Neutral Citation: **[2024] UKUT 00074 (TCC)**

Case Number: UT/2022/000154

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, Fetter Lane, London EC4A 1NL

Remittance of foreign gains – s 809L ITA 2007 – indemnity liability waived and UK inter-company debt not pursued pursuant to payment by non-UK third party overseas in separate transaction financed by taxpayers using proceeds of offshore chargeable gains – whether service provided or money used in the UK – whether money or consideration for service were or were derived from the gain – whether money used in UK was the gain – whether money that was or was derived from chargeable gains was used outside the UK in respect of a relevant debt

Heard on: 12-13 February 2024
Judgment date: 25 March 2024

Before

MR JUSTICE ADAM JOHNSON
JUDGE KEVIN POOLE

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Appellants

and

RAJ SEHGAL (1)
SANJEEV MEHAN (2)
Respondents

<u>Representation:</u>

For the Appellants: Christopher Stone and Bayo Randle, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondents: Michael Firth, Counsel, instructed by TT Law Solicitors

DECISION

INTRODUCTION

1. This appeal is concerned with whether the Respondents (UK resident but non-domiciled individuals) should be liable on the remittance basis in respect of certain payments made by an offshore company controlled by them to a third party offshore company, in consequence of which, amongst other things, the Respondents were released from liability under an indemnity they had given on a sale of shares in a UK company which they had previously controlled. The liabilities under appeal are £606,480 each, imposed on the Respondents by closure notices issued on 22 July 2020 in respect of the 2010-11 tax year.

2. The First-tier Tribunal ("the FTT"), in a clear and carefully reasoned decision released on 31 August 2022 ("the FTT Decision"), decided that the Respondents were not so liable for the reasons summarised below, and the Appellants ("HMRC") now appeal to this Tribunal against the FTT Decision. As the Respondents were the Appellants in the proceedings before the FTT, for the sake of clarity we shall refer to them in this decision as "RS" and "SM" respectively, or "the Taxpayers" collectively.

DOCUMENTS

3. We received, in electronic form, a hearing bundle of 1,292 pages, an authorities bundle of 1,462 pages and a core bundle of 50 pages.

BACKGROUND

4. The FTT gave a summary of the background facts at [10] to [20] of the FTT Decision, as follows:

> 10. The transactions giving rise to the disputed charge under s 809L ITA 2007 arose from the sale by the Appellants, two UK resident but non-domiciled individuals, of a company in which they were the major shareholders in 2010.
>
> 11. On 25 February 2010, the Appellants entered into an arm's length agreement (the Share Purchase Agreement ("SPA")) to sell their 31.5% (SM) and 41.5% (RS) shares of Visage Group Ltd ("VGL") to Centennial (Luxembourg) Sarl ("Centennial"), a Luxembourg resident subsidiary of the Li & Fung Group. The consideration was a mix of cash and loan notes issued by the purchaser, some of which were to be issued on deferred and earn out terms.
>
> 12. At the time of the sale, Internacionale Retail Ltd ("IR"), another company indirectly beneficially owned by SM (38%) and RS (38%), owed Visage Ltd (a subsidiary of VGL, "Visage") approximately £6 million. IR was a subsidiary of SKS1 Limited, a Jersey company. ("SKS")
>
> 13. Clause 8.1(d)(i) of the SPA provided
>
> "The Individual Sellers hereby covenant with and undertake to indemnify the Purchaser fully on demand and to keep it indemnified against any and all Losses incurred, suffered or sustained by them or asserted against it or any member of the Group or any member of the Purchaser's Group, or any or all of them arising out of any of the following:
>
>> […] (d) (i) any failure by Internacionale Retail Limited to pay any amounts owed by it to any member of the Group as at the Completion Date by the

date that is 30 days after the normal 120-day payment period for such debt (limited to amounts so owed plus costs and expenses in bringing a claim) and

(ii) any waiver or forgiveness by any member of the Group in respect of any amounts owed by Internacionale Retail Limited to any member of the Group prior to Completion (limited to amounts so waived, less costs and expenses in bringing a claim);

14. Shortly after the sale was completed, it became clear that the debt due from IR to Visage could not be recovered. This triggered clause 8.1 of the SPA and the Appellants were under an obligation to indemnify the purchaser (Centennial). (“the Indemnity”)

15. Li & Fung, however, were concerned about the effect on its own financial reporting of a straightforward payment of the indemnity amount and therefore requested that the Appellants’ obligations be discharged in a less straightforward way that Li & Fung hoped would not create any charge to profits.

16. A First Supplemental Agreement was entered into on 3 August 2010 which amended clause 8.1(d) of the SPA to read as follows (see clause 2.2 of the Supplemental Agreement):

“(d) (i) any failure by Internacionale Retail limited to pay any amounts owed by it to any member of the Group as at the Completion Date (or by any other company to pay equivalent amounts which have been agreed in writing by the Individual Sellers' Representative and the Purchaser to replace the relevant Internacionale Retail Limited debts) prior to 15 September 2010 (limited to amounts so owed plus costs and expenses in bringing a claim) and

(ii) any waiver or forgiveness by any member of the Group in respect of any amounts owed by Internacionale Retail Limited to any member of the Group prior to Completion (limited to amounts so waived, less costs and expenses in bringing a claim);”

17. In the event, what happened was that SKS bought clothing goods from Miles Fashion Ltd (“Miles”), a German resident subsidiary of Li & Fung (Trading) Limited for €6,783,000. Those goods were only worth approximately £200,000 and were ultimately gifted to a charity in Africa. (“the Compensatory Transaction”)

18. The money SKS used was contributed by the Appellants (and to a lesser extent two others) and was monies received by them in accordance with the original SPA (by redeeming loan notes).

19. With reference to these events, a side letter (the “Side Letter”) was entered into on 23 December 2010 between Centennial and the Appellants[1] whereby it was agreed between Centennial and the Appellants that:

(1) The payment by SKS to Miles “shall reduce the amounts owed to any member of the Group by IR as at the Completion date by the sterling equivalent of €6,783,0000”.

(2) Following receipt of the payment the Appellants were released from all and any existing or potential claims pursuant to clause 8.1(d)(i) of the SPA.

[1] The full text of the Side Letter is set out in an appendix to this decision.

> (3) IR's obligation to make payment to Visage in respect of the debt referred to above was to be reduced by an equivalent amount and the purchaser "shall procure that Visage Limited shall not pursue" IR for such debts.
>
> 20. Following the transactions, as referred to above, Visage issued a credit note to IR for £6m in respect of the £6m debt ("the Credit Note").

5. The parties did not dispute the accuracy of this summary. We adopt the definitions set out in it for the purposes of this decision.

THE LEGISLATION

6. The legislation which is in issue is set out at section 809L Income Tax Act 2007 ("section 809L"). It is common ground that if the Taxpayers' chargeable gains were "remitted to the United Kingdom" within the meaning of this section, then HMRC's appeal should be allowed. The provisions relevant to this appeal are as follows:

> **809L Meaning of "remitted to the United Kingdom"**
>
> (1) An individual's income is, or chargeable gains are, "remitted to the United Kingdom" if—
>
> (a) conditions A and B are met,
>
> …
>
> (2) Condition A is that—
>
> (a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person, or
>
> (b) a service is provided in the United Kingdom to or for the benefit of a relevant person.
>
> (3) Condition B is that—
>
> (a) the property, service or consideration for the service is (wholly or in part) the income or chargeable gains,
>
> (b) the property, service or consideration—
>
> (i) derives (wholly or in part, and directly or indirectly) from the income or chargeable gains, and
>
> (ii) in the case of property or consideration, is property of or consideration given by a relevant person,
>
> (c) the income or chargeable gains are used outside the United Kingdom (directly or indirectly) in respect of a relevant debt, or
>
> (d) anything deriving (wholly or in part, and directly or indirectly) from the income or chargeable gains is used as mentioned in paragraph (c).
>
> …
>
> (7) In this section "relevant debt" means a debt that relates (wholly or in part, and directly or indirectly) to—
>
> (a) property falling within subsection (2)(a),
>
> (b) a service falling within subsection (2)(b),
>
> …
>
> …

> (9) The cases in which property (including income or chargeable gains) is used in respect of a debt include cases where the property is used to pay interest on the debt.

THE DECISION

7. After summarising the facts as above, setting out the relevant statutory provisions and listing the authorities and other sources to which it had been referred, the FTT set out some oral testimony given by RS which provided a little more background to the summary set out above (and which we infer the FTT accepted, as it referred to RS as "a clear and convincing witness"). It also listed some of the main documentary evidence to which it had been referred, setting out extracts from key documents.

8. After then summarising the arguments that had been advanced on both sides, it made the following specific findings of fact at [93]:

> 93. On the basis of the oral and written evidence we make the following findings of fact:
>
> (1) It was known by August 2010 that IR would not be able to pay off its trading debts to Visage.
>
> (2) As a result of (1) the Indemnity at Clause 8.1 of the SPA was triggered on or before August 2010, under which the Appellants were obliged to make payment to Centennial in respect of IR's debts.
>
> (3) Payment under the Indemnity was the Appellants' preferred route to deal with IR's debts.
>
> (4) Payment under the Indemnity would not have given rise to a remittance in the UK.
>
> (5) Li & Fung did not want to recover the debt under the Indemnity because that would have resulted in an adjustment of the purchase price for accounting purposes. Li & Fung's aim was to ensure that the IR debt was paid in the normal course of business.
>
> (6) The Appellants were willing to accede to Li & Fung's wishes and avoid using the indemnity route because of the "ongoing relationship" with Li & Fung.
>
> (7) The Indemnity did not wipe out the debts outstanding between IR and Visage.
>
> (8) In the event, Centennial never made a claim under the Indemnity.
>
> (9) The effect of the Side Letter was to waive IR's debt obligations to Visage. IR's debts to Visage were not paid off.
>
> (10) The proposal to use another company to settle the debt was intended to avoid paying money into IR, which the Appellants thought would have resulted in a remittance.
>
> (11) In respect of the Compensatory Transaction, SKS did not actually want to buy any goods from Miles; it was not a clothing retailer and just a nominee share company in Jersey.
>
> (12) It was always understood that the jackets would be worth substantially less than the £6 million paid in order to give Li & Fung some financial value for the transaction.

> (13) The only purpose of including jackets in the transaction was to make it look like a genuine trading transaction.
>
> (14) The funds which arose from the redemption of the loan notes (arising from the SPA) were put into SKS and SKS paid that money into Miles.

9. At this point, it is fair to say that if the first sentence of [93(9)] was intended to convey a legal (rather than a broadly commercial) statement of the effect of the Side Letter, we would not agree; and as to [93(4)], whilst neither side disagreed with the statement, it only came to light in the hearing before us that there was significant disagreement between the parties as to the legal reasoning underpinning it. As it happens, in the light of our views expressed below, this is a disagreement that does not need to concern us further.

10. The FTT then moved on to its own consideration of the issues.

11. The FTT recorded at [101] that the parties had concentrated on –

> … the three contractual rights contained in the Side Letter which HMRC said gave rise to property, money or services derived from the gain and received and used in the UK by the Appellants and IR, releasing the Appellants from their indemnity obligation and IR from its debts to Visage:
>
> (1) The release of the Appellants from their obligations under the Indemnity.
>
> (2) The reduction of IR's obligation to pay its trade debt to Visage.
>
> (3) Centennial's undertaking that it would procure that Visage would not pursue IR for the trade debts.

12. The first issue the FTT considered was whether, as a result of the improvements in the legal position of the Taxpayers and/or IR by virtue of the Side Letter or of the payments referred to in it, there was any "property" that was "brought to, or received or used in, the United Kingdom" for the benefit of either of them. This they referred to as the "property analysis".

13. The FTT's view was that the rights which accrued to the Taxpayers (to have their indemnity obligations settled by a third party) and IR (to have its debts settled by a third party) were simply conditional rights (the condition being the payment by SKS to Miles of the €6.783 million) and this conditional nature of the rights precluded them from being fairly regarded as "property".

14. Once the rights became unconditional by reason of the payment from SKS to Miles, the FTT considered the position of the Taxpayers to be equivalent to debtors whose debt had been extinguished. Referring to *DMWSHNZ Limited v HMRC* [2015] EWCA Civ 1036, they decided that the extinguishing of the Taxpayers' indemnity liability did not give rise to any property rights. And so far as IR was concerned, whilst it had, in the FTT's view, obtained not only a discharge of its debt but also the benefit of Centennial's undertaking to procure that the debt was not enforced, these benefits were in effect too intangible to amount to "property" for the purposes of Condition A.

15. The FTT then moved on to consider whether, on the facts, any service had been provided in the UK to or for the benefit of the Taxpayers or IR as a result of the entry into of the Side Letter or the payments referred to in it. This they referred to as the "service analysis".

16. On the facts, the FTT considered that "Centennial's agreement to waive the debt due from IR and the Appellants' obligations under the Indemnity" did amount to the provision by Centennial of a service to each of the Taxpayers and IR. They said this at [134] to [136]:

> 134. It is clear that Centennial has provided something of value to IR and the Appellants, even if in the round and looking at the transaction as a whole, the economic effect is the same as if the Indemnity had been paid by the Appellants.
>
> 135. Considering the definition of a "service" suggested by the Appellants from the *Richmond on Thames*[2] decision "any self-employed economic activity, normally provided for remuneration" we do not think that it is stretching the meaning of "service" too far to suggest that this was some sort of financial service, in the same way as someone providing a third-party guarantee or credit protection insurance is providing a service.
>
> 136. From both the Appellants' and IR's perspective the "service" was commercial and for consideration, being the extinguishing of their obligations under the Indemnity (the Appellants) and the waiving of its debt obligations (IR). We think it is clear in this context that an agreement not to take an action or pursue a claim can be a "service".

17. The FTT went on to hold that this service was "provided in the UK". It is worth setting out verbatim their reasoning at [137] to [140]:

> 137. … as far as the service to IR was concerned it is in the UK, the agreement is governed by UK law and the relevant debts are between two UK companies. It is hard to see how, if a service has been provided, it can have been provided anywhere other than in the UK; the effect of the service was certainly in the UK, it is IR's debt obligations in the UK which are waived.
>
> 138. We also note that the descriptions of services provided in the UK in HMRC's manual suggest that if a service is enjoyed in the UK, it is treated as made in the UK for these purposes (see RDRM 33130).
>
> 139. The situation for the Appellants is more complicated, they are not in the UK, but the Side Letter is governed by UK law and the SPA was governed by UK law.
>
> 140. Of the indicia suggested by HMRC to determine the place where services are provided for these purposes, in our view where the services relate to the release of a debt, the most important indicia is where the debt is located; by reference to the normal application of situs rules, the debts owed by the Appellants have a UK situs and therefore the service should be treated as made in the UK.

18. Having decided that Condition A in section 809L was satisfied on the basis of the "service analysis", the FTT then turned to Condition B.

19. After recording that "a chargeable gain is not the equivalent of the sale proceeds for a particular transaction, it is the result of an arithmetical application of the chargeable gain rules", the FTT went on to say that "[t]he sale proceeds from a share sale are not the same thing as the chargeable gain which has been generated". Since there were various ways in which the gain could be adjusted after first crystalising (including by giving a deduction for indemnity payments made by the sellers after completion of a share sale), it would not be appropriate to treat a payment under the Indemnity as anything other than a reduction of the gain, rather than a payment derived from the gain.

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[2] R (oao Gaskin) v Richmond on Thames LBC and another [2018] EWHC 1996 (Admin).

20. The FTT acknowledged that the payment had not in fact been made pursuant to the Indemnity, but considered that this did not affect its underlying view:

> 155. The Appellants attempted to argue that the since the essence of the Compensatory Transaction was to settle the Indemnity in another form, the form in which the Indemnity was actually paid could not alter the analysis. From the Appellants' perspective, the transactions all stem from the Indemnity.
>
> 156. It is certainly the case that the Compensatory Agreement changed the legal form of the payment; from a payment under the Indemnity to a payment between two different parties and an agreement to release the debt.
>
> 157. However, in our view, in concentrating on whether property, money or services which are brought into the UK are, or are derived (directly or indirectly) from the gain, s 809L is asking us to consider not the manner of payment, but its source.
>
> 158. There was no dispute between the parties that the source of the payment was the profit generated on the Visage sale through the redemption of the loan notes. But, as we have already said, those proceeds are not the same as the "gain" on which the legislation is focused.
>
> 159. On this analysis, the process through which the proceeds passed through SKS to Miles and allowed Centennial to agree to the issue of the Credit Note by IR, does not alter the analysis of whether the property, money or services (being the release of the Indemnity) derives from the gain; it does not.

21. On this basis, the FTT decided that Condition B was not satisfied, and allowed the appeal.

22. The FTT also briefly recorded that HMRC had argued, in addition to the "property analysis" and the "service analysis" in relation to Condition A, that there was a potential "money analysis", to the effect that the payments made by SKS to Miles amounted to money deriving from the chargeable gain which was "used" in the UK because it secured the release of the Taxpayers' liabilities under the Indemnity, the waiver of IR's debt to Visage and the commitment from Centennial to procure that IR's debt to Visage would not be pursued.

23. Since they had already decided that Condition B was not satisfied because any money supposedly so used was not derived from the gain, the FTT did not consider the "money analysis" any further.

THE GROUNDS OF APPEAL AND RESPONDENTS' NOTICE

24. HMRC advanced four grounds of appeal, for which the FTT granted permission. They argued that the FTT had erred in law:

> 9.1. In respect of the Property analysis, by construing 'property' too narrowly for the purposes of Condition A, contrary to the overall purpose of the remittance basis legislation (s. 809L(2)(a));
>
> 9.2. In respect of the Property and Service analyses, by misdirecting itself in law in finding that neither the property nor the service was derived (wholly or in part and directly or indirectly) from the chargeable gains (s. 809L(3)(b));
>
> 9.3. In respect of the Property and Service analyses, by failing to consider HMRC's alternative argument that Condition B was satisfied because the chargeable gains were used outside the UK (directly or indirectly) in respect of a relevant debt (s. 809L(3)(c) and s. 809L(7));

> 9.4. By failing to consider the Money analysis, notwithstanding that in respect of Condition B, HMRC had an alternative analysis that the money was (wholly or in part) the chargeable gains (ss. 809L(3)(a)).

25. In their Respondents' notice, the Taxpayers contended that the FTT had erred by finding there was any service provided, and in finding that if there was, it was provided in the UK. If anything, it was the Taxpayers who were providing a service by agreeing to the restructuring of their liability to meet Li & Fung's requirements. Furthermore, there was no meaningful consideration for any service – the Taxpayers were simply arranging for payment of their liability under the Indemnity by a different mechanism; and the fact that the putative service related to a UK debt did not mean that any service was provided in the UK.

26. They also argued that HMRC's "relevant debt" argument must fail because:

> …there was no relevant debt and it is simply wrong to say that "the debt that IR owed to Visage" relates to a contractual right to waiver of that debt. Such reasoning gets things entirely the wrong way round – the contractual right to waiver might relate to the debt but not vice versa. By HMRC's logic, where (for example) there is a contract to sell a house, the house "relates" to the contract, which is plainly incorrect. The contract relates to the house, but the house does not relate to the contract."

THE ARGUMENTS IN SUMMARY

For HMRC

General introduction

27. Mr Stone addressed the grounds of appeal in order, save that he left Ground 1 to last because HMRC would only need to succeed on that ground to satisfy Condition A if we decided that the FTT had been wrong to decide the "service analysis" in favour of HMRC. After addressing the grounds of appeal, he then turned briefly to the Respondents' notice.

28. As a general proposition, Mr Stone submitted it was "trite law" that the correct approach to interpretation was "to ask whether the relevant statutory provisions, construed purposively, were intended to apply to the transactions under consideration, viewed realistically." He cited Lord Reid in *UBS AG v HMRC* [2016] 1 WLR 1005 in support.

29. He also submitted that the FTT had been correct to accept that section 809L was an anti-avoidance provision. As such, it was drafted broadly and without restrictive definitions of the basic concepts it relied on such as "property" and "service".

30. There was, as the FTT had found, some explanatory material available to assist in revealing the statutory purpose of the provisions. The main part of this was the explanatory note accompanying the clauses which provided for the introduction of what is now Chapter A1 Income Tax Act 2007. The note stated that "the Schedule also introduces measures to address a range of existing loopholes, flaws and anomalies in the remittance basis." It went on to say this:

> <u>Loopholes, flaws and anomalies in the remittance basis</u>
>
> 20. Various loopholes, flaws and anomalies in the way the rules currently operate undermine the effective operation of the remittance basis. Those eligible for the remittance basis can at present often arrange matters so that they receive or enjoy foreign income or gains in the UK without any liability

> to UK tax even though they have in substance remitted the foreign income or gains to the UK.
>
> 21. The main areas which the clauses address are outlined in the following paragraphs. The general aim is to ensure that income or gains to which the remittance basis applies are only excluded from charge to UK tax where they are genuinely kept offshore and not brought to the UK. But where they are in effect remitted to the UK in such a manner that the individual has the use or enjoyment of them in the UK, the individual should be liable to tax on them, precisely because the individual has effectively remitted them to the UK.

31. In the light of this, he submitted that the legislation was aimed at taxing gains that were not "genuinely" kept offshore, and which were "in effect" remitted to the UK "in such a manner that the individual has the use or enjoyment of them in the UK." This invited a broader enquiry than simply considering the physical location of property or of provision of services.

Whether property or service derived from gain – Ground 2

32. Mr Stone took issue with the FTT's preliminary statement at [142], when discussing this issue, that in order to give rise to a tax charge, the property or service in question "must 'derive from the chargeable gain'". He pointed out that the legislation was broader than this, covering all property and any service which "derives (wholly or in party, and directly or indirectly) from the income or chargeable gain". He submitted that the FTT had also misdirected itself by considering the "gain" in question to have arisen on the sale of the shares in VGL, whereas in fact it had arisen on the redemption of the loan notes into which the gain had been rolled over.

33. In Mr Stone's submission, the correct analysis was as follows. The reason that the property and/or services were derived from the chargeable gain was because part of the gain made on the redemption of the loan notes was invested by the Taxpayers into SKS and then transferred to Miles in order to bring about the release of the Indemnity and the waiver of IR's debt to VL; and since that release and waiver were clearly conditional upon the payment being made to Miles, the property and/or services which they represented were clearly derived indirectly from the chargeable gain.

34. Mr Stone submitted that the FTT had failed to properly analyse the actual transactions that had taken place, by inappropriately eliding the property and/or services with the satisfying of the liability under the Indemnity. The Compensatory Transaction (as the FTT had described it) comprised a set of transactions with very clear legal consequences and was specifically designed to avoid there being any payment under the Indemnity; it was therefore inappropriate to treat it as being equivalent to such payment.

Relevant debt – Ground 3

35. Mr Stone argued that the FTT had failed to consider HMRC's alternative argument that Condition B was satisfied because the Taxpayers had used their chargeable gains outside the UK (directly or indirectly) in respect of a relevant debt, namely the debt owed by IR to VL. This debt, he submitted, was "related to" the property and/or service – namely the waiver of that debt by Centennial.

The "money analysis" – Ground 4

36. Mr Stone also submitted that the FTT had not given any proper consideration to the "money analysis" because it had concluded that any "money" would not have been derived

from the chargeable gains of the Taxpayers, any more than the supposed property and/or service would have been, and accordingly Condition B could not have been satisfied.

37. In his submission, Condition A was satisfied because money (being the proceeds of the redemption of the loan notes) had been "used" in the UK for the benefit of both the Taxpayers and IR (a "relevant person") because the effect of its payment, though made overseas, was to benefit both the Taxpayers and IR by relieving them from their respective obligations (under the Indemnity and under the debt due to Visage respectively); in each case, the benefit accrued in the UK: for IR because it was a UK resident company which was relieved of the obligation to pay a trade debt to another UK resident company, and for the Taxpayers because they were also UK resident individuals who were relieved of an obligation to pay under the Indemnity. In both cases, the relevant obligations were governed by English law.

38. So far as Condition B was concerned, he argued the FTT had simply not addressed HMRC's argument that subsection 809L(3)(a) applied because the money used, rather than being <u>derived</u> from the chargeable gain, <u>was</u> (in part) the chargeable gain because it was the proceeds of the part redemption of the loan notes.

39. In response to a point raised by Mr Firth, Mr Stone acknowledged that this analysis (proceeding on the basis that the money was "used" in the UK) was inconsistent with his position in relation to "relevant debt" (where, *a fortiori*, the money had to be "used" overseas), but since these arguments were being advanced as alternatives he submitted that the inconsistency did not matter.

The property analysis – Ground 1

40. Before he made much progress in his submissions to us on this ground, we indicated to Mr Stone that he would face significant difficulties in persuading us that the FTT's conclusion on the "property analysis" was wrong. After taking instructions, he confirmed that HMRC did not wish to press this ground of appeal before us and we therefore heard nothing further from him on it. Beyond repeating the reservations that we expressed to Mr Stone, therefore, we say nothing further on the matter.

Response to Repsondents' notice – the service analysis

41. Mr Stone sought to uphold the FTT's finding on this point, essentially for the reasons given by the FTT. To summarise, given the purpose for which the legislation had been enacted, the word "service" ought not to be given a restrictive meaning. The service in question was that provided by Centennial when it agreed to waive the debt due from IR to Visage and the Taxpayers' obligations under the Indemnity. Centennial itself was not IR's creditor and therefore by providing something of value to IR and the Taxpayers, it was providing a service. The service in relation to the IR debt was provided in the UK because that debt was owed by one UK resident company to another in an agreement governed by English law; from IR's perspective therefore the service was enjoyed in the UK. In relation to the Indemnity waiver, the most important determinant was that the liability being waived was "located" in the UK.

For the Taxpayers

Introduction

42. Mr Firth's overarching general point was that the FTT had been correct to decide Condition B was not satisfied because, in substance, the transaction did not remit any gain to

the UK; on the contrary, it amounted to handing back part of the consideration to the Li & Fung group, reducing the gain. To decide otherwise would be to prefer form over substance. In his words, "[t]he legislation aims to tax persons who realise a gain and bring it to the UK, not persons who receive money at one point in the process of completing a sale, but are compelled to hand it back."

Whether property or service was derived from the gain – Ground 2

43. Mr Firth argued that Mr Stone's criticisms of the FTT Decision at [32] above were misconceived. So far as the lack of any reference at [142] of that Decision to "wholly or in part, and directly or indirectly" was concerned, it was clear from the FTT Decision when read as a whole that the FTT had those words in mind; and whether the gain arose on the sale of the shares in VGL or on redemption of the loan notes made no difference to the legal analysis – in either case, the gain was in part reversed as a result of the payment by the Taxpayers.

44. So far as HMRC's other arguments were concerned, the FTT had clearly considered them and had reached the view that in substance, the effect of the Compensatory Transaction was to reverse (in part) the gain. That was a finding that was open to it on the facts and was unimpeachable.

The "money analysis" – Ground 4

45. Mr Firth argued that for money to be "used" in the UK, it would have to have been paid in the UK; the mere fact that a UK resident might benefit from its payment was irrelevant. The statutory question was not where a "benefit is enjoyed", but where the money is used, which Mr Firth submitted to be where it was actually paid.

46. This was reinforced by HMRC's own guidance issued to the Chartered Institute of Taxation ("CIOT") in 2012 by way of a response to a letter dated 15 June 2012 from the CIOT to HMRC. The CIOT had expressed concern about the potential "remittance" implications of overseas payments by UK resident non-domiciled individuals out of foreign income or gains as part of divorce settlements. The CIOT's analysis included the phrase "As the Payment is made outside the UK, the Capital Sum is not brought into (or used in) the UK by any relevant person at that stage". It went on to say "The only contrary point may be if it could be argued that H might indirectly be said to be enjoying the property in the UK by virtue of being relieved of something which was otherwise his obligation and/or he has received value in the UK." The CIOT's final analysis of the point was that "Condition A requires property to be brought to, used or received in the UK by H or a relevant person in relation to him. As the payment is made outside the UK by H (ie the Capital Sum is not brought to used or received in the UK by him), Condition A is not fulfilled by the Payment." In their response to the CIOT, HMRC said that they "agree your conclusion that no taxable remittance will arise for the reasons given in your letter."

47. Furthermore, he pointed out that HMRC's alternative "relevant debt" argument proceeded on the assumption that the money in question was used outside the UK and not within it; whilst it was clearly open to HMRC to advance their case on alternative bases, complete self-contradiction was another matter altogether, especially bearing in mind that the statutory "relevant debt" rule explicitly applied where "the income or chargeable gains are used outside the United Kingdom (directly or indirectly)".

Relevant debt – Ground 3

48. Mr Firth argued that this ground of appeal should fail for three reasons. First, the funds used did not represent or derive from the gain, they reduced and in part reversed it (effectively, see Ground 2 above). Second, he submitted there was no "relevant debt". Third, the money was not "used in respect of" the IR debt.

49. The first point required no further development as it had already been covered by his argument under Ground 2 above.

50. As to the second point, a "relevant debt" is defined in subsection 809L(7) as "a debt that relates (wholly or in part, and directly or indirectly) to" either property or a service falling within Condition A. HMRC were seeking to characterise Centennial as providing a service here, arguing that the "relevant debt" in question was IR's debt to VL. It could not sensibly be argued that IR's (pre-existing) debt to VL in any way "related to" the supposed service being provided by Centennial, rather the contractual right to the waiver (or non-pursuit) of the IR debt might be said to relate to that pre-existing debt (in the same way that a contract for the sale of a house could be said to "relate to" the house, but it would be a nonsense to say that the house "related to" the contract).

51. As to the third point, since the payment had also resulted in the waiver of the Indemnity liabilities, it was appropriate to consider what that payment ought to be considered as being "in respect of". Given that IR was unable to pay its debt in any event but the Taxpayers were clearly able to pay their liabilities under the Indemnity, on any sensible view the payment was "in respect of" the latter rather than the former, with the waiver of the IR debt simply being an ancillary or incidental consequence.

The property analysis – Ground 1

52. As HMRC had confirmed they were not pursuing this ground of appeal (see [40] above), Mr Firth was not called on to expand upon his already voluminous submissions on the matter in his skeleton argument.

Respondents' notice – the "service" analysis

53. Mr Firth argued that the purpose of the rules was to give non-domiciled taxpayers and their advisers a clear and straightforward code to clarify what does and what does not amount to a remittance, to enable them to make an informed choice as to whether to remit or not. Ordinary English words – "property", "money" and "service" had been used without embellishment. Parliament had specifically not chosen to use wider wording encompassing, say, any "benefit" or "value" provided (as had been done in other tax legislation). Furthermore, what the legislation told us about the services it contemplated was that they were something which was "provided" in a particular geographical location (in this case, the UK), and for the benefit of a particular individual (or another "relevant person").

54. Mere payment of an existing liability could not sensibly be regarded as amounting to providing a service, and that was effectively what the Taxpayers had done here, albeit by a different legal mechanism. If anything, it would be more appropriate to regard the Taxpayers as having provided a service to the Li & Fung group, by agreeing to settle their liabilities in a different way to suit Li & Fung's accounting requirements.

55. In Mr Firth's submission, the ordinary meaning of the word "service" was "a beneficial activity of a commercial character which is normally provided for remuneration". Authority for this proposition was sparse. He referred to *R (Gaskin) v Richmond upon Thames LBC* [2018] EWHC 1996 (Admin), where the High Court considered the meaning of the word "service" in the context of the EU Services Directive and related legislation. He submitted, on the basis of *R v Preddy* [1996] AC 815 at 840, that "the making of a loan upon interest" would not normally be considered a service, nor would "an obligation to provide a room if the room is required" (based upon *Blue Lagoon Beach Hotel & Co Ltd v Assessment Review Committee* [2023] UKPC 24).

56. On any view, Mr Firth submitted, Centennial agreeing to the release of liabilities upon their being indirectly settled by a different route was far removed from any normal meaning of the word "service". He submitted that the FTT had had no basis for finding that, in providing something of value to IR and the Taxpayers, Centennial had provided them with "some form of financial service", analogous to the provision of a third party guarantee or credit protection insurance: the FTT had already found that the economic effect of the transactions was the same as paying the Indemnity liability, that the restructuring was at the request of Li & Fung, and that it was not the Taxpayers' "preferred route". In short, how could it properly be said that agreeing to do something that you would prefer not to do, in order to confer a benefit on a third party, at the request of the third party, amounted to the third party providing you with a service?

57. Mr Firth also argued that the analogous services to which the FTT had referred were in fact not analogous at all. A third party guarantor (for example a bank) or a credit insurer would charge a fee for its guarantee or insurance, a feature which was notably absent in the present case – Centennial had charged no fee for the "service" it had supposedly supplied beyond the payment of a liability which the Taxpayers were already subject to.

58. Furthermore, in his submission, HMRC must be taken to be arguing that for the purposes of subsection 809L(3) and satisfaction of Condition B, the putative remittance was any consideration supposedly given by the Taxpayers for the service (as the service itself, which HMRC were saying was provided by Centennial, clearly could not constitute the remittance on the basis that it derived wholly or in part, directly or indirectly, from the gain). As the Taxpayers had done nothing but simply settle their pre-existing liability by a different means at the request of Li & Fung, they had not given any consideration at all.

59. Finally, Mr Firth submitted that even if a service was found to have been provided by Centennial, for which the Taxpayers provided consideration which was derived from the gain, there was nothing to indicate that the service was provided in any particular geographical location. There was nothing in the legislation which required a geographical location to be identified for the provision of every service; the sole preoccupation of the remittance rules was whether the service was provided in the UK, and where the notional service was as abstract as that being advanced in the present case, there was every reason to regard it as having no geographical point of provision.

DISCUSSION

Introduction

60. First, whilst we accept that the codification of the remittance rules in Finance Act 2008 was clearly intended to address what HMRC regarded as "loopholes, flaws and anomalies" in the pre-existing rules, we do not accept the proposition that the new rules should be considered to be "anti-avoidance" rules and therefore interpreted more broadly than might otherwise be

the case. We agree that the provisions are to be interpreted in accordance with the normal rules of construction. These require us simply to enquire whether the statutory provisions, construed purposively, were intended to apply to these transactions, viewed realistically (see Lord Reed in *UBS* at [66], quoting Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 ITLR 454).

61. Mr Stone invited us, in the light of the explanatory notes accompanying the introduction of the legislation, to find that a purpose of the provisions is to tax offshore income and gains which are not "genuinely" kept offshore and which are "in effect" remitted to the UK "in such a manner that the individual has the use or enjoyment of them in the UK", examining the reality of the situation rather than its form. The difficulty with this argument (apart from the fact that it seeks to add a non-statutory gloss to the words chosen by Parliament) is that it is somewhat circular, begging as it does the question of what amounts to the use or enjoyment of offshore gains in the UK. This difficulty is further compounded by the fact that the legislation does specifically import the concept of "enjoyment" of goods or a service in subsections 809L(4) and (5) for the purposes of Conditions C and D but makes no such provision in relation to Condition A.

62. For reasons that will become apparent, we consider the Respondents' notice before addressing the other outstanding grounds of appeal.

Respondents' notice – the "service analysis"

63. We note that there are two elements to the "service" which is said by HMRC to have been provided by Centennial in the UK: its undertaking to procure that VL would not pursue the debt owed to it by IR, and its waiver of its rights against the taxpayers under the Indemnity in consequence of the payment made by SKS to Miles.

64. The first issue for us to decide is whether either element amounted to a "service… provided in the United Kingdom to or for the benefit of a relevant person" for the purposes of subsection 809L(2)(b). If we find that either of them did, then the second issue that arises is for us to decide whether Condition B in subsection 809L(3) is satisfied by any of the various means there set out.

65. So far as the first issue is concerned, it is agreed that each of the Taxpayers and IR was a "relevant person". The remaining questions therefore are:

(1) whether what occurred amounted to the provision of a service to (or for the benefit of) either or both of the Taxpayers and IR; and if it did,

(2) whether that service was provided in the UK.

66. Addressing the first point, the FTT's analysis was that it was "clear that Centennial has provided something of value to IR and the Appellants", even though the overall economic effect of the transactions was the same as if the Indemnity had been paid by the Taxpayers. They then said this:

> 135. Considering the definition of a "service" suggested by the Appellants from the *Richmond on Thames* decision "any self-employed economic activity, normally provided for remuneration" we do not think that it is stretching the meaning of "service" too far to suggest that this was some sort

> of financial service, in the same way as someone providing a third-party guarantee or credit protection insurance is providing a service.
>
> 136. From both the Appellants' and IR's perspective the "service" was commercial and for consideration, being the extinguishing of their obligations under the Indemnity (the Appellants) and the waiving of its debt obligations (IR). We think it is clear in this context that an agreement not to take an action or pursue a claim can be a "service".

67. We do not consider that any general definition of "service" can be derived from the *Richmond on Thames* decision. That case was concerned with whether the specific definition of "service" contained in the EU Services Directive applied to the activities of an individual who managed a house in multiple occupation which he owned. The definition in question referred to service as meaning "any self-employed economic activity, normally provided for remuneration, as referred to in article 50 of the Treaty"; and article 50 itself referred to services as being "normally provided for remuneration" and including "(a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions." Whilst the Court considered that "managing rented accommodation as a self-employed person and in return for the payment of rent" would, "in general terms, be regarded as providing a service", that was as far as it went in commenting on any general meaning for the word "service".

68. We note that the concept of what constitutes a service is sufficiently uncertain for the VAT legislation to provide that for VAT purposes "anything which is not a supply of goods but is done for a consideration… is a supply of services" (see section 5(2)(b) Value Added Tax Act 1994). Neither party urged this approach on us, and they were clearly right not to do so. The decision by the Privy Council in *Blue Lagoon v ARC* to which we were referred therefore does not assist, as it was decided by reference to the equivalent provision in Mauritius VAT legislation, and a passing comment by Lady Rose that "the obligation undertaken by Blue Lagoon *[to keep rooms available for guests sent by the tour operators]* might not comfortably be described as a 'service'" does not add anything to the present discussion.

69. Similarly, the comment by Lord Goff in *R v Preddy* that "it is not altogether natural to think of the simple making of a loan upon interest as itself constituting a service" does not cast any light on the matter as it was made in passing when considering the scope of a particular offence under the Theft Act 1978 which relied on an extended definition of "obtaining of services".

70. In his original skeleton argument before the FTT, Mr Stone argued that the OED definition of "service" as including "assistance or benefit provided to someone by a person or thing" and "an act of helping or benefiting another" was clearly broad enough to cover the transactions in this case, and there was no reason, in light of the purpose of the remittance rules, to narrow it down at all, for example to include a requirement that "service" should be commercial in character or require remuneration. We do not consider this approach pays adequate regard to the normal rules of interpretation – see [60] above.

71. We therefore need to address the meaning of "service" in section 809L as a matter of general construction, following the usual approach referred to above.

72. Like many words, "service" takes much of its meaning from the context in which it is used. In the context of the remittance code, which focuses on the enjoyment in the UK of benefits derived from foreign income and gains, we consider it is intended to refer to services in the ordinary sense of the word which are normally provided on a commercial basis in

exchange for payment. Services of hotels, restaurants, cleaners, garage mechanics and the like would be classic examples, where physical services are performed at a particular location. Services of a less tangible nature, such as the provision of professional advice or banking or financial services, would in our view also be services for this purpose (though the question of whether such services were "provided in the United Kingdom" would of course also need to be considered separately for the purposes of Condition A).

73. In the present case, the FTT saw the transactions as "some sort of financial service, in the same way as someone providing a third-party guarantee or credit protection insurance is providing a service". It also considered that "an agreement not to take an action or pursue a claim" (as in the present case) could be a service.

74. With respect, we disagree. We consider that the benefits conferred on the Taxpayers and IR as a result of the transactions did not amount to anything that would fall within the normal understanding of the word "service" and therefore it could not properly be said that any service was provided to either the Taxpayers or IR by virtue of them. If Parliament had intended that the conferring of <u>any</u> kind of benefit with a monetary value to the recipient should potentially give rise to a remittance, then it could easily have provided for that with appropriate wording, but it did not do so.

75. Furthermore, if a "service" is considered to have been provided in this case, the point referred to at [65(2)] above must then be considered. Mr Stone sought to persuade us that the place of provision of the service was in the UK for the reasons given by the FTT, essentially:

> (1) in relation to IR because the service amounted to the waiver (or undertaking to procure non-enforcement of) a debt owed by a UK-resident company to another UK-resident company under an arrangement which was governed by the law of England and Wales; and
>
> (2) in relation to the Taxpayers because (a) the governing law applicable to the contracts giving rise to the waiver was the law of England and Wales and (b) the effect of the service was to release them from a debt or obligation which, according to "the normal application of the situs rules", had a UK situs.

76. We discount the "governing law" point in each case as insignificant. Parties may adopt the law of England and Wales as the governing law in many situations where the connection with the UK is comparatively slight.

77. So far as the other stated reasons are concerned, it must be remembered that the statute requires a consideration of whether the service is "provided" in the UK, not of where its recipient or subject matter is to be found. Clearly, where the services are of a type which falls to be physically performed at a particular location there is little difficulty with this point – the location of performance will be the place where the service is "provided". But where that feature is absent, what can then be said about the location where the services are "provided"?

78. First, as Mr Firth pointed out, the only statutory enquiry required is whether the service is "provided in the United Kingdom". This leaves open the possibility that it might be "provided" in another jurisdiction, but also that there may be no geographical location that can properly be regarded as its place of provision.

79. The specific nature of the service may indicate such a location, for example telecommunication services supplied to an individual in a particular country to enable them to

communicate with others in that country or elsewhere are physically enjoyed by the individual in the country in question, wherever in the world their provider may be. But if an individual in the UK seeks professional advice from, say, a lawyer in an overseas jurisdiction, can it be said that the service is "provided in the United Kingdom" to that person if the advisor transmits their advice from overseas? Since the statutory wording focuses on the provision of the service (and therefore its provider) rather than its receipt (and therefore its recipient), we consider the better view is that in such cases if there is any geographical location in which the service is "provided", it is the location of the overseas adviser rather than that of the recipient in the UK.

80. The present case, if there was indeed a "service" being provided to (or for the benefit of) the Taxpayers and IR, is in our view analogous. It is common ground that any such "service" was provided by Centennial (a Luxembourg company) and accordingly if that "service" were being provided in any geographical location, it would in our view be Luxembourg rather than the UK. For this reason, even if we considered there to have been a "service" in this case which was provided to or for the benefit of the Taxpayers and/or IR, we would not consider that service to have been "provided in the United Kingdom".

81. We would also add that the very artificiality of the analysis required in such cases into the place of provision of the putative "services" further militates against the suggestion that transactions of this type were intended to be included within the meaning of "services" at all.

Remaining grounds of appeal

82. Having reached the above conclusion, and in light of HMRC's withdrawal of Ground 1 (the "property analysis") (see [40] above), their "Ground 3" (relevant debt) falls away, since HMRC no longer argue that there was any property falling within subsection 809L(2)(a) to which the "relevant debt" provisions could apply and we have found that there was no "service" falling within subsection 809L(2)(b) to which they could apply.

83. However, in case we are wrong, we express our views on Ground 3 before going on to consider Grounds 2 and 4.

Ground 3 – relevant debt

84. If we are wrong in finding that there was no "service" provided to IR and/or the Taxpayers in the United Kingdom, then the question arises as to whether Condition B is satisfied by reference to subsections 809L(3) & (7) (the "relevant debt" provisions).

85. The classic application of the relevant debt provisions is where a taxpayer incurs debt in acquiring property or services satisfying Condition A in subsection 809L(2) and then satisfies that debt overseas using money which is, or is derived from, foreign income or gains.

86. In the present case, HMRC argue that the "relevant debt" in question is the pre-existing debt owed by IR to VL. It is said that by injecting the €6.783 million into SKS and procuring its payment on to Miles, the Taxpayers have used either their foreign gains or money derived from those gains indirectly "in respect of" the debt owed by IR to Visage, because the payment that they made was ultimately used to settle that debt.

87. This argument is more than a development of the "classic" situation; it effectively stands it on its head. Subsection 809L(7) states that a "relevant debt" means "a debt that relates (wholly or in part, and directly or indirectly)" to either some property or service which is found to satisfy Condition A. How can it fairly be said that the debt owed by IR to VL "relates

(wholly or in part, and directly or indirectly) to" either (i) the "money or other property" which HMRC say was being "brought to, or received or used in the United Kingdom" or (ii) the "service" which they say was being "provided in the United Kingdom"? We agree with Mr Firth on this. The only sensible way to view matters is on the basis that the IR debt, as a pre-existing liability, cannot in any way be said to relate (wholly or in part, and directly or indirectly) to the payment which the Taxpayers subsequently agreed to make in order to secure their release under the Indemnity and the right to require VGL to prevent VL from enforcing its debt. Mr Firth gave the example of a contract for the sale of a house – where the contract clearly "relates" to the house but it would be an abuse of language to say that the house "relates" to the contract, however indirectly. Whilst this may not be an exact parallel, it illustrates the point clearly enough.

88. Thus even if we are wrong on the "service analysis", we consider the "relevant debt" provisions would have no application to the facts of this case.

Ground 2 – whether any property or service found to exist was derived from the foreign gain

89. The FTT held that as a matter of general principle, a "chargeable gain" was not the equivalent of the sale proceeds for a particular transaction, but was the "result of an arithmetical application of the chargeable gains rules." In short, it considered that "the sale proceeds from a share sale are not the same thing as the chargeable gain which has been generated." It pointed out that the legislation recognised that sale proceeds could alter over time, with sections 48 and 49 TCGA making explicit provision for later retrospective adjustments to be made, both upward and downward, in the amount of any chargeable gain to reflect events such as non-payment of deferred consideration or enforcement of certain contingent liabilities assumed as a term of the sale. Since the remittance provisions in section 809L had as their starting point the chargeable gains calculated in accordance with the provisions of the TCGA, any such adjustments ought to be reflected in the amount of any offshore chargeable gain which was considered to be subject to the remittance rules. They also said (and it was common ground before both the FTT and us) that if the Taxpayers had simply made payment under the Indemnity, the effect of that payment would have been to reduce the amount of the chargeable gain and, in that situation, there would have been no question of their payment being treated as a remittance.

90. Thus far, we agree. However, the FTT went on to consider whether the manner in which the Taxpayers had actually made payment (securing the waiver of their liabilities under the Indemnity rather than directly settling that liability) affected this view, and concluded that it did not.

91. On this point, we consider the FTT erred. We accept Mr Stone's argument (see [34] above) that the transactions that were entered into created rights and obligations which were distinct from the rights and liabilities under the original sale of shares and disposal of loan notes. The whole purpose of the structure adopted was to avoid there being a claim under the Indemnity, and that was its actual effect. We do not consider it is appropriate to regard this, as the FTT did, as simply a change of "form" on the basis that the ultimate source of the payment made by the Taxpayers remained the profit generated through the redemption of loan notes.

92. We therefore consider that if Condition A had been satisfied by virtue of either the "property analysis" or the "service analysis", then Condition B would have been satisfied by virtue of subsection 809L(3)(b).

Ground 4 – the "money analysis"

93. As summarised above, Mr Stone's argument was essentially that Condition A was satisfied because the €6.783 million was money that was "used in the United Kingdom" because of the effect its use had on the liabilities of the Taxpayers and IR in the UK; and Condition B was satisfied by virtue of subsection 809L(3)(a) because the money so used was in part the offshore chargeable gains of the Taxpayers, rather than simply being derived from those gains.

94. We note that this analysis, whilst advanced as an alternative to the "relevant debt" analysis (which depends on money being used outside the UK), throws up a very obvious point: Parliament clearly had in mind both the use of money inside and outside the UK, and catered separately for the two situations.

95. Turning to the language of the statute, we see two difficulties with Mr Stone's argument. First, his submission that the money was "used in the United Kingdom" even though it never came into the jurisdiction would require quite an extension to the normal concept of "use" of money in any particular place. Whilst some elasticity might be justified if it were needed to fill some obvious loophole which might otherwise appear, given the existence of the "relevant debt" provisions, we see no such loophole.

96. Even if we were wrong on the first point, the second difficulty faced by Mr Stone is his argument that the money was in part the chargeable gains previously made by the Taxpayers. As the FTT observed, "chargeable gain" is the result of an arithmetical application of the chargeable gain rules, deducting allowable expenditure from the capital sum derived from the disposal. It is not the same as the sale proceeds. Mr Stone invites us to gloss over this point by arguing that subsection 809L(3)(a) can only bear its intended meaning if we do so, since Parliament clearly meant something by including the words "or chargeable gains", and the most obvious meaning is to refer to the proceeds which derive from the chargeable gains in question.

97. We decline this invitation. We cannot envisage a situation in which money (being, as both sides agreed, included for this purpose within "property") "is (wholly or in part)" the chargeable gains under consideration, and to that extent we cannot see how subsection 809L(3)(a) can ever apply in relation to chargeable gains; however it clearly has potential application in respect of overseas income (where sums of money received overseas by a taxpayer can themselves be pure income profit), and subsection 809L(3)(b) caters specifically for the situation where money is derived from a chargeable gain – which is clearly the situation here. Thus whilst the statutory provisions contain some wording for which we can see no practical purpose, this does not in practice cause a problem because any perceived difficulty arising as a result is in fact addressed elsewhere.

98. We therefore reject HMRC's "money analysis".

The property analysis

99. As indicated at [40] above, in view of Mr Stone's withdrawal of this ground, we do not need to consider the matter further.

SUMMARY AND DISPOSITION

100. We consider that the FTT erred in law in accepting HMRC's "service analysis". We consider that no service was provided in the UK to the Taxpayers or IR by reason of the transactions under consideration (see [63] to [81] above).

101. If we are not correct in that view, we consider that the FTT also erred in its finding that any property or service was derived from the Taxpayers' chargeable gains (see [89] to [92] above).

102. We reject HMRC's "relevant debt" argument (see [84] to [88] above) and their "money analysis" (see [93] to [98] above).

103. We note that HMRC do not pursue their "property analysis" (see [40] above).

104. Accordingly, whilst we find that the FTT Decision contains errors of law, on a correct analysis we agree with the final result and accordingly the appeal is DISMISSED.

MR JUSTICE ADAM JOHNSON
JUDGE KEVIN POOLE

Release date: 25 March 2024

APPENDIX

TEXT OF SIDE LETTER DATED 23 DECEMBER 2010

Between: Raj Kumar Sehgal

[Address in UK given]

and

CENTENNIAL (LUXEMBOURG) S.à r.l.

1A, rue Thomas Edison L-1445 Strassen,

Grand-Duchy of Luxembourg

Date: 23 December 2010

Dear Sirs,

Agreement for the sale and purchase of the entire issued share capital of Visage Group Limited dated 25 February 2010

We refer to the agreement for the sale and purchase of the entire issued share capital of Visage Group Limited (**Initial Agreement**) dated 25 February 2010 between (1) the persons listed in part 3 of schedule 1 to the Initial Agreement and who are further listed in the Schedule to this letter, (2) Centennial (Luxembourg) S.à r.l. (a private limited liability company (société à responsabilité limité) incorporated under the laws of Luxembourg and having its registered office at 1A, rue Thomas Edison L-1445 Strassen, Grand-Duchy of Luxembourg, with a share capital of EUR 8,931,250.- Registered with the Luxembourg Register of Commerce and Companies under number B 120.255), and (3) Li & Fung (Trading) Ltd *[Chinese characters]* (a company incorporated under the laws of Hong Kong and having its registered office at Li & Fung Trading Limited, 11th Floor, LiFung Tower, 888 Cheung She Wan Road, Kowloon, Hong Kong SAR) and to the first supplemental agreement to the Initial Agreement dated 3 August 2010 between the same parties (**First Supplemental Agreement**).

Raj Sehgal is the Individual Sellers' Representative as defined in the Initial Agreement (as amended by the First Supplemental Agreement). Terms used but not defined in this letter shall have the meaning given to them in the Initial Agreement as amended by the First Supplemental Agreement.

In consideration of the payment of £1.00 by each party to the other and receipt of which each party acknowledges, each party to this letter (being (1) me, as the Individual Sellers' Representative and (2) Centennial (Luxembourg) S.à r.l. as the Purchaser, both as defined in the Initial Agreement (as amended by the First Supplemental Agreement) hereby agrees that, for the purposes of clause 8.1(d) of the Initial Agreement (as amended by the First Supplemental Agreement), the payment from SKS1 Limited (a company registered in Jersey under number 100807 and having its registered office at 13-14 Esplanade, St Helier, Jersey, JE1 1BD, Channel Islands) (**SKS1**) to Miles Fashion GmbH (a company registered in Germany having its registered office at Harckesheyde 91-93 D-22844 Norderstedt) (**Miles**) of an amount of €6,783,000 in payment of invoices issued by Miles on, prior to or after the date of this letter in respect of the sale of stock to SKS1, shall reduce the amounts owed to any member of the Group by Internacionale Retail Limited (**Internacionale**) as at the Completion Date (referred to as the Internactionale Retail Limited debts in clause 8.1(d)) by the sterling equivalent of €6,783,000 (as determined by the rate at which SKS1 converted sterling into Euros to make the invoice payment(s) (**Exchange Rate**)) and following:

1. receipt by Miles of the amount described above; and
2. Repayment by Internacionale to HM Revenue and Customs of the input VAT in respect of the sterling equivalent of €6,783,000 (as determined by the Exchange Rate) of Internacionale debt owed to members of the Group written down as described above and receipt by the Purchaser of evidence reasonably satisfactory to the Purchaser that such input VAT has been repaid,

then subject to the remainder of this letter

1. The Individual Sellers shall have no liability pursuant to clause 8.1(d)(i) of the Initial Agreement (as amended by the First Supplemental Agreement) and the Purchaser hereby releases the Individual Sellers from all and any existing or potential claims pursuant to clause 8.1(d)(i) of the Initial Agreement (as amended by the First Supplemental Agreement); and

2. Internacionale's obligation to make payment to Visage Limited in respect of any unpaid invoices issued by Visage Limited to Internacionale on or before 28 February 2010 shall be reduced by the amount of the sterling equivalent of €6,783,000 (as determined by the Exchange Rate) and the Purchaser shall procure that Visage Limited shall not pursue Internacionale for such debts to the extent that they are not in excess of the sterling equivalent of €6,783,000 (as determined by the Exchange Rate).

Notwithstanding any of the foregoing, in the event that Miles or another member of the Group or the Purchaser's Group makes payment or repayment to SKS1, a related party of SKS1 or an insolvency officeholder of SKS1 of an amount in connection with the payment by SKS1 to Miles referred to above following the payment by SKS1 to Miles being challenged for any reason by either SKS1 or any insolvency officeholder as a result of the insolvency of SKS1 or otherwise (including as a preference payment or a transaction at an undervalue or any analogous provisions which may be applicable to SKS1) (**Repaid Amount**), the above provisions of this letter shall cease to be of any effect in respect of the Repaid Amount and the Individual Sellers' liability to indemnify the Purchaser pursuant to clause 8.1(d)(i) of the Initial Agreement (as amended by the First Supplemental Agreement) shall remain in place as if the Repaid Amount had not been paid by SKS1. For the avoidance of doubt, any repayment by Miles or another member of the Group or the Purchaser's Group following request or demand from SKS1, a related party of SKS1 or an insolvency officeholder of SKS1 shall be in its sole discretion and neither Miles nor any other member of the Group or the Purchaser's Group shall be obliged to defend or test any request for repayment.

Each party to this letter agrees that they shall, at the request of the other and at their own expense, promptly execute and sign all such deeds and documents and do all such things as may be reasonably necessary in order to give effect to this letter.

This letter may be executed in any number of counterparts and by the parties to it on separate counterparts and each such counterpart shall constitute an original of this letter but all of which together constitute one and the same instrument. This letter shall not be effective until each party has executed at least one counterpart.

Other than the Individual Sellers acting in their capacity as such, the parties hereto do not intend that any term of this letter shall be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person who is not a signatory to this letter.

The construction, validity and performance of this letter and all non-contractual obligations arising from or connected with this letter shall be governed by the laws of England and Wales. The parties to this letter irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction over any claim or matter arising under or in connection with this letter and that accordingly any proceedings in respect of any such claim or matter may be brought in such court.

Executed as a deed on the date hereof.

Schedule 1

Schedule to the First Supplemental Agreement

BOSIF Investments Limited

With registered office at Level 1, Citymark, 150 Fountainbridge, Edinburgh, Lothian EH3 9PE and with registered number SC3113300

Jeremy Hacking Scholes

[UK address given]

Jeremy Hacking Scholes and Susan Scholes (as trustees of the Scholes Family Trust 2010)

[UK "care of" address given]
Anita Mehan
[UK address given]
Raj Kumar Sehgal
[UK address given]
Sanjeev Mehan
[UK address given]