent of an activity may be more difficult and will be informed by the statutory context. In the present case, the context is that of a relief from capital gains tax aimed at trading companies. Trading companies are defined in the first instance as companies carrying on trading activities, with an exclusion by refence to the extent of any non-trading activities. In that context it is clear to us that the FTT was right when it said at [153] that the purpose of the relief would be defeated if the limitation did not exclude shares in companies having substantial investment holdings. The holding of investments is an activity for these purposes. As we have said, we consider that the FTT was correct not to focus solely on physical activities. Otherwise, shares in a company with a small trading activity would qualify for relief even where it had a large investment business involving very little physical activity. Conversely, shares in the same company would not qualify for relief if it had a large investment business involving considerable physical activity. That result makes no sense to us in the context of a relief aimed at shares in companies carrying out trading activities. The measure of an activity for these purposes must be more than a simple measure of the time and work involved in carrying on the activity.

102. In the context of a relief from tax in relation to the shares of a trading company we consider that Parliament intended financial measures of activity to be taken into account as well as measures of physical activity.

103. Mr Ridgway submitted that the FTT's construction would lead companies to arrange for surplus investment assets to be converted to non-income producing assets in advance of the disposal of shares. We do not accept that this possibility would in any way frustrate the purpose of the relief. The relief is available to shareholders for whom the company is a personal company, that is where they hold at least 5% of the share capital. Such shareholders may not have influence over the company's activities. More importantly, whether an asset is income producing or not is not determinative of the availability of relief. The extent to which assets are income producing is only one factor and the circumstances in which a company comes to hold non-income producing assets would also be relevant.

104. Mr Ridgway also submitted that the FTT erred in looking only at balance sheet values, and failed to take into account the development value of ADL's properties. However, the FTT made findings as to the market values of the properties. It said as follows at [131]:

> 131. The Appendix also sets out the valuation of the various properties as at 31 December 2011. The parties agree that the valuations were applicable to the period in question, subject to one issue. Mr Ehab Allam asserted in his evidence that the valuation of the Cannon Street site would have been significantly higher if planning permission had been obtained for a residential development. We do not doubt his evidence. However, the fact remains that planning permission had not been obtained and, accordingly, we have treated the valuation in the Appendix as the appropriate market value of the relevant property at the time.

105. There has been no challenge to the FTT's findings of fact in this regard. In light of the finding at [131], we do not accept that the FTT failed to take into account development value. Market value would by definition include any development value, whether or not planning permission had been granted.

106. The FTT took into account as relevant factors the value of the capital assets employed in the various activities and the comparative turnover, expenses and profits. Mr Ridgway acknowledged that turnover and level of profits may be relevant, but only to the extent that they represented activity. In relation to what the FTT said at [167] – [169], he submitted that income and asset values do not demonstrate the extent of the physical activities. He again used the example of a property let on a long lease and contrasted it with a trade involving residential property development. In the former there would be little activity but possibly a large income. In the latter there may be considerable activity in terms of obtaining planning permission, demolition works and building works with little income perhaps for several years until the sale of individual dwellings.

107. We consider that in these paragraphs the FTT was looking at all the relevant factors and making a value judgment. It clearly considered that the factors to be given most weight were the income from non-trading activities and the capital employed in non-trading activities. The FTT recognised at [165] and [166] that certain assets were earmarked for development, which was a trading activity, but in the meantime had been let out for many years on full repairing terms. For example, it took that fact into account at [166] where it stated in relation to the Lime Street Car Park site:

> There must come a point at which, it is appropriate to discount the development activity (or the preparation for it) that has been undertaken in the light of the continued use of the property to derive rental income.

108. For the reasons given above, we are satisfied that in this case the FTT was entitled to take into account turnover and capital employed as a measure of activity. It did not do so in isolation. At [167] it stated that it took into account all the previously stated factors. It took into account that the development activity was a long term activity and might not have significant income in any particular year. It was entitled to take into account that the investment activity produced significant income in the meantime.

109. Mr Ridgway acknowledged the FTT's finding at [139] that the expenses incurred in 2011 were predominantly trading expenses, attributable to development work on the car park site and planning applications in relation to other sites. He did not suggest that the FTT had failed to take this into account but submitted that it indicated that the non-trading activity was not substantial. That is clearly a factor, but it is just one factor to be taken into account in the overall analysis. We do not consider that expenses incurred on trading or non-trading activities are by themselves a measure of those activities. Incurring expenses may indicate physical activity, but for the reasons given above the test is not solely concerned with physical activity.

110. In support of his submissions, Mr Ridgway referred us to Condition B in s 169I(7) which provides for relief in relation to companies which might be non-trading companies or indeed investment holding companies. He submitted that the FTT's view as to the purpose of the relief was inconsistent with relief being available to such companies.

111. We do not accept that submission. Relief by way of Condition B simply reflects the fact that a taxpayer may dispose of shares in a company following a previous disposal by the company of its trading activity. Parliament has chosen to give relief in such circumstances, but it is still necessary for the company to have satisfied the definition of a trading company in the 3 years prior to the disposal of shares.

112. Mr Ridgway also relied on the FTT decision in *Potter v HM Revenue & Customs* [2019] UKFTT 554. This was also an appeal in relation to the availability of entrepreneurs' relief and the decision was brought to the attention of the FTT, although the parties did not make submissions in relation to it. The company in question was carrying on limited trading activities in the relevant period. Those trading activities had reduced considerably as a result of the financial crash in 2008-09. Prior to the crash it had been extremely successful and had substantial cash reserves. It used £800,000 of those reserves to purchase two six-year investment bonds which paid interest of £35,000 pa. The FTT held that the company was a trading company and that its activities did not include to a substantial extent activities other than trading activities. It considered that there were no investment activities in that the investment was tied up for six years and the company did not have to do anything in relation to the investment. As such, it was not an investment activity. The FTT summarised its approach at [84]:

> 84. The asset and income position of the company are factors against trading activities. The expenses incurred and time spent by the directors/employees are factors pointing to trading activities. When one stands back and looks at the activities of the company as a whole and asks "what is this company actually doing?" the answer is that the activities of the company are entirely trading activities directed at reviving the company's trade and putting it in a position to take advantage of the gradual improvement in global financial conditions.

113. The decision of the FTT in *Potter* is not authoritative, but it is illustrative albeit the facts were unusual. It is not necessary for us to say whether the FTT in *Potter* was right in its judgment as to the significance of the investment in that case. It does seem to have placed considerable weight on the absence of any physical activity in relation to the investment bond. Indeed, it seems to have viewed that as not involving any activity at all. We do not consider that the FTT was right in that regard. There would always be some activity involved in such an investment, even if it is only checking that the interest is paid each year. In any event, for the reasons given above the test is not solely concerned with physical activity.

114. Overall, we do not detect any error of law or principle in the test applied by the FTT or in its approach to the application of that test. We do not consider that it took into account any irrelevant factors as alleged in the grounds of appeal. The FTT concluded that ADL was carrying on activities which were, to a substantial extent, not trading activities. We do not consider that there are any grounds for interfering with that conclusion, and we agree with that conclusion. In the circumstances, we dismiss the First Appeal.

THE SECOND APPEAL

115. Dr Allam was at all material times resident but not domiciled in the UK. He was entitled to use what is known as the remittance basis of taxation. In summary, where the remittance basis applies, an individual who is resident but not domiciled in the UK for tax purposes is not taxed on overseas income and gains unless and until they are remitted to the UK. Where funds are remitted to the UK and used to make qualifying investments, they may be treated as not having been remitted to the UK. This is known as business investment relief and provisions governing the relief are at s 809VA to 809VQ Income Tax Act 2007. However, the relief can subsequently be withdrawn where there is a "potentially chargeable event" and no mitigation steps are taken within a "grace period" of 45 days. In such cases, the funds are treated as being remitted at the end of the grace period.

116. Qualifying investments include making certain secured or unsecured loans to certain types of company. Potentially chargeable events include the disposal of an investment holding. Where an individual makes both qualifying and non-qualifying investments in a company, there are special ordering rules to determine whether a disposal from the holding is of a qualifying investment or a non-qualifying investment.

117. The FTT was not concerned with the detailed application of the business investment relief rules. The application of the relief and the circumstances in which the relief was to be withdrawn were largely agreed between the parties.

118. The transactions relevant to this appeal relate to Allamhouse, which was the company established by Dr Allam and Mrs Allam to acquire Hull City Football Club in 2010. In order to partly fund the acquisition, Dr Allam and Mrs Allam were paid a dividend of £2.5m by AML which they introduced to Allamhouse by way of a loan. It was credited to a loan account on which interest was charged.

119. In 2012-13, Dr Allam made loans to Allamhouse of some £6.9m. The funds had been remitted to the UK from interests he had in Egypt. They were credited to the same loan account and interest was charged on the combined balance. Dr Allam claimed business investment relief on the remittance of those funds in 2012-13 and HMRC accepted the claim.

120. It was common practice for companies controlled by Dr Allam to declare dividends out of their profits when the accounts were prepared for each accounting period. Dr Allam and Mrs Allam paid income tax on those dividends. However, the dividends were often not paid immediately in cash, but left outstanding as amounts due to Dr Allam and Mrs Allam. The amounts would then be paid as and when cashflow permitted. The amounts of unpaid dividends in Allamhouse were credited to the loan account.

121. A dividend of £400,000 was declared by Allamhouse in favour of Dr Allam on 19 December 2012. That sum was credited to the loan account and a sum of £400,000 was then paid in cash to Dr Allam and debited to the loan account on 14 March 2013.

122. Dr Allam filed his tax return for 2013-14 on 8 August 2014 in response to an automated notice to file for that year. HMRC opened an enquiry by notice dated 14 November 2014. They issued a closure notice on 8 April 2016 which assessed Dr Allam to income tax on the £400,000 paid to Dr Allam by Allamhouse on 14 March 2013. There was also an assessment in relation to further sums paid to Dr Allam in August 2013 and September 2013 of £1.5m and £1m respectively. The assessments all related to the withdrawal of business investment relief.

123. Dr Allam appealed against the closure notice in respect of all these assessments. The FTT dismissed the appeal. On this appeal, Dr Allam challenges the decision of the FTT in relation to income tax only on the payment of the £400,000. He does not challenge the decision in relation to the other payments.

The FTT's decision

124. The FTT upheld HMRC's closure notice which had the effect that business investment relief previously applied in respect of remittances made to the UK by Dr Allam was withdrawn.

125. It was common ground before the FTT that Dr Allam was entitled to be taxed on the remittance basis in tax years 2012-13 and 2013-14. Further, that the loans made by Dr Allam to Allamhouse in 2012-13 were qualifying investments in respect of which Dr Allam was entitled to business investment relief. The relevant question for the FTT, so far as this Second Appeal is concerned, was whether the payment of £400,000 made by Allamhouse to Dr Allam on 14 March 2013 was a potentially chargeable event on the ground that it represented a disposal of part of Dr Allam's holding in Allamhouse. That in turn depended on whether leaving payment of the dividend outstanding amounted to a non-qualifying investment in Allamhouse by Dr Allam, such that when it was paid it represented a disposal of part of a single holding.

126. If the payment was a potentially chargeable event, it was common ground that Dr Allam had not taken appropriate mitigation steps within the grace period with the effect that the payment would be treated as remitted income for Dr Allam in 2013-14.

127. The FTT considered the meaning of the term "investment" in section 809VN, and in particular whether the sum of £400,000 left outstanding represented a non-qualifying investment. It made the following observations in that regard:

> 278. … a normal dividend which is declared (and so becomes due and payable) does not, simply because it is not paid immediately, become an "investment" for the purposes of s809VN. In those circumstances, the dividend is a return on the investment (the shares). It is not a disposal of the investment. In the period before the dividend is actually paid, the obligation to pay the dividend does not (without more) become an "investment" for the purpose of the business investment relief rules so that when it is discharged the payment is treated as a disposal. This interpretation accords with the natural meaning of the words. It also avoids the risk of a dividend on shares becoming both taxable income and, at the same time, a potentially chargeable event under the business investment relief rules, which would run contrary to the purpose of those rules, which is to encourage investment in UK trading companies.
>
> 279. …
>
> 280. In our view, before an outstanding normal dividend can be treated as a further investment, there needs to be some further step which indicates that the shareholder is intending to reinvest the proceeds and put them at the disposal of the company. That may occur in a number of ways, for example, the shareholder and the company may take steps after a dividend has been declared to formalize the debt which is then outstanding between the shareholder and the company by entering into documentation to govern its terms or the shareholder may agree to accept further shares in lieu of the unpaid dividend. We also accept that that, in appropriate circumstances, it may be possible to infer that position has been reached between the company and its shareholders, for example, if a dividend has been left outstanding for a material period of time and/or if interest is charged on the amount due. Whether such an inference can be justified will depend on the circumstances of the case.

128. Neither party takes issue with this analysis of how the relevant question (whether an outstanding normal dividend can be treated as a further investment) fell to be approached. Both parties were content to accept this analysis as correct. The FTT then went on to apply the analysis to the facts as found:

> 281. If we turn to the facts of this case, in our view, the unpaid dividend declared on 19 December 2012 became an investment before it was paid on 14 March 2013. Steps were taken which indicate that Dr Allam was reinvesting the proceeds (albeit for a relatively short time) and putting them at the disposal of the company. The obligation to pay the dividend was added to the loan account of Dr Allam with the company and taken into account in the balance due to Dr Allam on that account. There was no differentiation made between the dividend and other amounts due to Dr Allam (which were clearly "investments" for these purposes) shown in that account in the respect. Interest was charged on the balance.
>
> 282. The outstanding dividend should therefore be treated as a loan made by Dr Allam and so as part of the same single investment and single holding in Allamhouse as his other qualifying investments (the overseas loans) and any other investments in Allamhouse that he may have had (s809VN(4)(a)).

129. It is this aspect of the Decision that Dr Allam challenges on this appeal. The FTT went on to find that payment of the sum of £400,000 on 14 March 2013 together with the other payments were part disposals of a single holding which would be treated as part disposals of a qualifying investment. As such they were potentially chargeable events and no mitigation steps had been taken. The FTT therefore dismissed the Second Appeal.

The grounds of appeal

130. Dr Allam has permission to appeal the FTT's decision in relation to the payment of £400,000 on the ground that the FTT failed to take into account evidence that the dividend had not been added to Dr Allam's loan account. Dr Allam's case was that the outstanding dividend

was merely recorded in the published accounts as such in the absence of any other way of showing sums due to Dr Allam by Allamhouse. As such, so the argument ran, the sum of £400,000 was not in truth a loan, and should not have been treated as a loan or as an investment in Allamhouse. The sum was, so it was contended, simply an undrawn dividend, payment of which was deferred.

131. We were referred to the evidence of Mr Jackson in his witness statement dated 20 September 2017 where at paragraph [12] he stated:

> The financial reporting formats do not allow a distinction to be made within company accounts between the dividend not drawn and an actual loan advanced to the company, however, as both are liabilities of the company they must be shown within creditors.

132. In his skeleton argument, Mr Ridgway indicated that this evidence had been uncontested at the hearing before the FTT. In oral submissions he corrected this and acknowledged that there was no material available from which we could identify how this aspect of Mr Jackson's evidence had been dealt with before the FTT. We know that Mr Jackson was cross-examined, however there is no transcript available, no agreed note of evidence of the advocates appearing before the FTT and no note of evidence from the FTT. Mr Ridgway did not appear before the FTT and Ms Choudhury did not appear before the FTT at the time the evidence was given. She was instructed only for the hearing in September 2019 which considered submissions on the Section 12D Issue.

133. In those circumstances we cannot see any basis on which we can or should interfere with this part of the Decision. There is no definition of investment in s 809VN. As we have noted, the parties did not dispute the analysis of the FTT in [280]. The argument in the Second Appeal is concerned with the application of that analysis to the sum of £400,000. In terms of the application of the analysis, the FTT decided, for the reasons which it set out in [281], that the sum was treated in a way which rendered it an investment in Allamhouse.

134. In making this decision we cannot say that the FTT failed to take into account any evidence that the dividend had not been added to the loan account. Nor can we say that the FTT should have treated the dividend as not having been added to the loan account. Nor can we say that the FTT should have treated the dividend as something which was not, in truth, a loan, and thereby an investment in Allamhouse. These were matters for the FTT to decide, on the evidence before the FTT. As we have already noted, we have not had sight of any transcript or other record of the oral evidence on this issue which was given before the FTT.

135. We should add that, while we have not had the benefit of the oral evidence which was before the FTT, the material which was before us leads us to conclude that the FTT was indeed right in the application of its agreed analysis to the facts of the case. Even if we were able to interfere, which we are not, we cannot see that the FTT was wrong to treat the sum of £400,000 as a loan, and as an investment in Allamhouse.

136. Indeed, in the course of his submissions Mr Ridgway accepted that the outstanding dividend was credited to Dr Allam's loan account with Allamhouse and that it earned interest at the rate of 4% per annum. He also acknowledged that, on any view, reporting formats would not require a sum to be charged to a director's loan account bearing interest at 4%. All this seemed to us to bring out the point that the sum of £400,000 was correctly recorded in the loan account, and was correctly treated as a loan and as an investment in Allamhouse.

137. We have no reason to consider that the FTT made any error of law or principle in finding, as it did, that the outstanding dividend was added to Dr Allam's loan account, that it bore interest and that it became an investment by Dr Allam in Allamhouse. As such, we do not consider that we can or should interfere with this finding. In any event, we also agree with the

finding, on the basis of the material which we have seen. We therefore dismiss the Second Appeal.

THE THIRD APPEAL

138. We have described above the circumstances in which Dr Allam sold his shares in ADL to AML for a consideration of £4,950,000. The First Appeal was concerned with the CGT treatment of that disposal. The Third Appeal concerns what is known as a "counteraction notice" which HMRC issued to Dr Allam pursuant to the "transactions in securities" provisions in ss 682 - 713 ITA 2007. Briefly, those provisions permit HMRC to issue a notice to counteract certain income tax advantages arising from a transaction in securities. HMRC's case before the FTT was essentially that Dr Allam's disposal of shares in ADL to AML was a transaction in securities, that one of his main purposes in being a party to that transaction was to obtain an income tax advantage and that he did obtain an income tax advantage.

139. The FTT set out the relevant legislation at [173] – [180]. For present purposes the following provisions are relevant.

140. Section 684 sets out the circumstances in which a person may be liable to the counteraction of a tax advantage as follows:

> 684 (1) This section applies to a person where —
>
> > (a) the person is a party to a transaction in securities or two or more transactions in securities (see subsection (2)),
> > (b) the circumstances are covered by section 685 and not excluded by section 686,
> > (c) the main purpose, or one of the main purposes, of the person in being a party to the transaction in securities, or any of the transactions in securities, is to obtain an income tax advantage, and
> > (d) the person obtains an income tax advantage in consequence of the transaction or the combined effect of the transactions.
>
> (2) In this Chapter *"transaction in securities"* means a transaction, of whatever description, relating to securities, and includes in particular —
>
> > (a) the purchase, sale or exchange of securities, …

141. The circumstances referred to in s 684(1)(b) and covered by s 685 are defined by reference to Condition A or Condition B as follows:

> 685 (1) The circumstances covered by this section are circumstances where condition A or condition B is met.
>
> (2) Condition A is that, as a result of the transaction in securities or any one or more of the transactions in securities, the person receives relevant consideration in connection with —
>
> > (a) the distribution, transfer or realisation of assets of a close company,
> > (b) the application of assets of a close company in discharge of liabilities, or
> > (c) the direct or indirect transfer of assets of one close company to another close company,
>
> and does not pay or bear income tax on the consideration (apart from this Chapter).
>
> (3) Condition B is that —
>
> > (a) the person receives relevant consideration in connection with the transaction in securities or any one or more of the transactions in securities,

(b) two or more close companies are concerned in the transaction or transactions in securities concerned, and
(c) the person does not pay or bear income tax on the consideration (apart from this Chapter).

142. It was common ground between the parties that the exclusions in s 686 have no application to the facts of this case.

143. An "income tax advantage" is defined by s 687 as follows:

687(1) For the purposes of this Chapter the person obtains an income tax advantage if —

(a) the amount of any income tax which would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution exceeds the amount of any capital gains tax payable in respect of it, or
(b) income tax would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution and no capital gains tax is payable in respect of it.

144. It can be seen therefore that a person will obtain an income tax advantage where they receive consideration on which CGT is charged and the amount of CGT is less than the income tax that would be payable if the consideration had constituted an income distribution.

145. Section 701 ITA 2007 makes provision for a person to apply to HMRC for advance clearance that no counteraction notice ought to be served in relation to a proposed transaction. The effect of advance clearance is that HMRC cannot serve a counteraction notice if the transaction proceeds as described in the application. Even if clearance is not granted, a person can still proceed with the transaction, but runs the risk that HMRC will serve a counteraction notice which would then have to be appealed.

146. HMRC issued a counteraction notice to Dr Allam on the basis that Condition A in s 685 was satisfied. Before the FTT, Dr Allam contended that Condition A was not satisfied and further, that obtaining an income tax advantage was not his main purpose or one of his main purposes in entering into the transaction.

147. The FTT found that Condition A was satisfied. That finding is not challenged by Dr Allam. The FTT also found that the obtaining of an income tax advantage was not a main purpose of Dr Allam being a party to the transaction. It was merely an incidental benefit obtained as a result of the transaction. As a result, the FTT allowed Dr Allam's appeal against the counteraction notice. HMRC appeal that finding on the ground set out below.

148. It is common ground that in relation to the main purpose of Dr Allam being a party to the transaction, we are concerned with Dr Allam's subjective purpose. We were referred to *Inland Revenue Commissioners v Brebner* [1967] 2 AC 18, a case involving a previous version of the transactions in securities provisions where Lord Upjohn stated at p30, agreeing with Lord Pearce:

> I agree that the question whether one of the main objects is to obtain a tax advantage is subjective, that is, a matter of the intention of the parties, and, as Lord Greene M.R. pointed out in *Crown Bedding Co. Ltd. v. Inland Revenue Commissioners*, is essentially a task for the Special Commissioners unless the relevant Act has made it objective (and that is not suggested here).

149. In the following sections we set out the FTT's findings of fact relevant to Dr Allam's purposes in being a party to the transaction, the FTT's decision and HMRC's grounds of appeal against that decision.

The FTT's findings of fact

150. The FTT's findings of fact relevant to this appeal are set out at [84] – [106] and [181] – [190]. We can summarise those findings as follows.

151. In May 2009, Ernst & Young made an application for advance clearance under s 701 ITA 2007 in relation to a proposed sale by Dr Allam to AML of his shares in ADL. The consideration was to be in cash equal to the current market value of the shares. The reasons given by Ernst & Young for the transaction were:

(1) AML traded from premises owned by and leased from ADL. It needed bigger premises to develop its business and it was proposing to develop premises owned by ADL for this purpose. ADL did not have the resources to fund the development, but AML did have the resources.

(2) The acquisition of shares in ADL would strengthen AML's balance sheet.

(3) The acquisition of ADL by AML would create a single group which would allow both companies to benefit from various tax grouping provisions and simplify the administration of both companies.

(4) ADL's main business was to hold properties, which it leased AML. It made commercial sense to group the companies under common ownership.

152. In making the application, Ernst & Young told HMRC that the consideration was to be in cash because it was to be used by Dr Allam to create a retirement fund which would be invested in real estate in Egypt.

153. HMRC refused clearance by letter dated 20 July 2009 on the grounds that Dr Allam would retain a controlling interest in ADL whilst realising the full market value of the shares by way of consideration which would not bear income tax.

154. In 2010, Ernst & Young made an application on behalf of Dr Allam and Mrs Allam as shareholders in AML for clearances under s701 ITA 2007 and under s138 TCGA 1992 in respect of a proposed transfer by them of the entire issued share capital of AML to a new holding company, Allamhouse. This was in connection with their acquisition of Hull City Football Club. It was proposed that Allamhouse would issue new shares to Dr Allam and Mrs Allam in exchange for their shares in AML. As a result, Dr Allam and Mrs Allam would hold the share capital of Allamhouse in the same proportions as their previous holdings in AML and AML would be a wholly owned subsidiary of Allamhouse. Allamhouse would then acquire interests in the companies owning and operating the football club.

155. HMRC granted both clearances. The transfer of shares in AML to Allamhouse took place in late 2010 in the manner described in the clearance application.

156. As described above, Dr Allam did sell his shares in ADL to AML on 26 July 2011. There was no application for clearance under s 701. We have described above the circumstances in which HMRC opened an enquiry into Dr Allam's tax return for 2011-12 and issued a closure notice refusing entrepreneurs' relief on 8 April 2016. The FTT noted at [95] that the capital gain on the disposal was reduced by allowable capital losses carried forward which Dr Allam had available from previous tax years. It is not recorded in the FTT decision, but it is common ground that Dr Allam's allowable capital losses carried forward were some £2m.

157. Sometime later, on 24 March 2017, HMRC issued a counteraction notice including an assessment to income tax of £1,318,298 which was the amount of income tax Dr Allam would have been liable to pay if he had received the consideration for his shares by way of an income distribution. We understand there would fall to be deducted from that assessment the amount of CGT to which Dr Allam is liable by virtue of his disposal of the shares.

158. At the time of the transaction, ADL did not have sufficient reserves to pay a dividend to Dr Allam equal to the consideration he received for the shares, namely £4,950,000. AML on the other hand had distributable reserves considerably in excess of that amount.

159. The FTT found Dr Allam to be a credible witness and accepted his evidence as to the circumstances in which the sale of shares took place in 2011 and his reasons for entering into the transaction. That evidence was recorded by the FTT at [188] and [189] as follows:

> 188. In his witness statement and his oral evidence, Dr Allam gave the following reasons for the transaction.
>
> (1) Dr Allam had retained the shares in ADL in his own direct ownership because he wanted to have a separate fund for his retirement independent from the engineering business. He regarded the shares in ADL, the value of which substantially reflected its interests in real property, as a safe investment.
>
> (2) Dr Allam had had various offers from third parties to buy the property business of ADL. At the time, he had turned down these offers because he wanted to protect the position of AML as the tenant in relation to the Melton site and not to expose it to third party landlords. These third party offers would, however, have provided a cash fund which Dr Allam wanted to form the basis of funds for his retirement.
>
> (3) It became necessary to redevelop the Melton site to provide new facilities for AML. In the period immediately around and after the financial crisis, the company's bankers were not prepared to lend to ADL for this purpose. However, they were prepared to lend to AML if the property was brought within the AML group. The transfer allowed the property to be brought within the AML group so that the new factory, warehouse and office facilities could be developed with the benefit of finance from the company's bankers.
>
> (4) HMRC had suggested that the transaction could have been undertaken as a share exchange followed by a dividend. However, the sale of shares to AML was the simpler transaction to do. That transaction would have provided him with the cash fund that he required for his retirement. The natural transaction to undertake with the company was to sell the shares in ADL to AML for cash.
>
> (5) Dr Allam took great exception to the suggestion that the transactions had been motivated by his desire to obtain an income tax advantage. He pointed to the significant dividends that he had taken from the companies over the years. In the year in question, Dr Allam received a dividend of £550,000 from ADL alone. UK tax was paid in full on that dividend. He produced figures, which were unchallenged, to show that in the period between 2004 and 2011, the various companies had paid dividends totalling £34 million. In his view, it was simply not sustainable that the transfer of the shares in ADL was structured as a cash sale simply to avoid the payment of tax on a dividend.
>
> 189. Dr Allam was questioned by Dr Schryber [then appearing for HMRC] about the refusal of the clearance for the proposed transaction in 2009. Dr Schryber put it to Dr Allam that the fact that he did not proceed with the transaction when the clearance was refused in 2009, but did proceed with a very similar transaction in 2011 without submitting an application for clearance showed that the primary motive for the transaction was to obtain an income tax advantage. Dr Allam dismissed this assertion. He said that he had understood that the refusal in 2009 was "discretionary" and that he was not able to proceed with the transaction when the application was refused. His understanding, perhaps mistaken, was that the changes in the legislation in 2010 were designed to ensure that commercial transactions such as the sale of ADL to AML would not be caught by the transactions in securities legislation. He was advised that, in those circumstances, it was not inappropriate to proceed without making a further application.

The FTT's decision

160. The FTT set out reasons for its decision that the obtaining of an income tax advantage was not one of Dr Allam's main purposes for the transaction at [205] – [211]. In dealing with a submission by HMRC that Dr Allam's reason for requiring cash was a personal reason and not a commercial reason, the FTT correctly stated at [206] that such a distinction was irrelevant. The only question was whether or not a main purpose of the transaction was to obtain an income tax advantage.

161. The FTT accepted a submission by counsel for Dr Allam that the mere fact the result of the transaction might have been achieved by a different transaction does not automatically give rise to an inference that the main purpose of the transaction was to obtain an income tax advantage. It quoted from Lord Upjohn in *Brebner*:

> My Lords, I would only conclude my speech by saying, when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out - one by paying the maximum amount of tax, the other by paying no, or much less, tax - it would be quite wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence.

162. The FTT noted at [208] that there must always be an alternative transaction which gives rise to an income tax charge if a person is to have as a purpose obtaining an income tax advantage. However, the question remained whether obtaining that tax advantage was a main purpose of Dr Allam being a party to the transaction. At [209] the FTT set out its conclusion:

> 209. Dr Schryber invited us to draw the inference from the surrounding facts that a main purpose of Dr Allam in being a party to the transaction was to obtain an income tax advantage. We have considered the arguments made by the parties and the evidence regarding the surrounding facts and, in our view, the evidence does not support the inference which HMRC invite us to draw.

163. The FTT went on to set out its reasons for that conclusion at [210]:

> 210. Our reasons are as follows.
>
> (1) As we have stated above, we found Dr Allam to be a credible witness. He gave clear reasons for the transfer: the need to unite ADL and AML under common corporate ownership to support the bank financing of the development at the Melton site and the desire to create a cash fund for his retirement. Dr Allam was consistent in the reasons that he gave for the transaction at all stages. Those reasons are either "commercial" or "personal" reasons, to adopt the terminology used by HMRC, but the crucial point is that they are not the purpose of obtaining an income tax advantage.
>
> (2) The main reasons put forward by HMRC that we should infer that the obtaining of an income tax advantage was one of the main purposes of the transactions are twofold.
>
> > (a) The first reason was that Dr Allam applied for a clearance in 2009 under a previous form of the transactions in securities legislation for a transaction which was in very similar form to the transfer of the shares which took place in 2011. Dr Allam did not proceed with that transaction when the clearance was refused.
> >
> > (b) The second reason that HMRC gave was that the transaction could have been undertaken in an alternative manner which would have incurred an income tax cost.

As regards the first of these arguments, Dr Allam's explanation was that his understanding was that, following the refusal, he was not able to proceed with the transaction, but that position altered when changes were made to the transactions in securities legislation in 2010. Although Dr Allam's understanding of the effect of the transactions in securities legislation and the changes to it may not be accurate, we accept that this was his understanding at the time.

As regards the second argument, for the reasons that we have given above, the mere fact that there exists an alternative means of undertaking a transaction which has a different tax result is not conclusive of the question as to whether an inference can be drawn that the obtaining of an income tax advantage was a main purpose of the transaction.

We accept that, in a particular case, the fact that an alternative transaction existed and was perhaps considered but rejected, may be a factor in deciding whether or not an inference can be drawn that the obtaining of an income tax advantage was a main purpose of a transaction. However, we do not draw that inference on the facts of the present case. Dr Allam did not consider an alternative transaction. Dr Allam had a clear purpose for the transfer (to unite the companies under common ownership) and a clear purpose for his desire to receive the proceeds in cash (to fund his retirement). The latter was not a commercial reason. It was a personal reason, but it was not a tax reason.

(3) The effect of the transaction was to realize the value of ADL and to use that value to support Dr Allam's desire for a fund for his retirement. The sale of the shares to AML was the simplest transaction to undertake to achieve that purpose and the purpose of uniting the companies under common ownership.

(4) The other surrounding circumstances do not support the inference that Dr Allam was seeking to obtain an income tax advantage: he received significant dividends from the companies in the tax year in question including the dividend of £550,000 from ADL representing almost 50% of the retained profits in that company.

The grounds of appeal

164. The FTT granted HMRC permission to appeal the decision on the Third Appeal on the ground that it erred in law in finding that Dr Allam did not have as a main purpose of being a party to the transaction the obtaining of a tax advantage. HMRC contend that:

(1) the existence of the alternative transaction must have been a strong factor in determining the structure of the transaction and the FTT did not give any, or any sufficient consideration to that factor;

(2) the FTT only gave consideration to Dr Allam's conscious motives without consideration of whether there was another object for entering into the transaction existed.

(3) The FTT failed to take into account all the relevant evidence and formed a view of the facts which could not reasonably be entertained.

165. Ms Choudhury acknowledged that this was essentially a challenge to the findings of fact made by the FTT on this question, so that the well-known principles in *Edwards v Bairstow* [1956] AC 14 apply. She relied in particular on what she said was the failure of the FTT to take into account:

(1) That Dr Allam had £2m of capital losses carried forward which could be offset against a CGT liability.

(2) That there was no evidence regarding Dr Allam's plans to retire, or why the cash was required at that particular time.

(3) The fact that Dr Allam had previously received and paid income tax on dividends did not mean that the particular transaction was not structured to avoid further dividends.

(4) There was no evidence as to the amount of lending which was subsequently provided to develop the site. Moreover, the FTT did not take into account the fact that extraction of £4.95 million from AML would have depleted its reserves and would not have supported the stated objective of strengthening the group's balance sheet for the purposes of securing external lending.

(5) In accepting Dr Allam's evidence that he had misunderstood the effect of changes to the transactions in securities provisions in 2010, the FTT failed to take into account that in 2010 Dr Allam had applied for and was granted clearance in relation to a share for share exchange involving AML and Allamhouse. The FTT should have inferred that he would only have gone ahead with the transaction if no income tax was payable.

166. Ms Choudhury acknowledged that *Edwards v Bairstow* imposes a high hurdle on an appeal such as this. We must be satisfied that the FTT made an error of law in making the finding it did. That would be the case if the finding of the FTT was made without any evidence, or upon a view of the facts which could not be supported, or where the finding was inconsistent with the only reasonable conclusion available to the FTT.

167. We do not consider that HMRC have come anywhere near establishing any such error of law in the FTT's finding that obtaining an income tax advantage was not one of Dr Allam's main purposes.

168. It was common ground that for the counteraction provisions to be engaged there will always be an alternative transaction which will involve an income tax charge, as compared to the actual transaction which involved a CGT charge. That is inherent in the requirement that a main purpose of being a party to the actual transaction was to obtain an income tax advantage. Whilst the existence of an alternative transaction is a necessary condition for service of a counteraction notice, it is not a sufficient condition in itself. The FTT recognised, at [210], that the existence of an alternative transaction that might have been considered by the taxpayer would be a factor in identifying the purposes for which the taxpayer was a party to the transaction which did in fact take place.

169. The actual transaction carried out may involve an artificial series of transactions with a view to generating a capital gain. The alternative transaction may be very straightforward. Such factors may be relevant to the FTT's assessment of the evidence as to the main purpose a taxpayer has in being a party to the actual transaction. However, there is no principle that the existence of an alternative transaction will always be a strong factor in identifying those purposes. The significance of the alternative transaction will depend on the facts of the case. In this case the FTT noted that the actual transaction was a very straightforward disposal and the alternative transaction was more complicated and involved share exchanges and dividends. Importantly, it made a finding of fact that Dr Allam did not consider the alternative transaction. Having accepted Dr Allam as a credible witness the FTT was entitled to make that finding on the evidence before it.

170. It is not clear to us what HMRC mean by their criticism that the FTT only considered Dr Allam's conscious motives. It was common ground that the test as to Dr Allam's purposes in being a party to the transaction is a subjective test. We cannot see that sub-conscious motives are to be taken into account, although we accept that inferences can be drawn from the primary facts as to a party's true motives. In this case the FTT did not accept the inference HMRC invited it to draw from the primary facts. It was entitled not to draw that inference.

171. We are not satisfied that the FTT failed to take into account all the relevant evidence. The FTT was invited by HMRC to draw the inference from the surrounding facts that a main purpose of Dr Allam in being a party to the transaction was to obtain an income tax advantage. In rejecting that invitation it is clear that the FTT considered the entirety of the evidence with care, which is reflected in the findings made by the FTT in [210], which we have quoted above.

172. The FTT specifically identified at [95] the fact that Dr Allam had capital losses carried forward which he could offset against capital gains. Clearly that might have given Dr Allam a reason to prefer a disposal for CGT purposes rather than a share exchange and dividend subject to income tax. However, the FTT had found that Dr Allam did not consider the alternative transaction. In those circumstances it is difficult to see how the FTT could have found that Dr Allam had as a main purpose a tax advantage of which he was not aware.

173. As with the evidence of Mr Jackson, there is no transcript of Dr Allam's evidence, no agreed note of evidence of the advocates appearing before the FTT and no note of evidence from the FTT. Ms Choudhury acknowledged that as a result we do not know what questions were asked of Dr Allam as to his retirement plans or why the cash was required at that particular time. All we have is the FTT's finding of fact that he wished to create a cash fund for his retirement. There is no suggestion that the FTT was not entitled to make that finding or that the FTT had any evidence on which it should have made further, more detailed findings of fact in that regard. It seems to us that HMRC are seeking to have a second bite of the cherry in how they put their case to Dr Allam.

174. The same points can be made in relation to HMRC's argument that there was no evidence as to the amount of lending which was subsequently provided to AML to develop the site. Further, if the suggestion is that the FTT accepted Dr Allam's evidence at face value and without scrutiny then we reject that suggestion. We are satisfied that the FTT reached its findings of fact following a careful consideration of all the evidence before it.

175. The FTT found that Dr Allam had previously received and paid income tax on dividends. HMRC say that this did not mean that the particular transaction was not structured to avoid further dividends. That must be right, however there is no suggestion that the FTT took that view of the evidence.

176. HMRC say that the FTT did not take into account the fact that extraction of £4.95 million from AML would have depleted its reserves and would not have supported the stated objective of strengthening the group's balance sheet for the purposes of securing external lending. We do not know whether this proposition was explored with Dr Allam in his evidence. In any event, we do not accept the proposition, in the terms in which it was put, that AML's "reserves" were depleted by the transaction. Its cash reserves may have been depleted, but otherwise it paid out cash of £4.95m and obtained a company with property assets worth £4.95m which could be used as security for the proposed lending.

177. Finally, HMRC say that the FTT failed to take into account Dr Allam's evidence that he had applied for and was granted clearance in relation to a share for share exchange involving AML and Allamhouse. It is said that the FTT should not have accepted Dr Allam's evidence that he had misunderstood the effect of changes to the transactions in securities provisions in 2010. The FTT made findings of fact in relation to the refusal of clearance in 2009 and considered what Dr Allam thought had changed between 2009 and 2011. It made findings of fact in relation to the 2010 clearance application. It was satisfied that Dr Allam thought that the transactions in securities legislation had changed, albeit he was mistaken as to the nature of the change. The FTT heard Dr Allam's evidence and he was cross-examined on that evidence. It was satisfied that he was a credible witness and it accepted his evidence. There is no basis for us to say that it was not entitled to do so. HMRC criticise the FTT for not inferring

that Dr Allam would only have gone ahead with the transaction if no income tax was payable. We do not know whether this was put to Dr Allam or whether the FTT was invited to make such an inference. We do know that the FTT found that Dr Allam did not consider any alternative transaction.

178. Overall, we are satisfied that the FTT was entitled to find that Dr Allam did not have as a main purpose the obtaining of a tax advantage. This is not a case where the FTT's view of the evidence could not reasonably be entertained. Still less is it a case where the FTT acted without evidence. We therefore dismiss the Third Appeal.

CONCLUSIONS

179. For the reasons stated above, we dismiss the First and Second Appeals of Dr Allam (including the Notices Appeal) and the Third Appeal of HMRC.

Signed on Original

MR JUSTICE EDWIN JOHNSON
UPPER TRIBUNAL JUDGE CANNAN

Release date: 23 November 2021