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Case Number: UT/2022/000084

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Distributions from share premium – Jersey law – whether the distributions were "dividends" – and whether the distributions were "dividends of a capital nature" – Section 402 ITTOIA 2005 – First Nationwide considered

Heard on: 1, 2 and 3 November 2023
Judgment date: 22 March 2024

Before

MR JUSTICE ROTH
JUDGE JENNIFER DEAN

Between

ALEXANDER BEARD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Malcolm Gammie KC, Counsel, instructed by Keystone Law

For the Respondents: Mr David Milne KC and Ms Calypso Blaj, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. Mr Beard is a UK resident and a shareholder in Glencore PLC ("Glencore"), a publicly listed company incorporated in Jersey and domiciled in Switzerland. He had acquired his shares upon the corporate restructuring of the company in 2011, pursuant to profit participation certificates issued to him as an employee. As a shareholder, Mr Beard received cash distributions paid in each of the tax years 2011-12 to 2015-16. In each case, those distributions were paid from the share premium account of the company; they were not debited to retained earnings. In 2015, Glencore further made an in specie distribution to its shareholders of shares in a subsidiary company, Lonmin plc ("Lonmin"), and as a result Mr Beard received a distribution of Lonmin shares. Like the First-tier Tribunal ("FTT"), we shall refer to all these distributions as "the Distributions".

2. On 8 October 2019, HMRC issued a closure notice assessing Mr Beard to income tax on the Distributions. Mr Beard appealed to the FTT on the basis that the Distributions were distributions of a capital nature which were subject to capital gains tax and not income tax in the UK.

3. By its decision ("the Decision") the FTT held that the Distributions were dividends of a non-UK resident company and that they were not dividends of a capital nature. The FTT treated the in specie Distribution paid to Mr Beard in the 2015/16 tax year in the same way as the Distributions paid in cash.

4. Permission to appeal was granted by the FTT on 30 June 2022 in respect of two grounds: (i) whether the payments of share premium made by Glencore were dividends within s. 402 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA 2005"); and (ii) whether the payments were "dividends of a capital nature" within s 402 (4) ITTOIA 2005.

5. In relation to the in specie Distribution, the FTT recorded in its decision on the application for permission to appeal:

> "…it was agreed by the Appellant at the Tribunal that the in-specie dividends should be treated in the same way as the cash dividends. No particular finding in respect of the in-specie dividends was made."

6. Permission to appeal was granted by the Upper Tribunal (the "UT") on 21 October 2022 in respect of a third ground concerning the treatment of the in specie Distribution and whether that Distribution should be taxed in the same manner as the cash Distributions. However, as HMRC had objected to this ground as inadmissible on the basis that it was not argued below, the permission granted was expressly without prejudice to consideration of its admissibility.

7. Mr Beard was represented by Mr Gammie KC. HMRC were represented by Mr Milne KC and Ms Blaj. We are grateful to Counsel for their full and helpful written and oral submissions. We have not found it necessary to make specific reference in our decision to all of the submissions or materials to which we were referred but we have taken all of them into account. References below to paragraphs in the form [X] are, unless otherwise indicated, references to paragraphs in the Decision.

THE FACTS

8. There was no dispute in relation to the material facts, which the FTT set out in detail at [8] – [47] of the Decision and which are summarised in HMRC's skeleton argument at paras 5 – 9 as follows:

“Glencore PLC was incorporated on 14 March 2011 in Jersey under the Companies (Jersey) Law 1991 (as amended) (“the CJL 1991”). It was headquartered in Switzerland throughout the period under appeal.

Prior to the listing of its shares on the Official List of the London Stock Exchange, Glencore PLC became the immediate holding company of Glencore International AG pursuant to a restructuring of the group. The Appellant, who was an employee of Glencore PLC, became a profit participation shareholder. This entitled him to a portion of Glencore International AG’s funds accumulated during the period that he held the profit participation certificates (such amounts being eventually exchanged for shares in Glencore International AG).

The issued shares in Glencore International AG were subsequently contributed to Glencore PLC.[1] Glencore PLC then issued 6,000,000,000 shares to Revelstoke Ltd, credited as fully paid up, on behalf of the existing shareholders. An additional 922,714,000 shares were issued by Glencore PLC to institutional and other investors on 24 May 2011. The difference between the nominal and fair value of both sets of shares was recognised as share premium.

All of the distributions received by the Appellant during the tax years 2011/12 to 2015/16 were in respect of the 320,260,410 shares that he held in Glencore PLC. The Appellant usually elected to receive his share of Glencore PLC’s cash distributions in sterling but some were in fact received in US dollars. In more detail:

i. 2011/12: An interim dividend of $0.05 per share out of Glencore PLC’s capital contribution reserves was declared by the directors on 22 August 2011 and paid on 30 September 2011.

ii. 2012/13: The directors recommended a final dividend of $0.10 per share out of Glencore PLC’s capital contribution reserves which was paid on 1 June 2012. An interim dividend of $0.054 per share was also declared out of Glencore PLC’s capital contribution reserves which was paid on 13 September 2012.

iii. 2013/14: The directors recommended a final dividend of $0.1035 per share out of Glencore PLC’s capital contribution reserves which was paid on 7 June 2013.

iv. 2014/15: The directors recommended a final distribution of $0.111 per share out of Glencore PLC’s capital contribution reserves which was paid on 30 May 2014. An interim distribution of $0.06 per share was also declared out of Glencore PLC’s capital contribution reserves which was paid on 19 September 2014.

v. 2015/16: The directors recommended a final distribution of $0.12 per share out of Glencore PLC’s capital contribution reserves which was paid on 21 May 2015. An interim distribution of $0.06 per share was also declared out of Glencore PLC’s capital contribution reserves which was paid on 29 September 2015.

At the Annual General Meeting on 7 May 2015, the shareholders were asked to approve a distribution in specie of 139,513,430 ordinary shares of $1 each in Lonmin PLC (which had been acquired by Xstrata PLC prior to its merger with

[1] We understand this to refer to the restructuring described in the previous paragraph that occurred prior to listing.

Glencore PLC) to the shareholders. The Appellant received 3,456,037.22 shares in Lonmin PLC as a result.

The sterling value of the distributions received by the Appellant during the period under appeal was agreed by the parties in a "Statement of agreed value of the 'distributions' received'" as follows:

UK Tax Year	**Value of Distribution received by the Appellant (GBP)**
2011/12	£10,372,469.26
2012/13	£31,272,820.54
2013/14	£32,956,347.85
2014/15	£32,964,799.40
2015/16	£42,167,539.61

…"

9. Mr Gammie highlighted that the Swiss Federal Tax authority had agreed that no withholding tax would be imposed on a return of the share premium contributed on the IPO. As a result, Glencore shareholders (including Mr Beard) have suffered no Swiss withholding tax on any of the amounts in question (including the money's worth of the Lonmin shares).

THE LEGISLATION

10. The appeal concerns both UK tax legislation and Jersey company law. As the FTT explained at [47]:

> "That is because UK case law has long established that in determining the correct tax treatment of a payment made by a non-UK company such as Glencore, the correct approach is to establish the character of the payment under the corporate law of the jurisdiction in which the paying company is incorporated, in this case Jersey, and apply UK tax legislation to that payment."

UK legislation

11. The relevant UK legislation is s 402 ITTOIA 2005 which provides, insofar as material:

> "**402 Charge to tax on dividends from non-UK resident companies**
>
> (1) Income tax is charged on dividends of a non-UK resident company.
> …
>
> (4) In this Chapter "dividends" does not include dividends of a capital nature."

12. It is relevant to note also that by s 56 of the Companies Act 1948, share premium of a company was taken out of the category of distributable reserves and 'assimilated' to the company's share capital. Put another way, the legislation applied the 'maintenance of capital' principle to share premium.

Jersey legislation

13. The relevant Jersey legislation is the Companies (Jersey) Law 1991 ("CJL 1991").

14. The CJL1991 deals with "Share Capital" in Part 8, "Reduction of Capital" in Part 12 and "Distributions" in Part 17. The legislation has been amended a number of times since its inception by the time of the dates relevant to these proceedings.

15. Article 39 in Part 8 sets out how share premium can be applied by Jersey companies. Following the Companies (Amendment No 6) (Jersey) Law 2002, the relevant parts of this provision were as follows:

"**39 Share premium accounts for par value companies**

[…]

(2) A share premium account may be expressed in any currency.

(3) A share premium account may be applied by the company for any of the following purposes –

(a) in paying up unissued shares to be allotted to members as fully paid bonus shares;

(b) in writing off the company's preliminary expenses;

(c) in writing off the expenses of and any commission paid on any issue of shares of the company;

(d) in the redemption or purchase of shares under Part 11.

(4) Subject to this Article, the provisions of this Law relating to the reduction of a par value company's share capital apply as if each of its share premium accounts were part of its paid up share capital."

16. By the Companies (Amendment No 10) (Jersey) Law 2009 ("Amendment No 10"), a further sub-paragraph was inserted in Article 39(3), as follows:

"(e) in the making of a distribution in accordance with Part 17."

17. Article 61 in Part 12 sets out the process whereby a company can reduce its capital accounts. Following the amendment made by the Companies (Amendment No 6) (Jersey) Law 2002, the relevant parts of this provision were as follows[2]:

"**61. Reduction of capital accounts**

(1) A company may by special resolution reduce its capital accounts in any way.

(2) In particular, and without prejudice to the generality of paragraph (1), the company –

(a) may extinguish or reduce the liability on any of its shares in respect of share capital not paid up; and

[2] The version set out in the Decision at [51] is the original version before this amendment.

(b) may, with or without extinguishing or reducing liability on any of its shares –

(i) reduce any capital account by an amount which is lost or is unrepresented by available assets, or

(ii) pay off any amount standing to the credit of a capital account which is in excess of the company's wants.

(3) Except as provided in paragraphs (4) and (5), every reduction of capital shall be subject to confirmation by the court."

18. This article was amended by the Companies (Amendment No 11) (Jersey) Law 2014 to provide that, as an alternative to sanction by the court, the directors could make and register a solvency statement (as specified in the new Articles 61A-61B). As so amended, Article 61 stated:

"(1) A company may reduce its capital accounts in any way.

(1A) A reduction of capital shall be sanctioned by a special resolution of the company.

(2) In particular, and without prejudice to the generality of paragraph (1), the company –

(a) may extinguish or reduce the liability on any of its shares in respect of share capital not paid up; and

(b) may, with or without extinguishing or reducing liability on any of its shares –

(i) reduce any capital account by an amount which is lost or is unrepresented by available assets, or

(ii) pay off any amount standing to the credit of a capital account which is in excess of the company's wants.

(3) Subject to paragraphs (4) and (5), every reduction of capital shall either –

(a) be supported by a solvency statement (see Articles 61A and 61B); or

(b) be subject to confirmation by the court (see Articles 62 to 64)."

19. Part 17 of the CJL 1991 sets out provisions whereby distributions can be made. The provisions of Articles 114-115 in this Part were fundamentally changed by the Companies (Amendment No. 9) (Jersey) Law 2008 ("Amendment No. 9"). Following that amendment, they were as follows:

"**114 Meaning of "distribution" in this Part**

(1) In this Part, "distribution", in respect of a company, means every description of distribution of the company's assets to its members as members, whether in cash or otherwise.

(2) However, "distribution" does not include a distribution by way of –

(a) an issue of shares as fully or partly paid bonus shares;

(b) the redemption or purchase of any of the company's shares;

(c) any reduction of capital made in accordance with Part 12; or

(d) a distribution of assets to members of the company on its winding up.

115 Restrictions on distributions

(1) A company may make a distribution at any time.

(2) A company shall not make a distribution other than in accordance with this Article.

(3) A company (other than an open-ended investment company) may make a distribution only if the directors who are to authorise the distribution make a statement in accordance with paragraph 4."

[Paragraph 4 sets out the detailed requirement of a solvency statement by the directors.] ...

(7) A distribution made in accordance with this Article is debited to –

(a) a share premium account or stated capital account, of the company; or

(b) any other account of the company, other than the capital redemption reserve or the nominal capital account.

(8) In paragraph (7), "nominal capital account", in relation to a company, means a share capital account of the company to which are credited funds equivalent to the nominal value of the shares issued by the company."

20. As noted in para 16. above, Amendment No. 10 inserted a new paragraph (e) into Article 39(4) so as to expressly permit a par value company to apply its share premium account in the making of a distribution in accordance with Part 17. It also inserted a new paragraph in Article 115, as follows:

"(9) A distribution made in accordance with this Article is not for the purposes of Part 12 a reduction of capital."

21. As the FTT observed, the Jersey statute defines a "distribution" in Article 114 by exclusion: any transfer of assets to a company's members is a distribution unless it falls within one of the excluded categories.

22. The new Articles 114 and 115, introduced by Amendment No 9, replaced a more restrictive provision regarding the payments which could be made by way of distribution. Previously, distributions had been confined to payments made out of realised profits or (subject to the making by the directors of a solvency statement) realised revenue profits or (with the sanction of a special resolution) unrealised profits. Amendment No 9 accordingly made share premium freely distributable under Part 17 and removed from Jersey company law the doctrine of the maintenance of capital. The parties agreed before the FTT that it was with the introduction of these provisions in 2008 that Jersey and English company law diverged.

ISSUES

23. The parties agreed before the FTT, and before us, that the issues to determine are as follows:

1. Are the Distributions "dividends"?
2. If the Distributions are "dividends", are they "dividends of a capital nature" for the purposes of s 402(4) ITTOIA 2005?

24. It is common ground that Glencore had adopted the procedure under Part 17 CJL 1991 in making the Distributions. Further, it is not in dispute that:

(1) An amount returned under Part 12 CJL 1991 is not within the scope of the charge to income tax under s 402 ITTOIA 2005 (being neither a dividend nor of an income nature) and is taxed as a capital distribution.

(2) An amount returned using the procedure under Part 17 is not within the scope of the charge to income tax under s 402 ITTOIA 2005 if it does not amount to a dividend or, even if it is so characterised, it is a dividend of a capital nature; it is then taxed as a capital distribution.

THE PROCEEDINGS BELOW

25. In addition to documentary evidence, the FTT heard expert evidence on behalf of both parties: Mr Felton (a Jersey qualified solicitor) for Mr Beard, and Mr Willmott (an advocate of the Royal Court of Jersey) for HMRC.

26. At [66] the FTT summarised the matters upon which the experts agreed, taken from their joint memorandum, including the followings:

"(1) The genesis of the law in Jersey, ….

(2) That at the time when Glencore made its distributions to Mr Beard, if a Jersey company wanted to make a distribution under Part 17 CJL 1991, the directors were obliged to form a view of the company's solvency and make a relevant statement.

(3) That the CJL 1991 does not require a Part 17 distribution to be made from the profits of the company, the only requirement is that the directors form the prescribed view in relation to the company's solvency.

(4) The term "dividend" is used but not defined by the CJL 1991. There is no operative provision in the CJL 1991 relating to the payment of a dividend. In particular the term dividend is not used in Part 17 CJL 1991.

(5) The term distribution is defined by Article 114 CJL 1991 and is used for the purposes of Part 17 to describe a payment made by a company to its members.

(6) Article 115 does not state whether a distribution should be regarded as capital or income or use those terms in this context.

(7) The CJL 1991 does not state whether share premium is "assimilated" to capital and the question of assimilation to capital has not been considered by the Jersey courts.

(8) A distribution made under Part 17 CJL 1991 and debited to a share premium account reduces the amount standing to the credit of a capital account.

(9) If the Jersey legislature had intended the amendment which introduced Part 17 to have the effect of characterising all distributions made under Part 17 which are debited to share premium account as distributions of income or profit, express language would have been required to achieve that."

27. The FTT summarised the evidence of Mr Felton and Mr Willmott at [68] – [97]. At [178] the FTT made the following findings of fact which were not, as we understand the position, controversial:

"(1) If Glencore had chosen to pay the Distributions in reliance on Part 12 CJL 1991 the Distributions would not have been treated as distributions for Jersey law purposes.

(2) The account from which Glencore debited the Distributions was a capital account. For Jersey law purposes that does not necessarily mean that the Distributions were debited to shareholder funds.

(3) Under CJL 1991 the only funds from which distributions cannot be made are the nominal capital and capital redemption reserve funds of a Jersey company.

(4) Glencore used both the term "dividend" and the term "distribution" to describe the Distributions made to shareholders.

(5) Part 17 CJL 1991 is the only relevant machinery which can be used by a company like Glencore to make income distributions."

ISSUE 1: Are the Distributions "dividends"?

28. There is no definition of "dividend" in ITTOIA 2005, and we consider that the word should be given its ordinary meaning, as under other tax legislation. Accordingly, this is the same question which confronted the FTT in *First Nationwide v HMRC* and was considered on appeal in that case by the UT: [2011] STC 1540 (UT).

29. *First Nationwide* concerned a structured finance transaction by which a subsidiary of the Nationwide Building Society sought to raise funds. A major part of the case was concerned with whether each of two distributions made by a Cayman Islands company was (i) a "dividend", and (ii) an "overseas dividend" for the purpose of the manufactured payments legislation in Schedule 23A ICTA 1988 and related regulations. If the answer to both those two "dividend issues" was 'Yes', then the corresponding payments were deductible as a management expense for the purpose of corporation tax. The distributions were paid out of the share premium account of the company. The UT upheld the FTT in concluding that the distributions were overseas dividends for the purpose of the relevant UK legislation.

30. On further appeal, HMRC accepted that the payments were dividends but argued that they were not payments of an income nature but capital payments and accordingly not deductible: [2012] EWCA Civ 278. We return to the reasoning of the Court of Appeal in addressing Issue 2 below.

31. In *First Nationwide*, the UT held that the meaning of dividend in the tax legislation was not a matter of Cayman law but of English law: see at [23]. It noted that in English law, prior to the Companies Act 1948, a premium paid on a subscription for shares could be returned by way of payment of a dividend to shareholders. In that regard, the UT relied on the judgments of Harman J and the Court of Appeal in *Re Duff's Settlement Trusts* [1951] Ch 721 and 923. There, Harman J said, at 724:

> "It is well known that before the Act of 1948 these sums [sums received by companies as premiums on the allotment of their shares] ranked as profits available for payment of a dividend …"

And Jenkins LJ in the Court of Appeal stated, at 926:

> "There appears to be little doubt that if, before s. 56 of the Companies Act, 1948, came into operation, the company had distributed amongst its shareholders in cash a sum representing premiums received on the issue of shares, the proportion of such distribution attributable to any trust holding of shares would have been income and not capital as between persons successively interested under the trust. ... The share premiums would have been profits available for dividend (see *Drown v Gaumont-British Picture Corporation* [1937] Ch. 402), and if any part of them had been distributed by the company otherwise than in liquidation the amount received by trustees in respect of a trust holding would necessarily have been income in their hands, because it was neither a payment in reduction of paid up share capital nor an addition to the shareholders' capital investment in the company, but simply a cash distribution which, no matter how described, and notwithstanding that

> in the hands of the company it bore the character of a capital, not an income, profit could not in law be anything else in the hands of the recipients than income derived from their shareholdings."

32. The UT proceeded to explain the effect of the English companies legislation, in paragraphs that merit quotation in full:

> "32. But section 56, Companies Act 1948 made all the difference to the result. Since the commencement of the Companies Act 1948, it has not been possible for an English company to pay a dividend out of share premium account. That section took the share premium account out of the category of divisible profit and prevented it being distributable by way of dividend. Accordingly, if a distribution is properly to be made out of share premium account, that can only be done by following a statutory procedure which effectively treats the distribution in the same way as a reduction of capital. The distribution is not a dividend nor is it received by the recipient as income.
>
> 33. That is not to say, however, that the ordinary meaning of the word "dividend" has changed. Suppose, for instance, that Jurisdiction X had in 1947 and at all time thereafter a statutory company law code identical to the pre-1948 English code. Prior to the Companies Act 1948, a distribution (being a payment out of distributable profits) could be made, in both Jurisdiction X and in England, out of share premium account by way of dividend. The Companies Act 1948 prevented such distributions being made by way of dividend in the case of an English company. But the company in Jurisdiction X could continue to make such distributions. Those distributions remained dividends within the ordinary meaning of that word. The Companies Act 1948 did not alter the meaning of "dividend": what it did was to treat what at common law was a distributable profit as no longer such so that it could no longer be paid out as a dividend. As *Duff's Settlement* shows, the consequence of the change in the way that share premium account could be distributed was that the receipt, in the hands of the recipient, was capital and not income.
>
> …
>
> 38 … Accordingly, if it were possible for an English company to effect a distribution out of share premium account by the same mechanism as it pays a dividend out of trading profits, that would constitute a "dividend" within the ordinary meaning of the word."

33. In that context, the UT considered the relevant Cayman Islands legislation. Cayman companies law from 1961 had included a provision corresponding to s. 56 of the English 1948 Act. But in 1989 the Cayman law was changed and that provision was replaced with a new provision which expressly provided that a share premium account could be applied as the company may determine, including by payment of dividends to shareholders, subject only to the proviso that the company must thereafter be able to pay its debts as they fall due. For the purpose of determining whether the payments were dividends, this was decisive. The UT explained, at [48]:

> "In construing the word "dividend", we think that it is right to consider what the relevant company is actually permitted to do under its governing law rather than what that company would be able to do with its share premium account if it were an English company."

34. In the present case, the FTT at [179] purported to follow the UT in *First Nationwide*, taking the view that the correct approach is to break down the dividend issue into two questions:

> "The correct approach to considering whether the Distributions paid by a Jersey company should be treated as dividends for English law purposes is, as set out by the Upper Tribunal in *First Nationwide* in reliance on earlier decisions particularly *Rae v Lazard*:
>
> (1) first, consider the meaning of dividend as a matter of ordinary usage for English law purposes, then look at the foreign law governing the relevant payment, in this case CJL 1991, and
>
> (2) Second, decide whether the payment made under Jersey law fulfils that definition for English law purposes (s 402 ITTOIA)."

The FTT addressed the first question at [179]-[205], and the second question at [206]-[235] where it considered the treatment of capital and share premium under Jersey law.

35. In our view, that is not entirely the effect of *First Nationwide*. The UT in *First Nationwide* did not regard the further considerations addressed by the FTT under its second question as necessary in order to decide the dividend issue. The UT stated at [50] and [54] (emphasis added):

> "Our conclusion, therefore, is that a distribution out of the share premium account of a Cayman company which is made by the procedure or mechanism of payment of a dividend, is a "dividend" within the manufactured payments provisions. Subject to the second of the Dividend Issues, we therefore agree with the Judge's conclusion that each of the Preference Dividends was also a "dividend" within those provisions. We do so, having disposed of the two arguments with which we have just dealt, for broadly the same reasons as he gave. *That is enough to dispose of the first of the Dividend Issues.*[[3]] *It will be noted that, under our approach and analysis, the categorisation in Cayman law of the share premium account as capital or profit is not relevant. Nor is it relevant whether Cayman law would treat a dividend paid out of share premium account as income or capital in the hands of the recipient. In case we are wrong on that, we consider the appropriate categorisation later in this decision.*
>
> …
>
> We have thus far only considered the meaning of the term "dividend" without having examined in detail the nature, for English law purposes, of the receipt of a dividend paid out of the share premium account of a Cayman company in the hands of the recipient. If the receipt is in fact income, then that of itself suggests strongly, if not conclusively, that the payment is properly to be seen as a dividend for all the purposes of English law. We propose to look at that question when considering the second of the Dividend Issues. As will be seen, we consider that such a receipt is income in the hands of the recipient."

36. On our reading, it is clear from the passages above that the UT in *First Nationwide* only proceeded to consider the matters which the FTT addressed under the second question in the event that it was held to have erred in respect of its approach to what the FTT here framed as the first question. See also the observation of the UT at [67].

37. Both parties agreed before us, and we accept, that, properly read, the first question set out at para 34 above is sufficient for our purposes in determining the dividend issue and

[3] i.e. of the issue whether the distributions were "dividends": see para 29 above.

that categorisation under local law goes to the issue of whether the payment is of a capital nature.

38. We consider, therefore, that the primary approach of the UT in *First Nationwide* sets out the correct test.

39. As regards Jersey law, the FTT noted that after the 2008 changes Jersey law was not the same as English law prior to 1948, with complete freedom as to payments out of a share premium account. Nor was it therefore equivalent to the amended Cayman law considered in *First Nationwide*. The FTT stated, at [209]:

> "However, neither it is the case that Jersey law is the equivalent of English law post 1948. Instead, Jersey law inhabits a hybrid territory between the two cases; having retained, from the time when it did have a more restrictive view of the use to which share premium could be put, Part 12, while also including the more recent, and more liberal Part 17."

40. Here, as noted above, the Distributions were paid pursuant to Part 17, and specifically Article 115. It is common ground that that is the mechanism in the CJL 1991 enabling the payment of dividends out of trading profits.

41. Before us, as before the FTT, Mr Gammie referred to the definition of "dividend" set out by Harman J in *Esso Petroleum Co Ltd v Ministry of Defence* [1990] Ch 163 and adopted by the Court of Appeal in *Memec plc v IRC* (1998) 71 TC 77:

> "In ordinary language today among people having some understanding of business a "dividend" refers to a payment out of part of the profits for a period in respect of a share in a company."

42. However, we respectfully agree with the observation of the UT in *First Nationwide* (at [37]), that those statements were apposite in the context in which they were made but should not be treated as legislation. Moreover, in *Re Duff's Settlement Trusts,* Harman J (not the same Harman J) had observed that:

> "… the share premium account itself represents a profit in the sense that the company got more for its shares than their nominal value."

As the UT noted:

> "It can, in any case, sensibly be said that the "profit" (see *Duff's Settlement*) which accrues when a premium is paid on a subscription is part of the profit for the accounting period during which the subscription is made, …"

43. Here, the FTT referred to those observations and cited the conclusion as to the meaning of dividend expressed by the UT in *First Nationwide* at [38]:

> "there is nothing to support the view that the ordinary meaning of the word "dividend"... excludes the sort of distribution considered in *Duff's Settlement*."

44. The FTT also noted that until Glencore changed its terminology from May 2014 (apparently on the advice of Mr Gammie), Glencore had described the Distributions as "dividends" and paid them under the provisions of its articles referring to the declarations of dividends.

45. Although *First Nationwide* concerned Cayman law and the application of ICTA 1988, unlike the appeal before us which concerns Jersey law and s 402 ITTOIA 2005, we agree with the FTT at [203] and [205] that:

> "…the Distributions fall within the meaning of a dividend as a matter of ordinary usage for English law purposes; in fact, the Distributions fulfil

> almost exactly the example description provided in *First Nationwide*; the Distributions were paid out of share premium account by the same mechanism (Part 17 CJL 1991) as would be used for paying a dividend out of trading profits…
>
> While accepting that the labels applied by Glencore to the Distributions are not determinative of their legal character, I have concluded that there is nothing either in the Jersey legislation or the manner in which these payments were made by Glencore to indicate that the Distributions cannot be treated as fulling the English law definition of a dividend."

46. We consider that this conclusion is impeccable and that the Distributions accordingly constitute "dividends" within s 402 ITTOIA 2005.

ISSUE 2: ARE THEY "DIVIDENDS OF A CAPITAL NATURE" FOR THE PURPOSES OF S 402(4) ITTOIA 2005?

47. The meaning of the expression, "dividend of a capital nature" in s 402(4) is clearly a matter of UK law since this is the wording of the UK statute. However, there is no statutory definition of "dividend of a capital nature", nor is that expression addressed by the authorities to which we were referred.

48. Mr Gammie submitted that the effect of s 402 is that there now exists a third category of receipt between income and capital as follows:

(i) a receipt which is not paid as a dividend and is therefore a capital receipt (such as a payment on a reduction of capital);

(ii) a receipt which is an income dividend, in that it is paid from trading profits or capital profits; and

(iii) a receipt which is paid as a dividend from what is treated under the law of the company as the capital of the company: that is a receipt "of a capital nature".

49. Mr Gammie emphasised that ITTOIA 2005 is a product of the Tax Law Rewrite Project, the aim of which was to re-write existing legislation in a more accessible format to make it clearer and easier to use. While recognising that many of the changes in the legislation were therefore more a matter of form, he submitted that as regards the taxation of foreign income there was a substantial change. Accordingly, earlier authorities which were decided by reference to a different statutory regime should not be followed in determining the appeal before us. In following those authorities, and in particular *First Nationwide*, Mr Gammie submitted that the FTT erred in law.

50. In that regard, Mr Gammie referred to the comments of Sales J (as he then was) in *Eclipse Film Partners No 35 LLP v HMRC* [2013] UKUT 639 (TCC) per Sales J (as he then was) at [97]:

> "The law regarding the approach to construction of a consolidating statute was explained by the House of Lords in *Farrell v Alexander* [1977] AC 59 and is well settled. When construing a consolidating statute, which is intended to operate as a coherent code or scheme governing some subject matter, the principal inference as to the intention of Parliament is that it should be construed as a single integrated body of law, without any need for reference back to the same provisions as they appeared in earlier legislative versions: see *Farrell v Alexander* [1977] AC 59, 73B-C (Lord Wilberforce), 82B-D and 83D-H (Lord Simon of Glaisdale) and 97B-E (Lord Edmund-Davies). An important part of the objective of a consolidating statute or a project like the Tax Law Rewrite Project is to gather disparate provisions into a single, easily accessible code. That objective would be undermined if,

> in order to interpret the consolidating legislation, there was a constant need to refer back to the previous disparate provisions and construe them. Therefore the court's main task in this case must be to construe the ITTOIA without reference back to section 18 ICTA and Schedule D."

51. Those observations were endorsed by Lord Carnwath (with whom Lord Reed, Lady Black and Lord Kitchin agreed) in *R (on the application of Derry) v HMRC* [2019] UKSC 19 at [10]. However, in that case Lady Arden in her judgment, at [88]-[90], drew a distinction between prior legislation and antecedent case law: she said that reference to such case law did not undo the good work of the consolidation since Parliament is likely to have had the previous case law in mind when enacting the consolidating statute. And in his judgment, Lord Carnwath said that the guidance which he approved from the *Eclipse Film* case should be read with those comments of Lady Arden: see at [10]. More recently, however, the Supreme Court in *NCL Investments Ltd v HMRC* [2022] UKSC 9 at [47] referred to Lady Arden's observations in *Derry,* which it noted were not necessary for the determination of that case, and said this:

> "… we think we should sound a note of caution that in a future case it may be necessary to give further consideration, with the benefit of submissions on the issue, as to whether and when it is appropriate to refer to earlier case law either in relation to a consolidation statute properly so called or to a Tax Law Rewrite Project statute."

52. In the present case, the analysis does not depend on reference to any prior statutory provisions. The fact that s 402 ITTIOA 2005 is not in the nature of a consolidating provision, unlike other parts of the statute, might be thought to reinforce the restraint required by way of reference to prior case law. We fully recognise that in order to interpret a new statutory provision it may well be inappropriate to rely on a previous case which determined the meaning of another, and now replaced, statutory provision. But when it comes to the use and understanding of such basic concepts as "income" and "capital", those are expressions which have been addressed and explained by a large number of authorities in a variety of contexts. We do not consider that there is anything in either *Eclipse Film* or, more particularly, *NCL Investments*, which means that we should eschew the assistance provided by that jurisprudence. To do otherwise would be to approach those concepts in a vacuum when the legislation was clearly drafted in light of that jurisprudence, some of which indeed concerned trusts and not tax. Indeed, it was notable that both sides before us made extensive reference to earlier cases.

53. Furthermore, in *Eclipse Film*, Sales J did find it appropriate to refer to the Explanatory Notes to ITTOIA: see at [96]. Here, Mr Milne referred to and placed considerable emphasis on the statement in the Explanatory Notes setting out the purpose of s 402:

> "***Section 402***: **Charge to tax on dividends from non-UK resident companies**
>
> 1630. This section charges to tax dividends of companies not resident in the United Kingdom. It is based on section 18(1) and (3) of ICTA.
>
> 1631. For the reasons explained in the overview, the expression "distribution" has not been adopted. It is possible that a non-UK resident company may make a distribution of income which would not fall within Chapter 4 of Part 4 of this Act because it is not a "dividend". But if the distribution comprises income it will fall to be dealt with either under alternative specific charges (eg interest) or within "income not otherwise charged", the charge on which appears in Chapter 8 of Part 5 of this Act.

> 1632. The term "dividend" is not defined in this Act. "Dividend" is a widely used and understood term and is defined only in very specific circumstances not applicable in this context (see, for example, section 49 of ICTA – dividends held in the name of Treasury). It is not thought appropriate to attempt to define "dividend" here. It will usually be a matter of referring to the relevant company law to determine whether or not a payment made by a company is a dividend.
>
> …
>
> 1634. Subsection (4) ensures that dividends of a capital nature do not fall within the charge to tax under this Chapter. In determining whether a payment is income in nature, it is necessary (as it is under the source legislation) to analyse the payment under local law (see *CIR v Trustees of Joseph Reid (dec'd)* (1949), 30 TC 431 HL and *Rae v Lazard Investment Co Ltd* (1963), 41 TC 1 HL). Whiteman on Income Tax, Third Edition, on page 1107, comments in this context "the proper test in such circumstances is, applying the local law, whether or not the corpus of the asset is left intact after the distribution. If it is not, the receipt will be a capital receipt; if it is, the payment will be chargeable".

54. In our view, these comments, which seek to place s 402 in the context of ITTOIA as a whole, are of assistance in indicating that s 402 is not seeking to create some novel, third category of receipt, and that the established approach, developed in predecessor authorities, should be followed to determine whether a dividend is in the nature of income or of capital.

55. In that regard, in *First Nationwide* in the Court of Appeal, Moses LJ, with whose judgment Rix LJ and Briggs J agreed, stated definitively, at [10]:

> "The jurisprudence is well-established. Payments made by a company in respect of shares are either income payments, or, if the company is not in liquidation, by way of an authorised reduction of capital. The courts have recognised no more than that dichotomy.

56. Further, we found helpful the exposition by Buckley J in *Courtaulds Investments Ltd v Fleming (HM Inspector of Taxes)* 46 TC 111 (a decision approved by the Court of Appeal in *First Nationwide*) at 125:

> "The rights and interests of shareholders in the assets and the profits of companies in which they hold shares vary widely in detail, but I think they can all be said to fall under three heads: (1) rights to participate in the distributable profits of the company while it is a going concern; (2) rights to participate in the division of the assets of the company in a liquidation, and (3) rights to participate in any distribution to shareholders on an actual or notional reduction of capital. Anything received under the first head is treated by English law as income of the recipients for both tax purposes and trust purposes (but subject as to the latter to any special provision of the trust) notwithstanding that the source of the distribution may be a profit not of the company's business but on capital account: see *In re Doughty* [1947] Ch. 263 and *Commissioner of Inland Revenue v Reid's Trustees*. Anything received under the second head is treated by English law as capital both for tax purposes and, subject as aforesaid, for trust purposes. So also is anything received under the third head. That this is so for trust purposes is clear from *In re Duff's Settlements* [1951] Ch. 923, where moneys received by trustees on a distribution of part of a share premium account under the Companies Act 1948, s. 56, were held to be capital for the purposes of their trust. My attention was not drawn to any case where the same has been held to be so

> for tax purposes on a distribution of a share premium account under s. 56, but in my judgment that must follow. This is because, as the Court of Appeal held in *In re Duff's Settlements*, s. 56 takes a share premium account of a company incorporated under the Companies Act 1948 out of the category of divisible profits and constitutes any distribution to shareholders from that account a notional repayment of paid-up capital."

First Nationwide is now indeed a case where the analysis of *In re Duff's Settlement* as regards share premium was applied for tax purposes, albeit to contrasting effect because Cayman law had adopted the contrary approach to s. 56 of the English statute: see para 33. above.

57. The question of whether there is a notional reduction of capital is another way of asking whether the corpus of the capital of the company making the distribution remains intact. That this is the governing test was made clear by the decision of the House of Lords in *Inland Revenue v Reid's Trustees* [1949] AC 361, as summarised by Lord Reid in the subsequent decision of the House of Lords, *Rae v Lazard Investment Co Ltd* (1963) 41 TC 1. The latter case concerned a distribution to the English shareholder of a Maryland company of shares in a newly formed company (Bestwall) to which part of the business of the Maryland company had been hived off. After citing from the speeches in *Reid's Trustees*, Lord Reid said, at 27:

> "the question is whether "the corpus of the asset" or "shares of the company" or "the capital of the possession" did or did not remain intact after the Bestwall shares were distributed…"

58. Further, that question is to be answered according to the local law since it is the law of the company which determines what constitutes the capital of the company. In *Rae v Lazard* the distribution was made through a process under Maryland law known as a partial liquidation, which had no parallel in the UK. While a distribution of money's worth by an English company would be treated as income in the hands of the shareholders, the evidence showed that under the law of Maryland the foreign possession was not regarded as remaining intact. The distribution was accordingly held to be by way of reduction of capital and not income. As Lord Guest expressed it in his speech at 29:

> "To ask in what would be the effect of such a distribution if made in England is to embark on a fruitless inquiry because English law gives no guiding light. According to English law a distribution of capital profits would be income in the hands of the shareholder: [*Reid's Trustees*]. But this is nihil ad rem in the present case, where the distribution has been made under Maryland law. In the Stated Case there are findings of fact as to the law of Maryland, and they leave me in no doubt that according to the law of Maryland there was a capital distribution."

Lord Pearce similarly explained that it was the machinery employed for the distribution of the assets, and not the source of those assets, which determines whether they are received as capital or income: see at 30.

59. This approach was emphasised by the Court of Appeal in *First Nationwide.* Immediately after the passage regarding the dichotomy between income and capital quoted at para 55. above, Moses LJ stated:

> "The distinction has depended upon the mechanics of distribution. If the payments are made by deploying the mechanisms appropriate for reduction of capital, then they are payments of capital. Such mechanisms can be readily identified as designed to protect the capital of a company."

Similarly, at [18], Moses LJ referred to "[t]he principle that it is the machinery by which the assets are distributed which determines where they are capital or income…."

60. Both *Courtaulds* and *First Nationwide* are illustrative and instructive as to the application of this approach to a distribution out of share premium. *Courtaulds* concerned a distribution received by an English shareholder from an Italian company. Italian law required a company to build up a legal reserve fund out of its annual profits up to the value of 20% of its capital, and such a reserve was not distributable except on a winding up. The law further provided that monies in a share premium account cannot be distributed until the legal reserve fund had reached that target. After Italian law introduced a new tax on dividends, the company, to avoid that tax, transferred profits of the year to the legal reserve, thereby bringing it up to the 20% threshold and enabling the company to make a distribution out of the share premium account. Under Italian law, such a distribution was treated as a distribution of capital, free from the new tax.

61. Following *Reid's Trustees* and *Rae v Lazard*, Buckley J stated, at 122:

> "The nature of the foreign possession can only be ascertained by reference to the law which governs it, which in the present case is Italian law. The effect of the distribution upon the foreign possession must also be ascertained by the same law."

Buckley J proceeded to hold that the legal reserve fund, since it was not distributable except in a winding up, was to be regarded as an accretion to the capital of the company. He noted that the position as regards the share premium account was not quite so clear, but that since it cannot be distributed until the legal reserve has been built up to the prescribed target the share premium account is to that extent "removed from the category of distributable profits". He rejected the argument of the Revenue that once the share premium became distributable any such distribution was income as a matter of UK law. The judge stated, at 126:

> "On the true view of the facts I think that the share premium reserve stands in the same position [as the legal reserve]. Italian law demands that this fund be set aside and that it be not distributed at all so long as the legal reserve is less than 20 per cent. of the share capital and that when the legal reserve has achieved that level, the share premium reserve may be distributed but only apparently on the footing that the distribution is treated as a return of capital. It seems that no legal formalities need be fulfilled to justify a distribution from a share premium reserve at any time when the legal reserve is complete, such as are required under the Companies Act 1948 to justify distribution of a sum standing to the credit of a share premium account of an English company, but the capital character of the distribution appears, upon the finding of the commissioners, to be no less clear under Italian law than under our own law.
>
> In my judgment, on the findings in this case, Italian law must be regarded as treating premiums paid on shares as being, ab initio and always, notional paid-up capital of the company…."

62. This decision was approved in *First Nationwide* (although, if we may respectfully say so, it was somewhat of an over-simplification to say that Italian law brought share premium within the scope of the rules for protection of capital "in a manner similar to s 56 of the Companies Act 1948": per Moses LJ at [18]). *First Nationwide* itself concerned a distribution out of the share premium account of a Cayman Islands company where, as explained above, Cayman law had been amended to remove the protection of share premium analogous to s. 56 of the English statute and enabled it to be distributed as a dividend. In its contention that the dividends paid out of the share premium account should be regarded as capital receipts, the Revenue relied on a specific provision in

Cayman law that prohibited a distribution out of a company's share premium account where a company could not pay its debts, a restraint which did not apply to distribution by way of dividend out of trading profits. However, the Court of Appeal rejected the argument that share premium was therefore not part of the profits as they would ordinarily be understood but instead constituted a *sui generis* category that was neither income nor capital. Echoing the UT in that case, Moses LJ stated, at [25], that there was no such third category:

> "United Kingdom law recognises only two species of payment in respect of shares: capital or income payments."

Referring to the mechanism of distribution as determinative, he proceeded to hold that the distribution of the share premium as dividends, as permitted by Cayman law, mirrored the situation in the UK prior to 1948 and established that the payments were income.

63. Turning to the present case, the FTT considered the position under Jersey law. Judge Short concluded, at [218]:

> "that payments debited from a capital account, such as a share premium account, in Jersey, are no more "assimilated to capital" than payments from any other type of account from which distributions can be legally made."

This conclusion led to her further findings, at [251]:

> "On my analysis, and even taking account of Article 39(4), my view is that Part 17 overrides the "assimilation to capital" provided by Article 39; the deeming provision at Article 39(4) is made subject to the ability of a company to pay a distribution under Part 17 (Article 39(3)(e)). The legal character of share premium as assimilated to share capital is broken by Article 39(3)(e) and payments made under Part 17 cannot properly be treated as anything other than distributable profits."

64. Mr Gammie sought to challenge these conclusions. He recognised that a finding as to foreign law is a finding of fact, but submitted that such findings of fact are of a special character, referring to *MCC Proceeds Inc v Bishopsgate Investment Trust plc* [1999] CLC 417, where Evans LJ, giving the judgment of the Court of Appeal, said at [13]:

> "When and to the extent that the issue calls for the exercise of legal judgment, by reference to principles and legal concepts which are familiar to an English lawyer, then the court is as well placed as the trial judge to form its own independent view."

This statement was approved by the Privy Council in *Perry v Lopag Trust Reg* [2023] UKPC 16 at [12].

65. However, that was said in the context of an appellate jurisdiction which permitted an appeal on questions of fact. As noted by the UT in *First Nationwide* at [66], rejecting the submission that it should look again at the questions of Cayman law found by the FTT:

> "Albeit that a question of foreign law is a question of a peculiar kind, the answer to the question remains a finding of fact. Our statutory jurisdiction is restricted to appeals on a point of law. Accordingly, unless the Judge has made a finding about Cayman law (or, which comes to much the same thing, about what the Cayman court would be likely to decide) which he could not properly make on the evidence before him, there is no relevant error of law. It is one thing for the Court of Appeal on an appeal from the High Court to carry out the sort of reappraisal indicated in *Parksha* and *MCC Proceeds* in the exercise of the appellate jurisdiction which it possesses; it is another for

> us to do so in the context of a statutory right of appeal restricted to an error of law."

66. It is of course possible nonetheless to challenge a finding of fact as constituting an error of law on *Edwards v Bairstow* grounds. But, in our view, no such challenge to the FTT's findings as to Jersey law can possibly succeed in this case. Although Mr Gammie was critical of the evidence of HMRC's expert, Mr Willmott, the FTT did not base its findings as to Jersey law on his evidence but on the decision of the Jersey Court in *In re WPP plc* [2013] JRC 031: see the Decision at [214]. In that case, the judges stated that the effect of the 2008 amendments to the CJL 1991 is that: "The principle of the maintenance of capital is now of very limited application in Jersey". And the FTT noted that the Jersey Court held that although the share premium account was defined as a "capital account" under the CJL (Article 1(1)(a)) distributions could be made out of it in the same way as from a non-capital account, provided that in both instances the rights of creditors were respected. Accordingly, we consider that the FTT's findings as to Jersey law and the effect of Amendment no 9 and Amendment no 10 were plainly open to it in this case, and Mr Beard cannot demonstrate an error of law on the basis of *Edwards v Bairstow*.

67. In our judgment, the FTT was entirely correct in rejecting the contention that share premium has an "essential character as capital": [222]-[223]. As the FTT colourfully put it, at [227]:

> "I would describe share premium as having a chameleon character, taking its colour from the law which is applied to it; it has no intrinsic colour of its own."

It was s 56 of the Companies Act 1948 which for English companies assimilated share premium to capital whereas previously it did not have that character. And conversely it was the 1989 amendment to Cayman Islands company law which deprived share premium of the character of capital and made it readily distributable: see para 33. above. The position in *Courtaulds* also contrasts with the legal position of Glencore under Jersey law, for the reason stated by the FTT at [244(1)]:

> "Unlike under the relevant Italian law, there appears to be no mechanism under Jersey law to protect shareholders if the directors choose to make a payment out of share premium account. The only protection is directed at creditors of the company in the form of the solvency statement."

68. Applying the method of distribution test, once a distribution of share premium is made by the mechanism under Part 17, the payment is not of a capital nature. The company is not using a mechanism which covers a reduction in the capital of the company: that mechanism is in Part 12.

69. Is that conclusion precluded by the fact that under Jersey law a payment from share premium could also be made under Part 12? This was a point stressed by Mr Gammie. It was addressed in the Decision at [266]-[269], where the FTT held that ultimately the form in which the payment was made must determine its character. In our view, that is correct. The focus of s 402(4) is on the character *of the dividend*, not of the funds from which the dividend is made. Moreover, we think that this is not simply a case of form over substance. What the FTT referred to as the "dualistic approach" of Jersey law means that when a distribution is made under Part 17, whereby share premium is freely distributable (subject only to a solvency requirement analogous to the position in *First Nationwide*) the corpus of capital of the company is not reduced because, to that extent, the share premium is in no different a legal position from distributable profits. However, if a company chooses to apply its share premium account under the mechanism of Part 12 then, as the heading of that Part states, that

constitutes a reduction in the company's capital and this requires a special resolution accordingly.

70. We find some support for that approach in the observations of the House of Lords in *Bouch v Sproule* (1887) 12 App Cas 385. That was a trust case where the right of the life tenant depended upon whether a distribution out of retained profits to shareholders to be used to subscribe to bonus shares constituted income or capital. It was held that on proper analysis, the company's transaction constituted the conversion of its profits into capital. Lord Watson said, at 401:

> "In a case like the present, where the company has power to determine whether profits reserved and temporarily devoted to capital purposes, shall be distributed as dividend or permanently added to its capital, the interest of the life tenant depends, in my opinion, upon the decision of the company."

So here, when Glencore decided, no doubt for good reason, to make the Distributions using the mechanism in Part 17 and not the mechanism in Part 12, the Distributions constituted payments of income and did not have the character of capital.

71. Finally, it is appropriate to consider whether this approach has the effect of depriving s 402(4) of all substance. That was not addressed by the FTT but was a major part of Mr Gammie's submissions. We accept that s. 402(4) means that some of the observations in prior authorities are not apposite to the new statutory regime. Moses LJ's statement in *First Nationwide* at [10] that if a payment is made by way of dividend, then by definition it is an income payment cannot be applied literally to s 402(4) since it would preclude the possibility of a "dividend of a capital nature". But, in our view, the approach we have held to apply does not leave s. 402(4) without purpose. Indeed, in a subsequent passage in his judgment in *First Nationwide*, Moses LJ stated, at [26]:

> "There are cases, where, on a true analysis of the facts, it is possible to identify a declaration of a dividend as being other than a payment of income."

72. Moses LJ cited the example of *Sinclair v Lee* [1993] Ch 497. That was another case where the respective interests of two beneficiaries under a will trust depended on whether a distribution by a company constituted income or capital. The issue arose on the corporate restructuring of ICI, whereby the company was to "de-merge" part of its business into a new corporate group (Zeneca), in which the existing shareholders of ICI would be issued with paid up shares. Although the value of existing ICI shares would substantially decrease, because of the divestment of a major part of the existing business, the shareholders would not suffer because of the value of the shares they received in the newly formed group, for which they did not have to pay. Those Zeneca shares were being allotted directly to the ICI shareholders by way of a dividend of an amount exceeding their nominal value. The question was accordingly whether the life tenant under the trust was entitled to the Zeneca shares as income.

73. As Sir Donald Nicholls VC (as he then was) noted in his judgment, no one would imagine that the new shares in Zeneca could sensibly be regarded as income. But the case raised the difficulty arising from what he described as "a long line of decided cases" concerning dividends paid on shares, as summarised by Lord Reid in *Rae v Lazard*, to the effect that every distribution by an English company must be treated as income in the hands of the shareholders unless it was made on a liquidation, or in respect of a reduction of capital, or by way of an issue of bonus shares. As the Vice-Chancellor noted, on its face that observation would cover the case before him.

74. After discussion of the range of circumstances in which companies may accumulate or distribute their profits or assets and examination of the existing jurisprudence, Sir Donald Nicholls turned to analyse the substance and form of the transaction in which ICI was engaged and found that it was "something of a hybrid. It had features both of a capitalisation and of a distribution of a dividend in specie." And he continued, at 514:

> "… in my view, to regard the I.C.I. transaction as a distribution of profits, akin to payment of a dividend in specie and hence income, would be to exalt company form over commercial substance to an unacceptable event…. Unless constrained by binding authority to the contrary, I consider the I.C.I. transaction is to be characterised as a company reconstruction, with two capital assets (shares in I.C.I. and Zeneca Group) in the trustees' hands replacing one existing capital asset (shares in I.C.I.)."

The Vice Chancellor held that he was not so constrained, although recognising that he was therefore not applying "existing principles in their full width". Having regard in particular to the fact that this was a trust case (which therefore concerned the presumed intention of the settlor), Sir Donald Nicholls felt able to determine that the shares in Zeneca to be received by the trustees should be held as capital, notwithstanding the apparent breadth of the principles enunciated in earlier cases, including *Rae v Lazard.*

75. *Sinclair v Lee* was not a tax case and concerned an English company. However, it did involve receipt of a dividend, and it seems to us that if a foreign company paid a dividend in such circumstances, for all the reasons given by Sir Donald Nicholls, that would be a "dividend of a capital nature" of the kind contemplated by s 402(4). Mr Milne for the Revenue readily acknowledged this, reflecting the view in the HMRC Manual at SAIM5210 that *Sinclair v Lee* was the kind of case that (if arising for a foreign company) would fall within this provision. As Moses LJ recognised in *First Nationwide*, there may be other such cases. It is impossible to envisage all the circumstances in which a company may pay a dividend, in particular when s 402 is concerned with companies incorporated under a multitude of foreign laws which may include procedures and arrangements unknown in the UK (cf *Rae v Lazard*). In our judgment, s 402(4) is therefore directed at a dividend which, as in *Sinclair v Lee*, cannot on any sensible view be regarded as income. We do not think it is engaged by the circumstances addressed in the present case.

76. As regards the Lonmin shares, Mr Gammie took us to the transcript of the hearing in the FTT where he had reserved his position in the event that there might be an appeal. It had been on that basis that he had advanced no separate argument regarding the distribution of those shares and made the concession recorded at para 5. above. In those circumstances, we do not think it would be right to exclude the third ground of appeal.

77. However, we do not find that any different analysis applies to the receipt of the Lonmin shares from the cash dividends. It is trite to observe that a dividend may be made in cash or in specie. The share distribution also resulted from the restructuring and, like the cash distributions, was effected out of Glencore's capital contribution reserves. As Mr Milne pointed out, if the share distribution were held to be of a capital nature and therefore not taxable as income, a company with cash available for a dividend in those circumstances could instead purchase an asset and then declare a dividend in terms of distribution of that asset. That would be a gateway to income tax avoidance.

78. Accordingly, for reasons which are for the most part similar to those set out in the impressive judgment of the FTT, we dismiss this appeal.

MR JUSTICE ROTH
JUDGE JENNIFER DEAN

RELEASE DATE: 25 MARCH 2024