[2019] UKUT 0008 (TCC)

Appeal number: UT/2017/0101 and 0106

INCOME TAX AND CAPITAL GAINS TAX –scheme to generate capital loss under s 106A TCGA – claim to income tax relief for the loss under s 574 ICTA 1988 – whether "value shifting" rules in s 30 TCGA applied to prevent a loss arising – whether waiver of loan to appellant gave rise to a receipt subject to income tax under s 687 ITTOIA 2005 (income not otherwise charged).

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

ADRIAN KERRISON **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE ZACAROLI
JUDGE GUY BRANNAN

Sitting in public at The Royal Courts of Justice, The Rolls Building, New Fetter Lane, London on 11 and 12 December 2018

David Ewart QC and Edward Waldegrave, instructed by Reynolds Porter Chamberlain LLP, for the Appellant

Julian Ghosh QC, Katherine Apps and Charles Bradley, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This appeal concerns the entitlement of the appellant to claim relief (in his tax return for 2006-2007) from income tax in respect of £1,083,984 of a capital loss of £1,102,655 that he claims to have suffered as a result of a scheme entered into by him in 2006[1]. Following an enquiry into the return, HMRC issued a closure notice on 10 August 2011 in which it concluded (1) that the claims should be denied and (2) that one of the transactions, a loan waiver described more fully below, gave rise to a charge to income tax on the amount waived.

2. The appellant appealed that decision to the First-tier Tribunal ("FTT"). In a decision dated 19 April 2017 (the "Decision"), Tribunal Judge Falk (as she then was) dismissed the appellant's appeal against the refusal of his claims to a capital loss and to relief against income tax in respect of that loss, but allowed his appeal against HMRC's conclusion that the loan waiver was subject to income tax.

3. Both the appellant and HMRC appeal to this tribunal, with the permission of the FTT (as to part) and Judge Bishopp in the Upper Tribunal (as to the remainder).

The facts in outline

4. The scheme entered into by the appellant, known as the Excalibur scheme, was designed and promoted by Premier Strategies Limited ("PSL"). The appellant was one of a number of participants. The Decision contains a detailed description of the scheme. Its essential details, however, can be shortly stated. It involved the following steps.

(1) A new company, Broadgate Trading Limited ("Broadgate") was incorporated in the Isle of Man on 28 April 2006. Its share capital was divided into 10,003 A ordinary shares (issued to its two directors) and 10,002 B Ordinary shares of £1. Broadgate acquired a small UK retail trade called the Flower Emporium.

(2) The appellant subscribed for 20 B ordinary shares in Broadgate at their par value (a total of £20) on 26 May 2006.

(3) On 9 June 2006, the appellant entered into two agreements with an unconnected company, Braye Finance Limited ("Braye"). Pursuant to the first agreement, he sold his shares in Broadgate to Braye at a price of £1.22 per share for a total consideration of £24.40. Pursuant to the second agreement, he granted Braye a put option to sell the shares back to him within 30 days for their "fair value" plus 9.1%.

[1] The claim for relief for income tax purposes in respect of a capital loss arose under s. 574 Income and Corporation Taxes Act 1988 where an individual taxpayer has subscribed for shares in a qualifying trading company.

(4) On 14 June 2006, Braye borrowed £155,269,464 from Schroders London, specifically to enable it to subscribe for one B share in Broadgate at a premium of £155,269,464. Broadgate guaranteed that borrowing. This amount reflected (as to a small part) the appellant's participation in the scheme and (as to the remainder) the participation of others who entered into the scheme.

(5) On 20 June 2006, Braye exercised the put option and sold 20 B ordinary shares in Broadgate to the appellant at a price of £54,546.47 per share (for a total consideration of approximately £1.1m). The appellant borrowed approximately £1m from Schroders (C.I.) Limited ("SCIL") and used the proceeds of that loan and £100,000 of his own money in that account to fund the purchase under the put option. Broadgate guaranteed that borrowing.

(6) On 30 June 2006, Broadgate established a British Virgin Islands subsidiary, Broadgate Group Holdings Limited ("Holdings"). Holdings advanced an interest-free loan to the appellant in order for him to repay his borrowing from SCIL. That loan was written off in November 2006 (the "Loan Waiver"). Broadgate signed a written resolution approving the write off of all loans made by Holdings (other than loans totalling £75,000 to Broadgate).

(7) The appellant donated his shares in Broadgate to charity on 3 December 2006.

5. It was common ground that the scheme had no commercial purpose and that it was solely designed to create a capital loss which could then be set off against the appellant's income for income tax purposes under s.574 Income and Corporation Taxes Act 1988 ("ICTA").

6. At [5], the FTT explained how the scheme was intended to work:

> "The intended tax analysis was that the sale and repurchase from Braye would fall within s 106A Taxation of Chargeable Gains Act 1992 ("TCGA"), such that the shares acquired from Braye would be identified with the shares disposed of to Braye for capital gains tax ("CGT") purposes, giving rise to a substantial capital loss on the basis that the appellant had acquired shares for a significant sum and sold them for a nominal amount. The appellant would be entitled to claim relief against income tax in respect of the loss under s 574 Income and Corporation Taxes Act 1988 ("ICTA"). The disposal to charity was a "no gain no loss" disposal (s 257 TCGA)."

The issues for determination before the FTT and its decision in outline

7. There were five issues raised for determination before the FTT.

Issue 1: HMRC contended that the sale of the shares by the appellant to Braye and their subsequent repurchase fall to be disregarded for CGT purposes by virtue of s.263A of the Taxation of Chargeable Gains Act 1992 ("TCGA") read with s 730A ICTA (the "repo rules").

Issue 2: If the appellant would otherwise be treated as having realised a loss on the sale and repurchase, then the value shifting rules in s.30 TCGA have the effect that the loss should be reduced to nil.

Issue 3: *Ramsay* principles apply to prevent the scheme achieving its intended effect. The potential alternative approaches under Ramsay are:

(1) all the transactions should be ignored: the appellant started with nothing and ended with nothing;

(2) either or both of the appellant's subscription for shares and his disposal of those shares to charity should be respected, but the other transactions should be ignored; or

(3) the amount purportedly paid to reacquire the shares from Braye was not consideration given "wholly and exclusively" for the acquisition of the shares, and therefore does not constitute allowable expenditure under s.38 TCGA.

Issue 4: Any capital loss that did arise may not be relieved against income tax under s.574 ICTA, either because Broadgate was not a "qualifying trading company", or because the disposal of shares to Braye was not "by way of a bargain made at arm's length for full consideration" within s 575 ICTA.

Issue 5: The Loan Waiver, made with the approval of Broadgate, is analogous to a dividend paid by Broadgate, and gave rise to an income tax liability under s. 687 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

8. Issues 1 to 3 arose as alternatives. If the appellant failed on any of them then no capital loss would arise.

9. The FTT determined Issue 1 in favour of the appellant, concluding that the sale and repurchase did not fall to be disregarded for CGT purposes under the repo rules.

10. The FTT determined Issue 2 in favour of HMRC, concluding that the value shifting rules in s.30 TCGA applied so as to reduce the loss to nil.

11. The FTT did not reach a final determination on either of the first two of the alternative *Ramsay* approaches. So far as the third *Ramsay* alternative was concerned, the FTT concluded that the repurchase price, excluding the 9.1% premium, was given "wholly and exclusively" for the shares purchased.

12. Although it was strictly unnecessary to deal with Issue 4 (since it did not arise in the absence of a capital loss), the FTT determined it in favour of HMRC on the basis that Broadgate was not a "qualifying trading company" within the meaning of s.293 ICTA (although the FTT found, in agreement with the appellant, that the disposal of shares was by way of a bargain at arm's length).

13. The FTT determined Issue 5 in favour of the appellant, concluding that the Loan Waiver did not give rise to an income tax liability under s.687 ITTOIA.

14. The appellant appeals against the FTT's conclusion in respect of Issues 2 and 4. HMRC appeals against the FTT's conclusion in respect of Issue 5. In addition, HMRC contends that the FTT should have determined Issues 1 and 3 in its favour, and should also have determined (in relation to Issue 4) that the disposal of shares was not by way of a bargain at arm's length.

15. We will deal first with the appellant's appeal in respect of Issue 2.

Issue 2: the value shifting rules in s.30 TCGA

The FTT's Decision in more detail

16. Section 30 TCGA provides, relevantly, as follows:

> "(1) This section has effect as respects the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby-
>
> (a) the value of the asset … has been materially reduced, and
>
> (b) a tax-free benefit has been or will be conferred-
>
> (i) on the person making the disposal or a person with whom he is connected, or
>
> (ii) subject to subsection (4) below, on any other person.
>
> …
>
> (3) For the purposes of subsection (1)(b) above a benefit is conferred on a person if he becomes entitled to any money or money's worth or the value of any asset in which he has an interest is increased or he is wholly or partly relieved from any liability to which he is subject; and a benefit is tax-free unless it is required, on the occasion on
>
> which it is conferred on the person in question, to be brought into account in computing his income, profits or gains for the purposes of income tax, capital gains tax or corporation tax.
>
> (4) This section shall not apply by virtue of subsection (1)(b)(ii) above in a case where avoidance of tax was not the main purpose or one of the main purposes of the scheme or arrangements in question.
>
> (5) Where this section has effect in relation to any disposal, any allowable loss or chargeable gain accruing on the disposal shall be calculated as if the consideration for the disposal were increased by such amount as is just and reasonable having regard to the scheme or arrangements and the tax-free benefit in question.
>
> (6) Where-
>
> (a) by virtue of subsection (5) above the consideration for the disposal of an asset has been treated as increased, and
>
> (b) the benefit taken into account under subsection (1)(b) above was an increase in the value of another asset,

any allowable loss or chargeable gain accruing on the first disposal of the other asset after the increase in its value shall be calculated as if the consideration for that disposal were reduced by such amount as is just and reasonable having regard to the scheme or arrangements in question and the increase made in relation to the disposal mentioned in paragraph (a) above.

(7) References in this section to a disposal do not include references to any disposal falling within section 58(1), 62(4) or 171(1).

…

(9) In relation to a case in which the disposal of an asset precedes its acquisition the references in subsections (1)(a) and (2) above to a reduction shall be read as including a reference to an increase."

17. The first issue which arose for consideration in relation to s.30 was whether "value" in s.30(1) meant "market value" or the value contemplated by the parties. If it meant the value contemplated by the parties, then there had clearly been a material increase because shares disposed of to Braye for £24.20 had been reacquired for approximately £1.1m.

18. The FTT noted that "market value" is a defined term under s.272 TCGA and that the word "value" was used in s.30(1) in contradistinction to the use of the defined phrase in other parts of the legislation. HMRC relied on *Stanton v Drayton* [1982] STC 585, 52 TC 286, for the proposition that "value" meant the value placed on the asset by the parties to the scheme. In that case, the House of Lords concluded that for the purposes of (what is now) s.38 TCGA (which governs acquisition and disposal costs for CGT purposes), "value" in the phrase "the amount or value of the consideration, in money or money's worth, given by him or on his behalf wholly and exclusively for the acquisition of the asset…" meant the agreed value of the shares. Having noted that, while some of the reasoning in *Stanton v Drayton* did not apply to s.30, the decision provided some support for the argument that by using the word "value" something other than market value was intended, the FTT concluded as follows (at [88] of the Decision):

"On balance, I think it is right that "value" is not necessarily the same as the defined term "market value". In circumstances where the party or parties to the scheme or arrangement entered into it on the basis that what they regarded as the "value" of the asset was materially reduced or increased, I think it would be appropriate to apply s 30(1) by reference to the reduction or increase contemplated by the parties, even if that was not reflected in a similar change in market value as defined in s 272 TCGA. I think this is consistent with the approach taken in *Land Securities*, discussed further below, of focusing on the scheme or arrangements in question and what it is intended that the scheme or arrangements achieve."

19. The FTT went on, however, to say at [89] that it was not necessary to reach a final conclusion on this point, because even if "market value" were the correct test, then there had in any event been a material increase in the value of the shares.

"If market value were the correct test then even on Mr Ryan's [HMRC's expert] approach there was an increase in the market value of the appellant's 20 B shares between 9 and 20 June, from £39.42 to £45.36. This is an increase of about 15%. No submissions were made on the meaning of "material", but I think a 15% increase should be regarded as material. I note that this approach does not mean that the adjustment of the loss under s 30(5) would also need to reflect that lower amount: that provision requires the adjustment to be determined "having regard to the scheme or arrangements and the tax-free benefit in question", with no reference to value."

20. The second issue under s.30 was whether s.30(9) applied, so that s.30(1) should be read as including a reference to an increase in value.

21. A similar issue arose in *Land Securities v HMRC* [2013] UKUT 124 (TCC), [2013] STC 1043. In that case, Land Securities acquired the relevant shares in question in about 1969. It disposed of those shares to a counterparty on 31 March 2003 for a fairly small sum, and entered into a call option with the counterparty to re-acquire them for a sum slightly in excess of their market value. It exercised the call option in September 2003 and relied on s.106 TCGA to claim a loss. Leaving aside an issue that was dealt with in that case as to the interplay between s.106 and s.30, the question arose whether, for the purposes of s.30(9), this was a case where the disposal of the asset preceded "its" acquisition.

22. The Upper Tribunal held that s.30(9) could not be read in isolation, but must be construed in the context of s.30 as a whole. That was especially so in circumstances that, even on its wording, it referred back to s.30(1). The "obvious and logical" way to read s.30(1) and s.30(9) together was by interpolating the relevant words from the latter into the former, so that s.30(1) reads as follows:

"This section has effect as respect the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby – (a) the value of the asset or a relevant asset has been materially reduced or, in the case in which the disposal of the asset precedes its acquisition, increased, and…"

23. The essence of the Upper Tribunal's reasoning is found in paragraph 30 of its decision, as follows:

"Section 30(9) is part of the provision of the statute that addresses value shifting. It applies, and only applies, in the context of "a scheme … effected or arrangements … made" which have the effect of changing the value of an asset and conferring a tax-free benefit: s 30(1). In considering whether the relevant acquisition of the asset in this case for the purpose of applying s 30(9) is the first acquisition in 1969 or the second acquisition on 9 September 2003, in our view, it is appropriate to take into account the "scheme" that engages s 30(1). That is particularly the case where, as here, the scheme has been planned before the disposal. If one asks whether, having regard to the scheme, the relevant acquisition in respect of the disposal of the shares on 31 March is

> the acquisition over 30 years before, in 1969, or the acquisition less than six months later on 9 September, there can be only one answer: the acquisition of the same shares within the "prescribed period" following their disposal was at the heart of the scheme. We therefore consider that on the proper interpretation of s 30(9) to the indisputable facts, this is "a case in which the disposal of an asset precedes its acquisition". This does not involve any process of "deeming" or preferring notional facts to actual facts."

24. In this case, the appellant contended before the FTT that the decision in *Land Securities* was to be distinguished because the original acquisition of the shares in that case occurred many years before Land Securities devised the relevant scheme. The acquisition of the shares in Broadgate by the appellant on 27 May 2006, in contrast, was an integral part of the scheme.

25. The FTT, rejecting that contention, held it was right to follow the approach in *Land Securities* notwithstanding that the first acquisition of the shares in Broadgate was part of the scheme. Adopting that approach, the question to be answered was "what is the relevant acquisition?" and, in answering that question, it was not necessarily the case that the subscription of shares by the appellant was the only acquisition. At [96] the FTT said "…in this case the undoubted aim of the scheme was to produce a capital loss by virtue of the operation of s 106A. In those circumstances I think the 'relevant acquisition' was the acquisition made from Braye on 20 June. This does not mean that s 30(9) can apply to 'any' later acquisition: the question is what was the relevant acquisition in the context of the scheme that engages s 30(1)."

26. The FTT found (and there is no appeal against this finding of fact) that the "scheme or arrangements" included the making of the loan by Holdings to the appellant, and its subsequent waiver, concluding at [97]:

> "Although I have accepted that PSL continued to explore some alternatives to a loan waiver after the sale and repurchase … it was clearly always a part of the scheme that cash would be extracted to repay SCIL in a way that was not intended to impact on the tax loss, and also that scheme participants would need to be left in a position where they had no real exposure in respect of that cash extraction. Realistically this meant that they would receive a benefit. The necessary BVI advice was also obtained for the loan and waiver before the sale and repurchase. I do not think that the fact that there may not have been an element of remaining uncertainty about the precise mechanics prevented there being a 'scheme or arrangements' which satisfied s 30".

27. Finally, the FTT concluded that the appropriate adjustment to the disposal consideration under s.30(5) was to increase it by an amount which eliminated the loss entirely. There is no appeal against that conclusion.

The meaning of "value"

28. In our judgment, the FTT's conclusion, reached "on balance", that s.30 is to be applied in this case by reference to the increase in value contemplated by the parties, was (unequivocally) correct.

29. Before dealing specifically with the appellant's arguments made on this appeal, we summarise our reasoning, from first principles, as follows:

(1) S.30 (which it is agreed is an anti-avoidance provision) applies in respect of a disposal of an asset where "a scheme has been effected or arrangements have been made".

(2) "Scheme" and "arrangements" connote something that is planned and which has a purpose or an objective. The relevant purpose or objective is identified by the remainder of the words in s.30(1), namely a scheme or arrangements "whereby" the value of an asset has materially decreased or increased and a tax-free benefit has been conferred.

(3) The purpose of the section is to adjust the (otherwise) allowable loss or gain on a disposal of an asset which has arisen as a result of the decrease or increase in value achieved by such a scheme or arrangement.

(4) In order to give effect to the purpose of the section, when determining how to measure the reduction or increase in value of the asset (and thus what is meant by "value"), it is necessary to have regard to the manner in which the scheme was intended to achieve that reduction or increase.

(5) A scheme might achieve that in a variety of ways, some of which would involve the parties themselves determining the value of the reduction or increase, whereas in other cases the question whether the value of the asset had reduced or increased might have to be determined objectively.

(6) For example, if the aim of the scheme was to effect the reduction in the value of an asset by taking some step which would indirectly impact on the value of the asset, but to an extent which was not pre-determined, such as – where the asset consists of shares in a company – the payment of a dividend, or the disposal of property, by the company, then the question whether the value had reduced would necessarily be answered objectively.

(7) On the other hand, if the aim of the scheme was to effect a change in the value of the asset by a pre-determined amount, by a disposal at £x and a re-acquisition at £y (or vice-versa), then the question whether the "value" has been reduced or increased for the purposes of s.30(1) is to be answered by reference to the amount fixed by the parties on the disposal and re-acquisition.

(8) In other words, "value" is not to be calculated always as "market value" or "the amount determined by the parties" (hence the deliberate use of a non-defined term). Instead, its meaning is dictated by the terms and aim of the scheme. If the change in value which the scheme was designed to achieve was one which was pre-determined by the parties (as in this case) then it means such pre-determined amount. But if the change in value which the scheme was designed to achieve was that which was the consequence of some other act, then the value is to be assessed objectively.

30. We also agree with the FTT that this conclusion is supported by the approach adopted in the *Land Securities* case (above). Just as it is necessary, in determining what is the relevant "acquisition" for the purposes of s.30(9), to focus on the intended

effect of the scheme, the aim of the scheme informs how the question whether the value of the asset is reduced or increased is to be determined.

31. We turn to address the specific arguments of the appellant against the FTT's conclusion.

32. Mr Ewart QC (appearing with Mr Waldegrave on behalf of the appellant) submitted, first, that there is no authority on the meaning of "value" in s.30(1) and that the only case cited by the FTT (*Stanton v Drayton*) is of no assistance as it involves a different statutory provision and a different factual context. We accept that, given these differences, the decision in *Stanton v Drayton* provides little assistance as to the meaning of "value" in s.30(1), but the Decision does not suggest otherwise. The FTT's conclusion at [88] was not based on *Stanton v Drayton*, beyond noting at [87] that "it is the case that s. 30(1), like s. 38, refers to 'value' rather than 'market value', and as Lord Keith pointed out this can be contrasted with other provisions where market value is specifically referred to." We agree that the use of "value" instead of the defined term "market value" provides at least some indication that Parliament intended a meaning other than that of the defined term. That is not to say that this indicates that it *cannot*, depending on the circumstances, mean market value, but that it provides support for the conclusion that it is not confined to market value.

33. Mr Ewart QC referred us to a number of provisions in TCGA where "value" (as opposed to "market value") is used in circumstances which indicate that it must mean something that is determined objectively (i.e. where it cannot mean the value determined by the parties). Thus, s.24(2)(b) relates to assets which have become of "negligible value" and permits a claimant to specify an earlier time than the time of the claim if the asset had become of negligible value at the earlier time. In that context, "value" must have an objective meaning, as opposed to the value subjectively determined by the claimant.

34. Similarly, in s.31(1), which provides that references in s.30 to reduction in the value of an asset shall exclude a reduction attributable to the payment of certain dividends, "value" cannot mean the value determined by the parties. The reduction in value caused by an event such as payment of a dividend can only be determined objectively. This is of particular relevance, since it has a direct bearing on the meaning of "value" in s.30. A similar point arises in respect of s.32(1) (referring to the reduction in the value of an asset, for the purposes of s.30, attributable to certain categories of asset disposal).

35. In s.42(2), relating to part disposals, an apportionment is to be made by reference to "the amount or value of the consideration for the disposal" on the one hand and "the market value of the property which remains undisposed of" on the other hand. Mr Ewart QC submitted that there should be no difference in the meaning of "value" as between the two sides of this equation.

36. Finally, reference was made to s.43, which relates to assets derived from other assets and which refers to circumstances where "…the value of an asset is derived

from any other asset." In this context, Mr Ewart QC submitted that "value" can have only an objective meaning.

37. We are minded to accept that in at least some of these other instances where "value" is used, the context shows that it can only refer to a value determined objectively. That is entirely consistent, however, with our conclusion (at [29] above) that "value" in s.30 is used in a flexible sense, such that depending on the aim and terms of the particular scheme it might mean either an objective value or the amount determined by the parties.

38. In the appellant's skeleton argument, four reasons were given why "value" must mean "market value".

39. First, it was submitted that the term forms a component of the "gateway" to s.30 and one would expect a gateway provision to operate by reference to objective criteria, as that would promote certainty. We reject this submission: certainty is not promoted any less by an interpretation of value which, by linking it to the purpose and objective of the scheme, includes the very value placed upon the asset by the parties to the scheme.

40. Second, it was submitted that the language used in s.30(1), in particular the word "whereby", indicates that "value" has an objective meaning. It is said that it is not a natural use of language to describe an arrangement where A agrees to buy B's house for more than its true value as one "whereby" the value has increased. In our judgment, however, where the aim of the scheme is to crystallise a loss for CGT purposes on disposal of an asset by reference to the difference between the amount for which the asset was acquired and disposed of, then it is a perfectly natural use of language to describe the scheme as one "whereby" the value of the asset increased by reference to the difference between its disposal and acquisition price.

41. Mr Ewart QC supplemented this point in oral submissions, contending that the requirement in s.30(1)(b) that there be a scheme "whereby" a tax-free benefit has been or will be conferred can only be judged objectively and, accordingly, the other requirement in s.30(1)(a) must also be judged objectively such that value means objective value. We disagree. In the first place, s.30(1)(a) already includes an objective element, namely that the reduction or increase in value is "material". Secondly, there is no reason to think that merely because the requirement in (b) is wholly objective, then so must be the requirement in (a).

42. Third, it was submitted that one would expect s.30 to operate by reference to objective, rather than subjective, criteria, since subjective criteria would be likely to present opportunities for avoidance. We consider the opposite to be true. It is important to remember that the amount of the allowable loss for CGT purposes which the scheme generated was a product of the price put upon the shares under the put option. Since the money provided to the appellant in order to pay the price of the shares went round in a circle (by virtue of it being injected into Broadgate, then loaned to him by Holdings with the loan being written-off), that price could have been in any amount. In contrast, the market value of the shares would have remained

constant if it was not for the happenstance that some participants in the scheme withdrew. In other words, there would be significantly greater opportunity to avoid tax by ignoring the price actually paid on the disposal and acquisition of the shares.

43. Fourth, it was submitted that s.30 can operate in circumstances in which no value had been identified by the relevant parties. In oral submissions, Mr Ewart QC pointed out that the "scheme" under s.30(1) does not have to comprise a disposal, it merely has to have the consequence of achieving a reduction (or increase) in value and the conferring of a tax-free benefit. Accordingly, the disposal which triggers the operation of s.30 might take place some time later, and not be part of the scheme at all. In such a case, the price agreed between the parties on the disposal had no relevance to the relevant increase in value contemplated by the section. The answer to this is again provided in our reasoning from first principles at [29] above. In short, this argument merely demonstrates that "value" does not mean *only* the value determined by the parties, and can have an objective meaning in appropriate cases.

Material increase in market value

44. In light of the above, it is unnecessary to consider the alternative proposition that the increase in the market value of the shares was material. Nevertheless, we will briefly state our conclusion.

45. If we are wrong in concluding that "value" means in the context of this case the value determined by the parties, then we think that the FTT was in any event right to conclude that there had been a material increase in the market value of the B ordinary shares.

46. Mr Ewart QC submitted that materiality was an absolute concept and that an increase of just under £6 could never be regarded as material in absolute terms. Alternatively, he submitted that if materiality was a relative concept, the materiality of the increase was to be judged by reference to the value of the tax-free benefit (approximately £1m) or to the size of the fee for entering into the scheme (approximately £100,000). It was clearly not material in either sense.

47. In agreement with the FTT, however, we consider that "material" is a relative concept, and that materiality is to be assessed relative to the value of the asset in question. That is the most natural reading of the words of the subsection: "the value of the asset has been materially reduced [or increased]". On that basis, although the increase is (in absolute terms) small, it constituted an increase of 15% in the value of the shares, which is appropriately described as "material".

Section 30(9): increase in value

48. Before us, the appellant repeated the argument advanced before the FTT. Mr Ewart QC made it clear that (while reserving the right to challenge the decision in any further appeal) he did not seek to challenge the reasoning in *Land Securities*. He sought to distinguish the decision, however, on the basis that in this case the initial acquisition of the shares in Broadgate formed part of the scheme. He submitted that

the FTT's decision failed to give any or any proper weight to the word "its" in s.30(9): the subsection only applied, he said, if the disposal of the asset preceded "its" acquisition and where, as in this case, the scheme involved the acquisition of an asset, its disposal and subsequent re-acquisition, "its" disposal clearly *followed* (and did not precede) its acquisition.

49. In our judgment, the FTT reached the right conclusion, essentially for the reasons expressed by it, as summarised above. Applying a purposive construction to s.30(9), properly interpolated into s.30(1), it is necessary to enquire, where a scheme involves more than one acquisition, by which acquisition did the scheme purport to achieve its aim of creating an increase (or decrease) in the value of the asset. Understood in that way, there is only one answer to the question on the facts of this case: the aim of the scheme was to create an increase in value of the shares via the disposal to Braye at par and the acquisition from Braye at a greatly increased price. Accordingly, the relevant acquisition for the purposes of s.30(9) was the acquisition of the shares from Braye pursuant to the put option. It was that acquisition which lay at the "heart" of the scheme (to adopt the language of the Upper Tribunal in the *Land Securities* case, at paragraph 30).

Issues 1, 3 and 4

50. In light of our conclusions in respect of Issue 2, and meaning no disrespect to the arguments advanced on the other issues, it is unnecessary to deal either with the alternative reasons advanced by HMRC (in Issues 1 and 3) as to why there was no allowable capital loss or with HMRC's argument that, had there been a capital loss, it would not have been available for relief against income tax.

51. Instead, we now turn to Issue 5.

Issue 5: the Loan Waiver – s. 687(1) ITTOIA

The FTT's Decision in more detail

52. Mr Ghosh QC (appearing before us with Katherine Apps and Charles Bradley for HMRC) argued before the FTT that the Loan Waiver was charged to income tax in the appellant's hands under s. 687(1) ITTOIA. The FTT rejected that argument and HMRC now cross-appeal against that decision.

53. Section 687(1) provides:

> " Income tax is charged under this Chapter on income from any source that is not charged to income tax under or as a result of any other provision of this Act or any other Act."

54. The FTT decided that the Loan Waiver did not result in a charge to income tax for four reasons.

55. First, the FTT noted [143 (1)] that the Loan Waiver was entirely voluntary. The FTT contrasted the Loan Waiver with a dividend or other distribution paid in respect

of shares. In the latter case, although a shareholder had no right to require a dividend to be paid, any dividend would be paid in accordance with the bundle of rights attaching to the shareholder's shares. The FTT drew an analogy with *Drummond v. Collins (Inspector of Taxes)* [1915] AC 1011 and *Cunard's Trustee v. IRC* (1945) 27 TC 122.

56. Secondly, the FTT observed [143(2)] that the Loan Waiver was a "one-off" transaction which was clearly capital in nature. The appellant had a significant liability under the interest-free loan which was entirely removed by the Loan Waiver. In order to fall within Case VI it was necessary for the receipt in question to be of an income nature (*Leeming v Jones* 15 TC at 359 and 360 and *Explainaway and others v HMRC* [2012] UKUT 362 (TCC) at [35a]).

57. Thirdly, the FTT was not persuaded [143(4)] that what was clearly a capital transaction could be viewed as giving rise to income by being linked to the appellant's shareholding in Broadgate. Mr Ghosh QC had argued that the Loan Waiver was a disguised distribution by Broadgate, which was analogous to a dividend. Because the share rights of the appellant remained intact following the Loan Waiver (there was no reduction or repayment of capital) Mr Ghosh QC submitted that this indicated that the receipt was income (see, for example, *Rae v Lazard* 41 TC 1). The FTT did not agree that the Loan Waiver gave rise to income under s. 687 simply because the shares still existed.

58. Finally, the FTT concluded [143(3)] that even if a capital transaction such as the Loan Waiver could be transformed into income by linking it to shares, there was not a "sufficient link" (per the Upper Tribunal in *Spritebeam and others v HMRC* [2015] UKUT 75 (TCC) [69] and [80] (Proudman J and Judge Colin Bishopp)) ("*Spritebeam*"). The FTT observed that neither the relevant board minutes nor the shareholder approval given by Broadgate in connection with the Loan Waiver referred to the fact that the loans were made to Broadgate shareholders. In addition, Broadgate's approval of the Loan Waiver was not, in the FTT's view, sufficient to re-characterise it as a distribution by Broadgate in respect of its shares. Instead, the Loan Waiver was made because it was a key step in the scheme effected in order to remove the liabilities that PSL's clients had incurred under the loan from SCIL in a way which did not compromise the tax losses being sought. The appellant had benefited from the Loan Waiver because he was a client of PSL who had signed up for the scheme and the Loan Waiver had been arranged in order that PSL's clients' expectations should be met. The FTT noted that the Loan Waiver could have occurred even if the appellant had already given his shares away.

Submissions in outline

59. Mr Ghosh QC submitted that the making of the loan by Holdings and, in particular, the subsequent Loan Waiver was *eiusdem generis* with a dividend received by a UK resident shareholder from a non-resident company chargeable under s. 402 ITTOIA. Broadgate indirectly distributed its assets to its shareholder, the appellant, by procuring that Holdings entered into the Loan Waiver. There was no reduction or repayment of capital by Broadgate.

60. Section 402 ITTOIA, so far as material, provides:

> "(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."

61. Mr Ghosh QC accepted that the Loan Waiver could not be taxed directly under s 402 ITTOIA because it was made by Holdings, a company in which the appellant was not a shareholder. Nonetheless, Mr Ghosh argued that the receipt was of essentially the same quality as a dividend and therefore was taxable under s. 687(1) ITTOIA.

62. As regards the FTT's decision, Mr Ghosh QC submitted that the FTT had erred by:

(1) attaching weight to the fact that the Loan Waiver was "voluntary". In the ordinary case shareholders had no right to require dividends to be paid and that, therefore, dividends were also "voluntary";

(2) placing reliance on the fact that the Loan Waiver was a "one-off" – a dividend could also be a "one-off" transaction; and

(3) holding that there was not a "sufficient link" between the appellant's shareholding in Broadgate and the receipt of the Loan Waiver. The loans had been made and waived by Holdings by virtue of the appellant's shareholding in Broadgate. The minutes of the board meeting of Broadgate at which it was resolved to make the loans referred to the borrowers being shareholders in Broadgate (referred to in the FTT's decision at [46]). Furthermore, Mr Ghosh QC contended that the purpose of the interest-free loans was to enable those shareholders to repay the SCIL loans they had taken out to acquire their shares under the put option. Moreover, the amounts of the loans made by Holdings were proportionate to the scheme participants' shareholdings. It was not realistic to analyse the Loan Waiver in isolation from the making of the loan – the unwinding of the scheme required both events to happen.

63. Mr Ewart QC submitted that there are two principal requirements (first, that the Loan Waiver had the character of "income" and, second, that it was analogous to some other head of charge under what was previously Schedule D) and that HMRC's submissions failed properly to address the first, and prior, question. In particular, he submitted that it was an improper conflation of the two requirements to suggest that the question whether the Loan Waiver had the character of "income" was answered by reference to the fact that a dividend was income.

64. As regards the first requirement, Mr Ewart QC submitted that the Loan Waiver did not have the character of income for the reasons given by the FTT. In particular, it was a "one-off" transaction which was incapable of repetition.

65. As regards the second requirement, Mr Ewart QC submitted that there was no similarity with a dividend and a better analogy was with the distribution of assets on a winding up (which was clearly capital in nature). Further, he submitted that there was not a "sufficient link" between the shares and the Loan Waiver (as required by the decision in *Spritebeam* at [84]). The FTT found [143(1)] that Holdings was under no obligation to waive the interest-free loan. Mr Ewart described as "hopeless" HMRC's argument that a "sufficient link" was established between the shares in Broadgate and the Loan Waiver just because that loan was made to enable the appellant to repay the SCIL loan which had funded his purchase of the shares from Braye.

Discussion of Issue 5

66. Prior to the enactment of ITTOIA, the residual charge to income tax arose under Schedule D Case VI on any annual profits or gains not falling under any other Case of Schedule D, not charged under Schedules A, E and F (s.18(3) ICTA).

67. This residual charge to income tax is now found in s. 687(1) ITTOIA. This re-enactment was part of the Tax Law Rewrite Project and it was intended that the scope of the re-written taxing provisions should be the same as in the predecessor statute. It follows, and this was common ground, that the earlier authorities relating to Schedule D Case VI remain relevant to the interpretation of s. 687(1) ITTOIA.

68. We consider that those earlier authorities can be summarised in the following propositions. The receipt must:

(1) have the nature of "annual profits". That simply means that the receipts must be capable of being "calculated in any one year" (per Rowlatt J in *Ryall v Hoare* 8 TC 521 at 526). It does not mean that the income must recur every year (*per* Viscount Dunedin in *Jones v Leeming (HMIT)* 15 TC 333 at 359) ("*Leeming*");

(2) be of an income nature (*Leeming, ibid*);

(3) be analogous to some other head of charge under what was previously Schedule D (*Leeming, ibid*) – this is the *eiusdem generis* principle;

(4) be the recipient's income (*Spritebeam* at [54]); and

(5) involve a sufficient link between the source and the recipient (*Spritebeam* at [54]).

69. Before the FTT, Mr Ewart QC also argued that it was necessary for the receipt to have a "source" for tax purposes and because the Loan Waiver was purely gratuitous there was no source. The need for a source was not itself disputed before the FTT but Mr Ghosh submitted that the Loan Waiver had a source, viz the appellant's shareholding in Broadgate.

70. In relation to the source issue, the Upper Tribunal noted in *Spritebeam* at [55] that the House of Lords in *National Provident Institution v. Brown* (1921) 8 TC 57 left open the question whether it is necessary to identify a source before a Case VI liability can arise. We note, however, that s. 687(1) expressly refers to "income from

any source" which suggests to us that in order for income to be taxable under Case VI it requires a source. Moreover, it is hard to see how a receipt which had no source could be *euisdem generis* with the other heads of charge in what was formerly Schedule D, all of which require a source for the receipt in question. Nonetheless, although we would be minded to accept that a receipt taxable under s.687(1) ITTOIA must have a source, it is not necessary for us to reach a decision on this point for the reasons set out below.

71. In our judgment, the FTT was plainly correct to decide at [143] that the Loan Waiver did not result in a charge to income tax under s. 687(1) ITTOIA.

72. We consider that the FTT was correct when it concluded at [143(1)] that the Loan Waiver was an entirely voluntary transaction. Although Mr Ghosh QC argued that a dividend was similarly a voluntary event, we reject that argument. It is true that a shareholder cannot usually compel the declaration of the dividend (either by the board of directors or by the company in general meeting), but the right to a dividend once declared forms part of the bundle of rights comprising a shareholder's entitlement *qua* shareholder. A dividend is therefore different from an entirely voluntary transaction.

73. The FTT at [141] noted that the Upper Tribunal in *Spritebeam*, after an extensive review of the authorities in relation to the question whether voluntary payments could fall within Schedule D Case VI, had concluded at [68]:

> "…it is immaterial that the recipient cannot enforce payment; what matters is whether there is an obligation on the payer to pay."

In the present case, Holdings was under no obligation to enter into the Loan Waiver. In our view, therefore, the FTT made no error of law in concluding that the entirely voluntary nature of the Loan Waiver was a factor which pointed against it falling within s.687(1) ITTOIA.

74. We also consider that the FTT was correct when it decided at [143(2)] that the Loan Waiver, as a one-off event, was capital rather than income in nature. The loan made by Holdings to the appellant was made in order to discharge the SCIL loan which was used in order to purchase the 20 B ordinary shares in Broadgate under the put option. Those transactions were, in our view, capital, rather than revenue, in nature. The Loan Waiver therefore partook of the capital nature of the original Holdings loan. We see no reason to disturb the FTT's conclusion on this point.

75. Furthermore, we see no genuine analogy between the Loan Waiver and a dividend or other income distribution in respect of the shares of Broadgate. It is true that the appellant's B ordinary shares in Broadgate remained intact after the Loan Waiver and that there was no reduction or repayment of capital. But that, of itself, does not invest the Loan Waiver with an income nature.

76. Moreover, we take the view that the Loan Waiver was not made in respect of the appellant's shareholding in Broadgate. It was made, effectively, to collapse the scheme in which the appellant participated. The FTT was, therefore, correct when it

concluded at [143(4)] that there was no "sufficient link", to use the *Spritebeam* terminology, between the Loan Waiver and the appellant's shareholding in Broadgate. The fact that Broadgate, in which the appellant was a shareholder, approved the Loan Waiver does not, in our view, establish that link. As the FTT observed, the appellant benefited from the Loan Waiver because he was a client of PSL and it ensured that the appellant's expectations were met, viz that an income tax deduction could be bought at a cost of 10% of the income sought to be sheltered. In our judgment, the FTT was entitled to reach this conclusion on the evidence and we see no reason to interfere with it.

Conclusion

77. In relation to Issues 2 and 5, the FTT's decision discloses no error of law and, therefore, we dismiss the appellant's appeal and HMRC's cross-appeal.

Costs

78. Any application for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and be accompanied by a schedule of costs claimed with the application as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE ZACAROLI
JUDGE GUY BRANNAN

UPPER TRIBUNAL JUDGES
RELEASE DATE: 22 January 2019