[2019] UKFTT 0406 (TC)

TC07221

Appeal number: TC/2017/5191

***CORPORATION TAX – tax on capital gains – pre-entry loss rules: Sch7A TCGA – para 1(7) meaning of "immediately" – meaning of "had assets"; application of* Ramsay.**

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANO (No.1) LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at The Rolls Building on 14-16 May 2019

David Ewart QC and Quinlan Windle instructed by BDO LLP for the Appellant

Kevin Prosser QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns the operation of the pre-entry loss rules in Sch 7A TCGA 1992. Those provisions restrict the ability to use capital losses which have accrued or arisen to a company before it joins a group of companies. They do not, however, restrict the use of a group's losses against the capital gains of a company which joins the group after those losses have accrued or arisen.

2. Thus it may be said that the provisions restrict the use of “brought in” losses but not the use of losses against brought in gains. They are sometimes referred to as affecting “bought in losses”, but the schedule contains nothing which requires the losses to have been paid for.

3. The appeal relates to a series of transactions which were intended to enable the capital gains of companies in the group of companies whose holding company was O&H Holdings Ltd (“the O&H group”) to be offset against allowable losses of companies in the group of companies whose holding company was headed by the appellant (“the ANO group”).

4. Had the O&H group (the gains group) acquired the ANO group (the loss group) schedule 7A would have applied to restrict the use of the ANO group’s losses, but if the ANO group acquired the O&H group schedule 7A would not have applied to restrict the use of the ANO group’s losses. The transactions were structured with the intention that they should, for the purposes of schedule 7A, be treated as the latter – the acquisition by the loss group of the gains group.

5. The transactions involved the insertion of a new holding company above ANO before the acquisition of O&H. Paragraph 1(7) Schedule 7A has the effect that if two conditions are satisfied the group headed by the new holding company is treated as the same as the ANO group. Therefore if paragraph 1(7) applied the use of ANO’s losses against O&H’s gains would not be restricted since, in effect, the loss group would have acquired the gains group. The issue in this appeal was whether those conditions had been satisfied.

6. The appeal is made against amendments to ANO’s corporation tax return for the accounting period ending 28 February 2005 made by a closure notice issued by HMRC on 3 February 2017. The conclusion in that notice is that the conditions in

paragraph 1(7) schedule 7A were not satisfied with the result that ANO's losses could not be set against the O&H group's capital gains.

7. The notice of appeal contained two grounds of appeal:

(i) that the conditions of paragraph 1(7) were satisfied, so that schedule 7A did not apply to deny the use of ANO's capital losses, and

(ii) that the capital gains which HMRC was seeking to tax were overstated as they were notional gains based on market valuations which had not been agreed.

8. The parties agreed that the question of valuation should be left in abeyance pending the resolution of ground (1). This decision is therefore concerned only with ground 1 and is to that extent a preliminary decision.

The Evidence.

9. I heard evidence from Mr Remedios who was at material times a tax director of the BDO LLP and a member of the tax team advising the O&H group and its shareholders in relation to the transactions relevant to this appeal. I also had an unopposed witness statement from Eli Shahmoon who was the son of one of the major shareholders in O&H and had worked in the O&H business since 1998. I had bundles of copy correspondence and transactional documents.

Findings of fact.

10. There was no dispute about the nature or timing of the transactions. These took place in the eight Steps described below. There was a dispute related to the period between Step 5 and Step 6, and in relation to how likely it was that once Step 5 had been completed Step 6 would follow. I start with the uncontentious facts.

(a) the uncontentious facts

11. O&H was the parent company of a property development group. Its shares were owned by the Gabbay and Shahmoon families in equal portions. In 2003 it was envisaged that the focus of the group would be changed by selling some smaller properties and focusing on larger ones. But many of the smaller properties would on disposal realise capital gains against which no relief was available. At a meeting in May 2003 between Eli Shahmoom, Mr Remedios and Edward Margrin, a partner in BDO, there was a discussion which started with the possibility that the O&H group might purchase a company or group with capital losses against which the O&H gains which would arise on the disposal of the smaller properties could be set. Advice was given that schedule 7A would deny that benefit but it would not do so if a loss group acquired the O&H group.

12. Mr Shahmoon was worried by the idea that the O&H group should be acquired by a loss group (even allowing for the supposition that after the acquisition the loss group's shareholders will be those of the O&H group) because a loss group could have disgruntled creditors who would then have access to the value of O&H or unexpected liabilities. BDO proposed a structure under which a new holding company

would be formed which would come to own both O&H and the loss group and would not involve the loss group joining a new group for the purposes of schedule 7A.

13. They were then further meetings in May and June 2003 to discuss more of the details. In June 2003 BDO were instructed to commence the search for a loss group with usable capital losses of £100 million or more. In July Mr Remedios was sent information about the ANO group by Ernst & Young.

14. Mr Remedios indicated that the planning for the set off of the O&H group's latent gains against ANO group's losses was combined with some personal tax planning for Mr and Mrs David Gabbay (who together owned 30.6% of the O&H shares, and Mr and Mrs Frank Shahmoom (who together owned 29.2% of the O&H shares) (the remaining shares being held by the children in each family to bring each family's holding to 50%). Mr Remedios confirmed that the children were aware of what was planned and gave their consent to the Steps (such as Step 7) which required it.

15. On 16 July 2003 as part of that planning David Gabbay acquired all the shares or Chalina Holdings Ltd ("Chalina") and Frank Shahmoon acquired all the shares in Brightstar Ventures Ltd ("Brightstar").

16. Further information was received in about ANO from E&Y in July 2003 and there were further meetings between BDO and O&H about the structure of the acquisition of ANO.

17. In August 2003 a price for the shares in ANO was agreed between E&Y and David Gabbay and Eli Shahmoon. There followed due diligence and work on the detail of the acquisition of ANO (this was complicated by the fact that it had been a publicly quoted company which may have had claims against its previous advisers).

18. In November 2003 an early draft of the step plan was sent to O&H by BDO. Mr Remedios said that the plan would have been refined in later discussion and it would have been fairly final form by 1 February 2004 but he did not say that what had been suggested in the November version was materially different from what thereafter took place. I conclude that it was not.

19. The following transactions then took place

20. Step A1. On 5 December 2003 David Gabbay transferred his shares in Chalina to the Gabbay Trust. At the same time Eli Shahmoon transferred his shares in Brightstar to the Shahmoon Trust.

21. Step B1. On 5 December 2003 Mr and Mrs David Gabbay transferred their shares in O&H (being 30.6% of its ordinary share capital) to the Gabbay trust and Mr and Mrs Frank Shahmoon transferred their shares in O&H (being 29.2% of its ordinary share capital) to the Shahmoon Trust.

22. Step C1 On 6 February 2004 Chalina and Brightstar each borrowed £1.85 million from O&H.

23. Step 2. On Wednesday, 18 February 2004 Challina and Brightstar used the money borrowed from O&H to acquire all the shares in ANO at a total cost of some £3.7m.

24. Step 3. On Friday, 20 February 2004 Chalina and Brightstar each acquired one of the two issued £1 shares in Style Services Group Ltd ("SSG"), a newly incorporated BVI Company.

25. Step 4. On Monday, 23 February 2004 the trustees of the Gabbay Trust transferred their O&H shares to Chalina and the trustees of the Shahmoon Trust transferred their O&H shares to Brightstar.

26. Step 5. On Wednesday, 25 February 2004 Chalina and Brightstar transferred their shares in ANO to SSG in return for debt of £3.95 million which was left outstanding.

27. Step 6. On Friday 27th of February 2004 Challina and Bright Star transferred their respective shareholdings in O&H to SSG in return for the issue of shares in SSG.

28. Step 7. Also on Friday, 27 February 2004 SSG subscribed for new ordinary shares in O&H so as to increase its holding of O&H's ordinary share capital to over 75% (so that O&H might be become might be a member of the same capital gains tax group as SSG.)

29. Step 8a. On Friday 5 March 2004 SSG transferred is its shares in ANO to O&H for £3.95 million.

30. Mr Remedios told me that the purpose of Step 8a was a housekeeping exercise to clear (i) the loans which had arisen when Chalina and Brightstar borrowed to buy ANO at step 2 (ii) the debt which had arisen at Step 5 when SSG bought ANO. Thus after step 8a O&H would pay SSG £3.95 million; SSG would have funds to repay Chalina and Brightstar £3.95 million, and Chalina and Brightstar would repay O&H £3 .7 million.

31. It is noteworthy that after Step 8a ANO lay under O&H as it would if it had been acquired by O&H. It was not suggested to me that Step 8a should be regarded as part of a preordained series of transactions designed to have that effect.

32. There followed disposals of assets by companies in the O&H group. Elections were made under section 171A TCGA to treat those disposals as made by ANO. In its corporation tax return for the accounting period ending 28 February 2005 ANO claimed to deduct its allowable losses from the capital gains on those disposals.

33. HMRC enquired into ANO's return and concluded that its capital losses could not be deducted from the O&H gains because of the provisions of Schedule 7A.

(b) Events in the period between Step 5 and Step 6 and the likelihood that Step 6 would follow the completion of Step 5.

34. Mr Remedios said that on 25 February 2003, after the completion of Step 5 (SSG's acquisition of ANO) he gave some thought to Step 6 (SSG's acquisition of 59.8% of O&H) and Step 7 (the issue of further shares by O&H to SSG to make O&H a 75% subsidiary of SSG). He said that although it had been decided what type of shares O&H would issue to SSG "what hadn't been looked at ... was how this was going to be funded by the new company [SSG]". SSG did not have any funds to make the subscription. That issue, he said, had been overlooked in the planning: it was a blunder in the step plan.

35. That evening at 8.35pm Mr Remedios sent an e-mail to Mr Magrin headed "Step 7 problem" In that e-mail he said that this was the step where additional shares of a new class would be issued to SSG to bring its ordinary share capital in O&H up to 75%. He writes that he had calculated that some £125,000 of new par value shares had to be issued, but where would SSG get that from? He sets out a possible solution in which: (i) the subscription price was left outstanding, (ii) in the following step 8a, ANO would be sold by SSG to O&H for a £125,000 profit and (iii) the excess funds representing that profit would be used by SSG to settle the subscription debt to O&H.

36. In his witness statement Mr Remedios related that he e-mailed Mr Magrin about the problem and says "unless a share subscription or some other technique could be used to achieve a 75% grouping with O&H the matter could not proceed any further". In his oral evidence he said that even though £3.9 million had at that stage been spent on acquiring been spent on acquiring ANO he was not keen to proceed with Step 6 unless a solution could be found for Step 7.

37. Mr Remedios said that he met Mr Magrin several times on 26 February and discussed the issue with him. He knew that Mr Mangrin would continue to think about the issue. Mr Remedios told me that he had prepared instructions to counsel on the next day, the 26th, setting out what he thought were possible solutions and that Mr Magrin had a telephone conversation with counsel before 8 am on 27 February.

38. Mr Magrin e-mailed Mr Remedios at 8:17am on 27 February having spoken to counsel. In his e-mail he said:

> "... 2. Re Step 7 which must take place before step 8a:
>
> 3. The £125k new shares of £1 each must be 1p paid. The balance can be paid at any time. They should be redeemable at par not 1p each.
>
> 4. It is imperative that at Step 7 the new shares are issued before step 8a ...".

39. There are two oddities in the account in the last three paragraphs. The first is that even though Mr Remedios said that it had been settled ithat O&H would issue shares to SSG to increase its ordinary shareholding to 75%, he speaks in his witness statement of a share subscription (the very thing which had been agreed) as a solution to the funding problem (and I do not think he was contemplating a share subscription in SSG by Chalinor and Brightstar since that would not have achieved the 75% grouping). The second oddity is that the e-mail from Mr Magrin appears to be written against the background of the presentation of one and only one solution mechanism to counsel - or at least to Mr Magrin by Mr Remedios. But of course it may be that there

had been an earlier discussion between them reducing the possibilities to one. It is a long time ago.

40. Mr Remedios said that because of the concern about the funding of SSG's subscription for the extra O&H shares at Step 7, Step 6 (SSG's acquisition of O&H) had been delayed. He said that he saw no reason not to delay Step 6 and "did not want to get into a situation where he needed to reverse something [he had] done to solve the problem".

41. Later in his evidence Mr Remedios said that if the funding problem had proved insuperable it might have been decided to abandon the project and to sell SSG complete with its subsidiary ANO. He said he had been told it could have been sold for £3 million. Had they gone ahead with Step 6 - putting 59.6% of O&H under SSG - that would have blocked that possibility. That, he said it was among the considerations he had had in delaying a Step 6.

42. BDO Fidecs Trust Company was a trustee of the Gabbay and Shahmoon trusts, and an employee of BDO Fidecs Management Limited, Liz Plummer, was a director of Chalina and also of Brightstar. Fidecs at that time was associated with BDO but later left the BDO network.

43. Mr Remedios said that in the transactions which followed Step 2 (the acquisition of ANO by Chalina and Brightstar), the trustees of the two trusts and the directors of those companies were not aware of the future intended steps, although they were aware that certain transactions would be presented for their approval on documentation which would be provided by BDO in advance after each prior transaction had been completed.

44. In the days preceding 26 February 2004 Mr Remedios had been in e-mail contact with Liz Plummer in relation to the earlier steps: thus for example, on 23 February he had written to her in relation to Step 3 (the exchange by the trusts of shares in O&H for shares in Chalina and Brightstar) saying (in capital letters):

> "To Be Done Today On Each Company"

and setting out: a change to the Articles, the issue of shares to the two trusts in exchange for the O&H shares, and a further alteration to the Articles. In his e-mail he concludes "when this is done please fax me the relevant paperwork to enable me to confirm the steps".

45. Mr Remedios said that he was not telling Liz Plummer what had to be done. She "in her fiduciary capacity will do it and she will tell me she cannot do it if there was a problem with it".

46. On 24 February he emailed Liz Plummer asking her to confirm that the structure at that stage conformed to his expectations and enclosing a diagram illustrating the expected structure against which the position could be checked. He asked for the documentation to be forwarded to him so that he could check it.

47. In like manner on 25 February 2004 Mr Remedios wrote to Liz Plummer about Step 5: "In this step, Brightstar and Chalina will sell [ANO] to [SSG] ... The contract of sale is in the form of a letter… First Brightstar needs to hold a board meeting to consider and approve the letter. IT IS IMPORTANT that the steps take place in this order and at the set times". He says that he is arranging for his colleague, Ian McFarlane, to be at her offices on 26 February to go through the remaining transactions.

48. Mr Remedios described in Liz Plummer's job has being to consider the drafts supplied and effectively to treat them as an agenda for the meeting. Ultimately, he said, she could have said no, but he assumed she would go ahead.

49. It was clear to me that Mr Remedios tightly and assiduously controlled the movement through the Steps in the plan and that he had no expectation at any time that the Steps he told Fidecs to complete would not be undertaken. Indeed his later deferral of Step 6 indicated his control over the process.

50. There were email exchanges between Mr Remedios and Fidecs on 26 February in relation to the documentation for Step 6. It appeared that Mr Remedios had sent draft documents by email to Fidecs and asked for them to be converted into a form which could be signed. The drafts include draft Board Minutes bearing the date 26 February, and at 6.21 that evening Liz Plummer reported to Mr Remedios that the documents had been approved and were ready for signature. On 27 February Fidecs sent Mr Remedios a package of executed documents which included Board minutes dated 27 February.

51. Mr Remedios said that after his concerns with the funding of Step 7 had arisen (and a decision made to delay Step 6) he would "possibly" have phoned the people in Gibraltar. And although his colleague Ian McFarlane was busy tidying up the documentation for Step 6 in Gibraltar he "didn't stop him amending draft documents" but did not give the go-ahead. [He] would have told them to wait. But there was nothing wrong with getting everything ready in case we went ahead on that basis."

52. The change in the date of the board resolution from the draft (to be dated 26 February) to the signed version dated 27 February indicated to me that there was an unexpected rather than a planned delay in the execution of Step 6. The confirmation from Fidecs at 6.21pm on 26 February indicated to me that it was not a crucial part of the plan that they be signed on 26 February, and that the delay might have had, at least in part, administrative causes. I concluded that the funding issue was not regarded as an insuperable or very serious problem: it was more a question of which route to take.

53. In the bundle before me there was a copy of an e-mail from Paul Nicholson of O&H to Liz Plummer indicating that, as part of [Mr Remedios's transactions], he needed to transfer £2 million to Gibraltar on 27 February "for O&H". Mr Remedios said that this was not to do with the funding for Step 7. It was for something else.

54. On the morning of 27 February Mr Remedios sent Liz Plummer a diagram showing the structure after the completion of Step 6 and asking for confirmation that that indeed was the position. In the afternoon of that day Step 7 took place. I was not told how the £1,250 share subscription monies were funded.

55. Mr Prosser asked me to reject Mr Remedios' evidence that before 25 February the BDO team had not considered how SSG would fund the £125,000 subscription for the Step 7 O&H shares. Before spending £3.9 million on ANO this detail would surely have been considered.

56. He argues that there was no "blunder" and that either (i) the decision had already been made as to how to fund the subscription and accordingly that the e-mail of 25 February 2004 (at 8:35pm) was a put up job, or (ii) that a deliberate decision had been made as part of the tax planning to insert some artificial uncertainty (an anti-Ramsey device) after Step 6 by leaving the decision as to how to fund the subscription until the 25th in the knowledge that some way would almost certainly have been found.

57. He notes in this context that Mr Remedios told me that given time he would have found a solution to Step 7. He argues that the continuation of the preparation, in Gibraltar, of the documentation for Step 6 on 26 February by Ian MacFarlane and Mr Remedios' recollection that it was only "possible" that he had phoned Gibraltar to put things on hold, show that there was no real possibility that Step 6 would not take place.

58. Mr Ewart says that it would be fanciful to think that a professional firm would conspire to pretend that there was a problem when there was not, and it he argues that the use of "problem" in the 25 February e-mail points against any conclusion that the issue of funding the subscription had deliberately been left unconsidered artificially to provide to provide uncertainty.

59. I did not think it likely that Mr Remdios' e-mail of 25 February "Step 7 problem" was part of a conspiracy intended to give the false impression that a problem had arisen when in fact the solution to that problem was already known. The e-mail was sent at 8:35pm when small matters may loom large. It suggests a possible solution which may have had some small downside but nothing compared to giving up the transaction.

60. However, I believe that at some time before the end of 26 February Mr Magrin and Mr Remedios had decided on the route to be taken and that Mr Magrin's conference with counsel on the morning of 27 February related only to the chosen route. That is because of the terms of Mr Mangin's e-mail at 8:17am that day (see [38] above).

61. I also consider Mr Remedios' consideration of the funding issue did contribute to a temporary halt in the march of the Steps. That is because the draft for the board minutes for Step 6 (which were being readied for execution in Gibraltar) bore the date 26 February, but the actual minutes were dated 27 February.

62. I consider it possible that the issue of how SSG would fund the subscription at Step 7 had been deliberately left uncertain rather than being overlooked. These transactions involved many steps in many different tax and company law considerations; they also involve substantial sums of money. That suggests that great care would be taken over the detail - and Mr Remedios's assiduous control and inspection of the transaction documents attested to the care being taken – and that made omissions unlikely. But sometimes, even in the best laid plans, omissions happen and it is in my view possible that the question of whence SSG would get the funds for the subscription had not been addressed (and no doubt the constraints of section 151 Companies Act 1985 would have caused difficulty or delay with a loan from O&H).

63. Nevertheless, I do not believe that there was any practical likelihood that Step 6 would not be implemented because of the concern about the funding of Step 7. Mr Remedios said that if he could not find a solution to the funding of Step 7, SSG could have been sold. I think that was highly unlikely. Given the time and money invested in the transactions up to that point, the downside of any scheme for the funding of SSG's subscription would have to be very large to lead that result.

64. The likelihood of finding a source of funds was in my view great. The e-mail of 26 February from Paul Nicholson about the payment of £2 million indicated to me that there were corners of the empire in which funds might be available which could fund £125,000; even if that were not the case would be the possibility of SSG borrowing money secured on the ANO shares, and after Step 6 on the O&H shares. A dividend from O&H after Step 6 would have provided funds (although at a tax cost for family members). The subscription price could have been left outstanding until funds became available. The route actually adopted would suffice. None of these would require Step 6 not to take place. Some routes might have had a cost - in tax or otherwise, but I cannot see how that cost would be greater than the fees and expenses already incurred and that it would outweigh the hoped-for benefits of the capital losses of ANO. I did not believe that Mr Remedios seriously considered selling SSG with ANO beneath it: as he said in answer to another question all this was 16 years ago; and I think that that memory of what one actually thought at that distance is not always good.

65. Thus, whether or not as part of the planning for the Steps it was decided to leave the question of the funding of SSG's subscription to be decided at the time, and even if not planning what to do was an oversight, it seems to me that it was after Step 5 virtually certain that Step 6 would take place.

The statutory provisions.

66. Section 171 TCGA permits assets to be transferred between companies which are members of the same group on a no gain no loss basis for the purposes of corporation tax on chargeable gains ("CGT").

67. Section 170 TCGA defines a CGT group as a principal company and all its 75% subsidiaries. A company is the 75% subsidiary of another if 75% of its "ordinary

share capital" is owned by the other or if it is the 75% subsidiary of one of those subsidiaries and so on (but subject to a limitation to effective 51% subsidiaries).

68. Thus if A and B are members of a CGT group and A has an asset of standing at a loss and B has an asset standing at a gain, the loss-making asset can be transferred to B from A, and B can sell that asset and its gain making asset and any resulting allowable loss may be set against the gain.

69. Section 171A TCGA short-circuits that. It permits A and B to elect to be treated as if an asset disposed of by A had been transferred to B "immediately before the disposal" so that any loss or gain on the disposal arises to B which may use the loss against its gains or cover the gain with its losses.

70. These provisions provided scope for tax saving. If group A had an asset, X, standing at a gain which was to be disposed of, the acquisition of a loss company by the group - a company holding an asset standing at a loss or with a carried forward loss - would enable the gain on the disposal of X to be covered by the losses of the loss company.

71. Schedule 7A, inserted into the TCGA in 1993, restricted the ability to make such savings. It has effect in relation to any "pre-entry" losses of a company which joined a group of companies. A pre-entry loss was a loss which accrued before the company became a member of that group (or the portion of a loss on the disposal of an asset it held before it joined a group attributable to the period it was held before joining). In outline the Schedule provides that such a pre-entry loss could not be set against gains on assets already held by members of the group which the company joined.

72. Section 170 contains rules for the identification of a group where the principal company of one group becomes a member of another group (e.g. on a takeover) section 170(10) provides:

> "(10) For the purposes of this section and sections 171 to 181, a group remains the same group so long as the same company remains the principal company of the group, and if at any time the principal company of a group becomes a member of another group, the first group and the other group shall be regarded as the same, and the question whether or not a company has ceased to be a member of a group shall be determined accordingly."

73. Subparagraphs 1(6) and (7) Schedule 7A address the effects of section 170(10) in relation to the situation in which one group is acquired by another on the basis[1] that its effect would be that if a gain group acquired a loss group the two groups would be treated by section 170(10) as the same group, and as a result losses made by companies which were members of the loss group would not be pre-entry losses in relation to the gains group (since it would be the same group as the gains group) and so could be used freely. Paragraph 1(6) provided:

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[1] See [73 to 80] *Greathey Investments & Ors v HMRC [2013] UKFTT 461 (TC)*

"(6) Subject to so much of subparagraph (6) of paragraph 9 below as requires groups of companies to be treated as separate groups for the purposes of that paragraph, if -

(a) the principal company of a group of companies ("the first group") has at any time become a member of another group ("the second group") so that the two groups are treated as the same by virtue of subsection (10) of subsection of section 170, and

(b) the second group, together in pursuance of that subsection of the first group, is the relevant group,

then, except where subsection (7) below applies, the members of the first group shall be treated for the purposes of this Schedule as having become members of the relevant group at that time, and not by virtue of that subsection that the times when they became members of the first group."

74. Since the members of the first group are to be treated as having become members of the combined group when the acquisition occurred, losses arising prior to the takeover would be pre-entry losses and would be restricted.

75. Paragraph 1(7) provided an exception to paragraph 1(6):

"(7) This subparagraph applies where -

(a) the persons who immediately before the time when the principal company of the first group became a member of the second group owned the shares comprised in the issued share capital of the principal company of the first group are the same as the persons who, immediately after that time, owned the shares comprised in the issued share capital of the principal company of the relevant group; and

(b) the company which is the principal company of the relevant group immediately after that time -

(i) was not the principal company of any group immediately before that time; and

(ii) immediately after that time had assets consisting entirely, or almost entirely, of shares comprised in the issued share capital of the principal company of the first group."

The Application of Schedule 7A in this appeal.

76. It is clear that if O&H had acquired ANO directly, the ANO group companies would be treated by paragraph 1(6) as having joined the O&H group at the time of the acquisition. As a result their losses (realised and latent) would be pre-entry losses and not utilisable against gains of the O&H group companies.

77. It is also clear that if ANO had acquired O&H, Schedule 7A would not restrict to set off of losses incurred by ANO against gains on assets of former O&H group companies.

78. But the steps actually undertaken were different. At Step 5 SSG was put on top of ANO. At that stage the ANO companies became members of the SSG group (of which SSG was the principal company). Thus, as regards the SSG group the effect of paragraph 1(6) would be that the ANO losses would be pre-entry losses to the SSG group. That would mean that when O&H became a member of the SSG group, gains on its disposals could not be covered by ANO losses since those losses would be pre-entry to the SSG group.

79. ANO contends that paragraph 1(7) avoids this result. It says that:

> (i) immediately before the time it became a member of the SSG group (Step 5) its shareholders were Chalina and Brightstar, and
>
> (ii) immediately after that time the shareholders of SSG were the same persons,

and as a result paragraph 1(7) (a) is satisfied;

and,

> (i) immediately before Step 5 SSG was not the principal company of any group, and
>
> (ii) immediately after Step 5 SSG's assets were £2 plus the shares ANO - in other words they consisted almost entirely of the shares in ANO,

and as a result paragraph 1(7)(b) is satisfied.

80. ANO say that because paragraph 1(7) applies paragraph 1(6) is disapplied and leaves section 170(10) free to treat the ANO group losses as not being pre-entry to the SSG/ANO group and so usable against the gains of the O&H group after O&H became a 75% subsidiary of SSG.

81. HMRC say that the way in which the O&H shares became held by SSG was such that paragraph 1(7) did not apply, and that as a result the losses of ANO are pre-entry by reference to the SSG group and not utilisable against the O&H gains. They say that paragraph 1(7) does not apply for two reasons:

> (i) that in the statutory context, purposively construed, "immediately after" in paragraph (b) does not mean the very instant after, but long enough to encompass SSG's acquisition of the O&H shares in Step 6 with the result that "immediately after" SSG's acquisition of the ANO shares, SSG had assets (namely the O&H shares) which did not consist entirely of shares or almost entirely of shares in ANO; and
>
> (ii) that, again in the statutory context purposively construed, and in relation to preordained Steps, which they say were preordained, SSG could be said to have "had assets" other than ANO immediately after the acquisition of ANO even if "immediately" meant that the very instant after that acquisition.

82. No argument was made that the shares issued at Step 7 were not ordinary share capital or that Step 8a was to be considered as part of a preordained scheme such that

the transactions could be said, for the purposes of paragraph 1(7) to be the acquisition of ANO by O&H.

Preordained transactions

83. I have set out above my findings in relation to the likelihood that the Steps would take place as planned. In this section I address the question of whether that finding means that they can be characterised for a relevant purpose as pre ordained.

84. In *Craven v White* 62 TC 168*,* Lord Keith, confining himself to cases broadly similar in character to *Furniss v Dawson* [1984]AC 474, at [171E] addressed the circumstances under which transactions in a series might be regarded as preordained. He said that transactions in a series could be regarded as preordained "if, but only if, at a time the first of them is entered into the taxpayer is in a position for all practical purposes to secure that the second also entered into." [172E].

85. Lord Oliver, having described the essence of *Furniss* as lying in the approach of the court to a combination of events designed to produce an actual result quite different from that which for fiscal purposes it was intended to display [193E], regarded the principle as no wider than that where successive transactions are so indissolubly linked together, both in fact and intention, as to be properly and realistically viewed as a composite whole, the court is bound so to regard them [199F"]: "where there is (i) a scheme involving a series of transactions plus (ii) and expectation that it will be carried through from beginning to end and (iii) no likelihood that it will not, the court is bound ... to look at the composite ... as a single transaction [202G-H]. That involved more than simply being planned or thought out in advance but a degree of certainty and control over the end result at the time the intermediate steps taken [268] and "no sensible or genuine interruption" [206F]. Lord Goff, in the minority so far as one of the appeals was concerned, thought it was not necessary that the details of the second step be settled when the first one was taken nor that they should correspond exactly with those planned in advance [212F]. Lord Jauncey adopted a test of there being no real likelihood of a series of transactions not being carried through and that they were carried through without genuine interruption [221G].

86. I concluded that Steps 4, 5, and 6 were preordained as that expression was relevant in *Furniss*. There was an expectation that they would, and no real likelihood that they would not, be carried out and there was no significant interruption in the planned steps. Mr Remedios exercised a degree of control adequate to ensure that they took place as planned. Although it was not ANO or SSG who secured that Step 6 was entered into after Step 5 Mr Remedios did so, and I do not think that any lack of knowledge of the plan by those whom it affected can, where their consent was almost certain to be obtained, prevent the steps from being pre ordained for this purpose.

"Immediately after" – ordinary meaning and context

87. Mr Prosser relied on four cases as showing that the expressions "immediately before" and "immediately after" took their meaning from their context. In the context

of Schedule 7A he said that the expression should be interpreted as meaning that there was no lapse of time of any practical or commercial significance. The lapse of time between SSG's acquisition of ANO and its acquisition of the O&H shares had no commercial significance.

88. *Litster v Forth Dry Dock Co Ltd* [1990] 1AC 546 concerned the application of the Transfer of Undertakings regulations to employees whose employment had been terminated one hour before the completion of the transfer of their employer's undertaking to another company. The regulations gave protection to employees "employed immediately before the transfer". The regulations had been made to give effect to an EU Directive whose effect had been held by the ECJ to apply to employees who were dismissed for a reason connected with the transfer even if not at the very instant before the transfer. Lords Keith and Templeman read into the regulation words to give effect to EU law, Lord Templeman saying that if this had not been possible the regulations would have failed in their object (558F). Lord Oliver considered the meaning of "immediately before" in the regulations. He said (567G):

> "the expression "immediately before" is one which takes its meaning from its context, but in its ordinary signification it involves the notion that there is, between two relevant events, no intervening space, lapse of time or event of any significance."

But he did not consider that even a flexible construction of these words could give them the meaning required by the Directive (567A - G); instead new words had to be read into the regulation to give effect to the Directive (577C).

89. Mr Prosser relies on Lord Oliver's formulation of the ordinary meaning of "immediately before" and his statement that the words take their meaning from that context. In the context of paragraph 1(7) he says that "immediately after" should be construed as meaning: without any lapse of time of any practical significance.

90. Mr Ewart notes that Lord Oliver's formulation "no intervening space, lapse of time or event of any significance" specifies three things, any of one of which destroys the necessary immediacy. Thus even if there is no event of any significance, if there is a lapse of time there is no immediacy. He also asks whether "of any significance" only qualifies only the word "event".

91. That a one hour gap was not short enough or sufficiently devoid of events to permit the termination of the employees' employment to persuade Lords Keith and Oliver that the employees were not employed "immediately before the transfer", and given that Lord Oliver could not find a way of extending the meaning of the words beyond their "ordinary signification" and found that that did not encompass the one hour gap, I conclude that in its ordinary meaning "immediately after X" means at, or almost at, the very moment after X.

92. In *Clarke v Mayo* [1994] STC 570 the CGT retirement relief provisions in Finance Act 1985 were considered. These provisions gave relief from CGT to an individual on the disposal of shares in a company which had ceased to conduct business on his retirement. The provisions also permitted relief on the disposal of an

asset owned by the individual if the disposal took place as part of the withdrawal of the individual from the business and "immediately before the ... cessation of the business ... the asset was in use for the purposes of the business.".

93. Evans-Loombe J held that these words should be construed in the context of the provisions rather than in isolation and that the condition imposed by the words seemed:

> "to have been provided for so as to ensure that the associated disposal was genuinely part of the withdrawal" (578B to C)

and so "where such is the case the Commissioners are justified in construing the ... words ... so as not to require precisely that at the instant before the cessation the asset was in use in the business". The words "immediately before" thus might be construed as meaning sufficiently proximate in time to the cessation as to justify the conclusion that the transaction in question formed part of it.

94. Mr Prosser relies on this as an example of contextual construction which rejects the restriction of "immediately before" to the very instant before. Mr Ewart argues that the judge was adopting a construction of the whole condition which treated the cessation of the business as a continuing event and that for the disposal to be "immediately before" the cessation it had only to be genuinely part of it.

95. I find some ambiguity in the critical passage of the judgement. At first the judge refers to the disposal as being genuinely "part of the withdrawal" and then later to the disposal as being part of the "cessation". It also seems to me that the first meaning given to the provision merely replicates of the first conditions in the section. Nevertheless I accept that it is an example of the need to read a provision in context.

96. In *Ex parte Clarke* [1974] 1QB 220 the Court of Appeal construed a requirement of some antiquity that dissatisfaction with a determination of the General or Special Commissioners had to be declared "immediately after the determination of the appeal" as meaning "with all reasonable speed given the circumstances of the case". (232A, 225E). The circumstances of the appeal concerned a determination which had been made in writing and posted to a party. It seems to me that to have construed “immediately” in that context to mean the moment after the decision was made would have struck at the evident intention of the section to give a practical right of appeal.

97. In *Re Dix* [2004] 1WLR1399 concerned an action by A for relief out of the estate of D under the Inheritance (Provision for Family and Dependents) Act 1975.

98. It was a condition for such relief that the claimant had during the period of two months "immediately before" the death of D been maintained by D. Having cohabited with D for some 26 years. A moved out three months before he died. Ward LJ cited an earlier judgement of Megarry J in which he had said:

> "it seems to me improbable that the word "immediately" in the relevant section is intended to confine the gaze of the court to whatever was the state of

> maintenance existing at that precise moment ... if there is some settled basis or arrangement between the parties as regards maintenance, then I think [the section] should be applied to this rather than to any de facto variation in the maintenance which may happen to exist at the [moment of death].",

and the judgement of Griffiths LJ who had said that the words could not be construed literally as applying to the de facto situation at death, but referred to the general arrangements subsisting at death. Ward LJ held that to construe "immediately" as meaning the position of the moment of death stated the law too narrowly and gave "immediately" too limited a construction.

99. I am less convinced that this case provides assistance in the construction of "immediately" in paragraph 1((7) because the reasoning applies to the nature of the arrangements for maintenance. Such arrangements naturally exist over a period of time and it is those settled arrangements which exist over the period ending with death which are relevant to the application of the provision.

100. I conclude from this review that unless the context or the purpose of the provision otherwise dictates, "immediately after X" means at, or almost at, the very moment after X.

"Immediately" – context

101. The context of the condition in 1(7)(b)(ii) suggests a tight focus the precise instants before and after the imposition of Newco. It is set in a subparagraph which uses the word "immediately" repeatedly. That to my mind indicates the importance of a tight focus. The surrounding words do not say merely "after" or "before" – words which allow some latitude – but "immediately after" and "immediately before"; and to construe "immediately" to refer to an interval of time would render that emphasis otiose.

102. In subparagraph (a) it is required that the shareholders be the same immediately before and after. There is no suggestion of a period which in which, or at any time in which, they must be the same. Shareholders, particularly in listed companies can change quickly: "immediately", it seems to me, refers to the shareholders at the instant before or after the takeover. It makes no sense to construe it otherwise. That use of "immediately" in subparagraph (a) also suggests that the same meaning is intended in subparagraph (b).

103. Whereas in *Ex parte Clarke* there were practical reasons for construing "immediately" to mean "with all reasonable speed" I can see no such practical reasons in relation to paragraph 1(7). In *Re Dix* the question was whether the arrangements existed for a period ending with death. There is no such legislative context in paragraph 1(7): the emphasis is on the single transaction by which the new holding company is imposed.

104. In *Clarke v Mayo* Evans-Loombe J drew his construction of 'immediately' from the surrounding provisions. In paragraph 1(7)(b) "immediately after that time" appears twice: first in the introductory words and then at the beginning of 1(7)(b)(ii).

That suggests to me the same meaning in both places, and where the words first appear they naturally refer to the moment after the takeover, and not to an interval in which at some point the relevant company could be identified. Likewise "immediately before that time" in paragraph 1(7)(b)(i) - the requirement that the new holder was not the principal company of any group - cannot mean that it requires that there was an interval in which nothing of practical significance incurred before the imposition in which Newco was not the principal company of any group. If it was not the principal holding company of the group at the moment before the imposition, that is enough to ensure that it does not bring with it companies to which losses may be surrendered from the group it acquires. That again indicates a similar meaning for "immediately after" in paragraph 1(7)(b)(ii).

105. I conclude that the context of paragraph 1(7) indicates that immediately after means at, or almost at, the very moment after.

"Had assets" – ordinary meaning and context

106. Mr Ewart says that "assets" are defined by section 21 TCGA to be "all forms of property": SSG had no legally recognisable right – no form of property immediately after it acquired ANO other than ANO and £2; and a person had an asset at a particular time only if they had such a right. I agree that absent any context or purpose which dictates otherwise it could not be said that SSG "had assets" other than £2 and ANO at the moment after it acquired ANO.

107. I can see nothing in the legislative context which indicates a different meaning.

Purpose

108. It is well established that in considering the application of a statute to a set of facts that the statute must be interpreted purposively and applied to the facts considered realistically. But the type of realism required depends on the nature and purpose of the provision in question. As Lord Reed illustrated in *UBS AG v HMRC [2016] 1 WLR 1005* the *Ramsay* approach needs to be applied with sensitivity to particular statutory contexts.

109. The question arises as to how to find the purpose of a provision. In *UBS AG v HMRC [2016] 1 WLR 1005* Lord Reed found no explanation in the relevant Act on which a purposive interpretation could be based nor any provision which indicated that a restrictive condition attached to shares purely for tax avoidance purposes fell outside the scope of the exemption being considered. But he found [74] that the authorities indicated a context of the relevant provision which provided some indication of what Parliament had intended, and that the purpose of the relevant Part of the Act had been identified (as against the background of the law which had previously applied) as including the counteracting of opportunities for tax avoidance.

110. In this context he said it was necessary to consider whether the restrictive provision attaching to the shares in that case should be construed as referring to a provision with a genuine basis or a commercial purpose [76]. Approaching the matter at a general level the fact that the legislation was introduced to forestall avoidance

schemes made it difficult to attribute an intention that it should apply to advantage schemes which were carefully crafted to fall within its scope or scheme where the award of shares had no purpose other than that of obtaining exemption [77]. On this basis he found that the relevant definition of restricted was to be construed as being limited to a provision with a business or commercial purpose [85], and since the restriction in that case had no such purpose the shares were not restricted securities.

111. I find no explanation in the Act on which a purposive interpretation of paragraph 1 Schedule 7A can be based, but the circumstances of its enactment and it context have been found to provide some indication of what Parliament had intended

112. The purpose of Schedule 7A was described by Mummery LJ in *Limitgood v HMRC [2009]* FTC 980:

> "[2] ... the aim of the inserted provisions is to restrict the tax benefits which can be obtained by a group of companies buying a company which has capital losses.
>
> [3] The… Act…restricts the tax benefits of set off by ring fencing pre entry capital losses brought into a group of companies"

113. That purpose is exhibited by paragraph 1(6) which insures that on the acquisition of a group of companies each member of the group is treated as entering the combined group at the time of the acquisition - just as it would be if the companies in the group had been acquired individually.

114. But Mummery LJ's description is not one of a broad anti avoidance purpose or of a purpose which consists of restricting the use of all losses when companies join groups; it is only to restrict the use of losses brought into a group by buying a company with losses. The purpose is not to restrict the use of losses where Loss Co acquires Gain Co. The purpose he describes is limited.

115. The Budget Press Release of 16 March 1993 described the Finance Bill proposal as being to "restrict the set off of capital losses brought into a group" and as having the intention of curtailing capital loss buying. It indicated that without the legislation "there would be substantial avoidance of the corporation tax charge on capital gains as a result of schemes for capital loss buying.

116. HMRC argue that one of the main purposes of Schedule 7 was to prevent avoidance through loss buying.

117. But given the absence of any tax avoidance test in Sch 7A and the detailed nature of the provisions I do not think that it can be construed as being suffused with a purpose of restricting the use of losses whenever there is a scheme designed to use them. It is legislation which denies the use of losses in specific circumstances only

118. Subparagraphs 1(6) an (7) were added to Finance Act 1993 in Committee Stage. Counsels' researches revealed no Parliamentary material available to illuminate the insertion, but Dr Avery-Jones, one of the Special Commissioners in *Limitgood* said

these subparagraphs were introduced following representations from the ICAEW. He said:

> "…we know that the Revenue had expressed the view that on the introduction of a pure holding company the legislation applied at that time to restrict losses. The amendment containing what is now 1(7) is a strict definition of a pure holding company being put on top of an existing group so that there is effectively no real change in the group."

119. The researches of Mr Ewart and Mr Windle unearthed the ICAEW's comments on the Finance Bill. In relation to what became Sch 7A the comments accepted that an anti avoidance provision targeting the transfer of losses might be appropriate but regarded the wide range of the proposed Sch 7A as striking at wholly commercial transactions and imposing a disproportionate compliance burden. They proposed a simpler provision disallowing the use of capital losses of an acquired company if the sole or main object of the acquisition was the use of its losses. That proposal was not taken up. The final comment was this:

> "We understand, moreover, that it is the Revenue's view…that the draft legislation operates to prevent the carry forward of capital losses even in the even of a group reconstruction involving no change in ultimate ownership. This would apply if a company becomes technically a member of a group because a new holding company is inserted between it and the ultimate shareholders."

120. Section 136 and 139 TCGA relate to schemes of "reconstruction" (as defined in Sch 5AA) . Section 136 provides relief to shareholders who receive shares in another company as part of an arrangement entered into for the purposes of a scheme of reconstruction. Section 139 provides for a no gain/no loss transaction where a scheme of reconstruction involves the transfer of all or part of a company's assets to another company.

121. An Inland Revenue Press Release of 9 June 1993 described four amendments tabled to the Finance Bill provisions. The amendment which brought in paragraphs 1(6) and (7) was described as being to "introduce specific rules for reconstructions". It was noted that representations had been made that the provisions did "not make clear the consequences of a reconstruction of a group of companies" and that the amendment would make clear that when a new holding company was inserted on a group with the same shareholders and with assets confined to shares in the old principal company the pre entry loss restriction would not apply.

122. HMRC argue that it does not appear from either the ICAEW representations or the 9 June Press Release that Parliament had in mind a "reconstruction" which went beyond the simple insertion of a new holding company. In other words that para 1(7) was not directed at the kind of reconstructions envisaged by section 136 and 139.

123. To the extent that this material may indicate the purpose of paragraph 1(7) I do not think that the use of "reconstruction" should be read so restrictively. One would normally use "reconstruction" to refer to a more fundamental interference with

shareholdings in, or assets of, a company rather than merely to superimposing a new holding company.

124. The reference to a 'reconstruction' also appears in HMRC's manual CG475570. It says that para 1(7) deals with the case where a new company is introduced as the principal company of an existing group "on a reconstruction". It says: "If newco Y, with no assets other than a nominal amount of subscribers' funds, acquires the principal company X of the X group and the shareholders of Y are the same as the previous shareholders in X, there is no reason in principal to apply the set of loss restrictions by reference to the time Y acquires X.

125. The purpose of paragraph 1(7), it seems to me, is to permit newco Y to be treated as the same company as X for the purpose of Sch 7A. It will be such where it is clean or "pure" and has the same shareholders as Y. There is no reason in principle to restrict loss usage where Y with X underneath is the same economically and in ownership as X at the time Y acquired X.

126. But the specific transaction of putting a new clean holding company on top of an existing group would almost never be done in isolation. It will only be done for a purpose which will involve further steps: there will rarely be any point in doing it otherwise. Thus for example a newco might be put on top of an existing principal company :

> (i) if a UK resident company is non-UK incorporated and it is desired to have a UK incorporated company (governed by English law) as a holding company on a flotation (when there would be a change in shareholdings);
>
> (ii) on a demerger where new holding company may be imposed prior to hiving up certain assets and then reconstructing the enterprise by liquidating the new holding company or reducing its capital and spinning out constituent parts in the manner envisaged by section 136 and 139 TCGA. That might be the case for example, where insufficient realised profits, uncertain liabilities or trading contracts held by the principal company would prevent a demerger by distribution, or a liquidation or reduction of capital of the original holding company.

127. In such cases the imposition of the new holding company will generally be part of a set of steps planned in advance, which, once started, will normally be likely to be completed. It would, for example, be embarrassing for a quoted company to go to the trouble and expense of putting a new holding company on top and then to fail to complete the plan.

128. I conclude that at least one purpose for the exemption from paragraph 1(6) which is granted by subparagraph 1(7) is for situations where there will generally be planned and virtually certain further transactions in the shareholders and/or the assets of the new holding company after its imposition.

Immediately after – purpose

129. A meaning of "immediately after" which envisages something other than the instant after, or a meaning of "had assets" which takes into account the virtual certainty of the acquisition of assets in later steps, would be at odds with that purpose; and it seems to me that, because such transactions would be done in contemplation of other transactions in the assets or in the share capital of the new holding company, the relief given by paragraph 1(7) is restricted by reference to the events "immediately" surrounding the imposition of the new holding company.

130. Thus the context of para 1(7)(b)(ii), the purpose of paragraph 1(7) and the purpose of Sch 7 indicate to my mind a meaning of "immediately after" which is synonymous with 'at the very moment after".

131. Even if "immediately after" in subparagraph (b) meant before the end of an interval in which nothing of practical significance occurred, it seems to me that, giving "had assets" its ordinary meaning there was in fact such an interval - namely the interval before the acquisition of O&H. If it can be said that until that acquisition SSG "had" no assets other than ANO until the acquisition of O&H, there would have been a period in which no event of significance occurred in which SSG had no other assets.

"Had assets" –purpose

132. HMRC say that if, at the time of SSG's acquisition of ANO, SSG had a contractual right to acquire O&H that right would have been an asset and have been sufficiently significant for the test in paragraph 1(7)(b)(ii) to be failed. I agree.

133. They then say that paragraph 1(7) should be interpreted so that the position is no different if the transaction by which O&H became an asset of SSG was preordained rather than pre-contracted. "Had assets" they say is not a strict legal concept and should be construed to include the case where, by steps in a preordained series of transactions, a company will also acquire other assets and it is practically certain that the second acquisition will take place; and in particular if the second acquisition is "artificially delayed for the sole purpose of exploiting a perceived shortcoming in paragraph 1(7)" On the facts they say that for all practical purposes SSG had assets on 25 February when it acquired ANO in the form of the practical certainty it would acquire O&H shares.

134. (Before addressing the meat of this argument I should deal with the argument that the purpose of exploiting a "perceived shortcoming" in paragraph 1(7) – namely that it may have been concluded that it would apply to these transactions - is relevant. I do not consider that the purpose of the authors of the transactions is relevant to the application of the legislation which has no reference to such a purpose and, inter alia, in view of the rejection of the ICAEW's representations, is not in my view intended to depend on such a purpose.)

135. In the context of the main argument Mr Prosser relies upon Lord Brightman's speech in *Furniss* where he said at 526G and H:

> "My Lords, in my opinion the rationale of the new approach is this. In a preplanned tax saving scheme, no distinction is to be drawn for fiscal purposes, because none exists in reality, between (i) a series of steps which are followed through by virtue of an arrangement which falls short of a binding contract, and (ii) the like series of steps which are followed through because the participants are contractually bound to take each step seriatim. In a contractual case the fiscal consequences will naturally fall to be assessed in the light of the contractually agreed results. For example, an equitable interest may pass when the contract of sale is signed. In many cases equity will regard that as done which is contracted to be done. *Ramsey* says that the fiscal result is to be no different if the several steps are preordained rather than pre-contracted."

and then at 527:

> "The formulation by Lord Diplock ... expresses the limitations of the Ramsay principle. But first, there must be a preordained series of transactions; or, if one likes, one single composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (i.e. business) end. The composite transaction does, in the instant case; it achieved a sale of the shares in the operating companies ... secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of a liability to tax - not "no business effect". If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The court must then look at the end results. Precisely how the end result will be taxed will depend upon the terms of the taxing statute sought to be applied."

136. It became clear after *Furniss* (if it was not clear at the time) that the R*amsay* doctrine was founded on a broad purposive interpretation giving effect to the intention of Parliament (Lord Stein: *IRC v McGuckian* [1997] 1 WLR 991 at 1000G); and that the limitations of which Lord Brightman spoke in *Furniss* were not universals; always one must go back to the discernible intent of the taxing Act (Lord Cooke *McGuckian* 1005G). The paramount question is always one of interpretation of the particular statutory provisions and their application to the facts of the case (Lord Nicholls [8] *MacNiven v Westmoreland Investments Ltd* [2003] 1 AC 311).

137. Just as Lord Brightman's formulation is not a limitation on the *Ramsay* principle it does not express a recipe to be universally applied: whether a series of preordained transactions should be treated for fiscal purposes as a single composite transaction will depend on the nature of the statutory words which must be applied. In some cases the proper construction of the statute will require such an approach, and may require the kind of disregard of inserted steps of which Lord Brightman speaks or the application of the statute to a composite transaction. In other cases it will not. Thus, Lord Hoffman in *McNiven* describes Lord Brightman's formulation (at 527 in *Furniss*) as not a principle of construction but of the consequences of giving a commercial construction to a fiscal concept

138. In *Furniss* the taxpayers' shares in two family companies were transferred by the Dawsons to Greenjacket in exchange for shares in that company and then almost immediately afterwards sold by Greenjacket to Wood Bastow. The taxpayer sought to

rely on para 6 Schedule 7 Finance Act 1965 in relation to the disposal to Greenjacket. If para 6 applied then the Act deemed there to have been no disposal of the shares in the family companies.

139. Para 6 provided that where a company issued shares in exchange for shares in another company and where the issuer had in consequence control over the other company, the transaction was not to be treated as a disposal.

140. It was in the context of this provision that it is said in some judgements that the issue in *Furniss* was whether there was a disposal. The issue was whether, construing para 6 purposively, the transactions by which the taxpayers' shares were transferred fell within it. The House of Lords' judgement was to the effect that the transitory ownership of the shares by Greenjacket was not enough to satisfy the requirements that Greenjacket had control[2] over the family companies and that there was an exchange of its shares <u>for</u> the family companies' shares: "control" suggests something exercisable over a period of time; and an "exchange for" a thing something suggests more than the transitory ownership of that thing[3].

141. In the context of those statutory questions the identification of a series of pre ordained transactions was relevant because the effect of being so ordained meant that there was not such an exchange or such control as that statute required. But given the purpose for, and meaning I attribute to, "immediately" and the emphasis on immediacy in paragraph 1(7), it seem to me that a construction of "had assets" which included an asset which was not owned but would at a future time be owned pursusant to a series of preordained transactions, be owned is not intended.

142. The same construction is indicated by the condition in paragraph 1(7)(b)(i) that the new holding company must not be "the principal company of any group immediately before that time". That cannot be construed as being satisfied by the preordained acquisition of the principal company if the old group.

143. Mr Prosser says that any restrictive interpretation of paragraph 1(7) under which a preordained series of transactions is not treated as being capable of meaning that a company "had assets" "immediately" after the acquisition gives the 'go by' to schedule 7A in all circumstances and that undermines its purpose. He gives the example of P, who owns Gainsco, and H, who owns Lossco. If Gainsco acquires Lossco from H schedule 7A would apply by virtue of paragraph 1(6). But if paragraph 1(7) is given a restricted construction, P could acquire Lossco, incorporate a clean Newco, sell Lossco to Newco and then sell Gainsco to Newco and so escape schedule 7A.

144. I accept that that may be the case (although I wonder how long an interval "immediately after " would need to comprehend in order to avoid the consequence Mr Prosser foresees), but if P simply acquired Lossco and sold Gainsco to it, Schedule 7A

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[2] See Lord Keith in *Craven v White* 61 TC 168 at 171D

[3] "commercially… the transaction was a transfer by Dawson to Wood Bastow ini exchange for a payment to Greenjacket":Lord Hoffman in *MacNiven at*[46]

would likewise have no application. It is true that owning Lossco is not the same as owning Newco which owns Lossco, but if Newco has no other assets is commercially the same.

145. The purpose of Sch 7A is not to deny the use of A's losses against B's gains in all cases where A and B become members of the same group, but only where A is brought into B's group. The provisions operate at the level of the groups involved rather than at the level of their shareholders. Although in this appeal losses were, in effect bought, they were bought (in the form of ANO) by the shareholders of O&H and not by O&H. The legislation has no effect at that stage. If thereafter Lossco acquires Gainsco the legislation evinces no intention to restrict the use of Lossco's losses. I see no reason to regard paragraph 1(7) as creating such a restriction because a "clean" holding company is placed above Lossco prior to the acquisition of Gainsco even if that is part of a preordained series of transactions.

146. I conclude that for the purposes of paragraph 1(7)(b)(ii) that at the tine immediately after its acquisition of ANO SSG had no assets other than £2 and the shares in ANO.

Conclusion

147. I conclude that the conditions of paragraph 1(7) are satisfied so that para 1(6) does not apply. I allow the appeal.

Rights of Appeal

148. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

CHARLES HELLIER

TRIBUNAL JUDGE
RELEASE DATE: 24 JUNE 2019