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Neutral Citation: [2023] UKFTT 00358 (TC)

Case Number: TC08782

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/02480

INCOME TAX AND CAPITAL GAINS TAX – Special Dividend from US company – HMRC discovery assessment on the basis that the Special Dividend was part income and part capital – subsequent HMRC review decision that all of Special Dividend taxable as income – whether review decision out of time – interaction of discovery provisions and statutory review provisions – case law on capital/income nature of foreign dividends – HMRC's original decision confirmed and not increased

Heard on: 7 February 2023
Judgment date: 4 April 2023

Before

TRIBUNAL JUDGE ANNE REDSTON
MR NOEL BARRETT

Between

JOHN BUCKINGHAM

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ms Mary McSweeney, wife of the Appellant

For the Respondents: Mrs Mary Donnelly and Ms Paula O'Reilly, Litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION AND SUMMARY

1. Mr Buckingham has for 35 years held shares in the Dr Pepper Snapple Group ("DPS" or "DPSG") and its predecessor companies. In 2018, DPSG merged with Keurig Green Mountain Inc ("Keurig") using a special purpose vehicle; the merged company is known as Keurig Dr Pepper Inc ("KDP"). DPSG and KDP were incorporated under Delaware law.

2. Immediately prior to the merger, a "Special Dividend" of $103.75 per share was paid to DPSG shareholders, including Mr Buckingham, who received £109,812.75. He included that amount on his self-assessment ("SA") tax return as capital, because the overall capital value of his shareholding was significantly less than it had been before the merger. However, documentation published at the time of the Special Dividend stated that $29.50 of the $103.75 was income, with the balance being capital.

3. HMRC received information under the Foreign Account Tax Compliance Act ("FATCA") which included the income part of the Special Dividend paid to Mr Buckingham. HMRC purported to open an enquiry into his SA return under Taxes Management Act 1970 ("TMA"), s 9A. The case officer was Mr Robbie Butler. He considered the facts and the relevant law as well as consulting HMRC's manual and an internal specialist. Having done so, he decided $29.50 of the Special Dividend was taxable as a distribution under UK law and that the balance of $74.25 was capital. He issued a closure notice to that effect, increasing Mr Buckingham's overall tax liability by £10,599.15.

4. Mr Buckingham appealed that closure notice, and on 10 November 2020 Ms Laube, an HMRC review officer, correctly decided that HMRC had been out of time to open an enquiry under TMA s 9A. The closure notice was withdrawn.

5. On 15 December 2021, Mr Butler issued Mr Buckingham with a "discovery" assessment under TMA s 29; that assessment reflected the earlier closure notice amendment. Mr Buckingham appealed the discovery assessment and asked for a statutory review.

6. On 30 March 2022, Ms Amelia Vickerman issued her review decision, holding that the whole of the Special Dividend was income for UK tax purposes, and that the discovery assessment was therefore "varied" so as to increase the tax due from Mr Buckingham by a further £26,267.21.

7. Mr Buckingham notified his appeal to the Tribunal. In his grounds of appeal, he accepted Mr Butler's income/capital split, but disagreed with Ms Vickerman's review decision. At or around the same time, he paid the extra tax charged by Mr Butler's assessment.

Interaction of discovery and statutory review provisions

8. We accepted that Mr Butler had met the conditions for issuing a "discovery" assessment, but we asked HMRC for submissions as to how the provisions of TMA s 29 interact with those relating to statutory review. We noted in particular that Mr Butler had "discovered" that "an amount" of income tax "ought to have been assessed but has not been assessed", but by the review decision, Ms Vickerman decided that a higher "amount" of income tax had not been assessed. We asked HMRC whether a review decision increasing the "amount" of a discovery assessment must also meet the other requirements of TMA s 29 and related sections, in particular with relation to time limits.

9. Having taken time to consider the matter, Mrs Donnelly did not answer those questions, but instead asked that the Tribunal use its power under TMA s 50(7)(c) to increase the discovery assessment to reflect Ms Vickerman's conclusions, and we proceeded on that basis.

Whether the whole of the Special Dividend was a dividend under UK law

10. Ms McSweeney, acting on behalf of her husband Mr Buckingham, relied on the same US information as had underpinned Mr Butler's assessment; Ms Vickerman in contrast had not considered most of that material. Ms McSweeney concurred with Mr Butler's analysis of the law, which was itself consistent with HMRC's own published guidance.

11. Having considered the facts and the evidence and applied the law, we agreed with Ms McSweeney that Mr Butler's discovery assessment was correct.

12. A Tribunal can increase an HMRC assessment under TMA s 50(7)(c) if it has first decided that the appellant has been undercharged by that assessment. We did not so decide, and we therefore did not increase the assessment made by Mr Butler. As a result, the position remains as set out in that assessment, and is not varied to reflect Ms Vickerman's review decision.

Whether Ms Vickerman's decision was out of time

13. We also considered whether Ms Vickerman's review decision had been issued outside the statutory time limit. In a case such as this, where an appellant has asked for a statutory review, TMA s 49E(6) requires HMRC to issue a review decision within 45 days beginning with the day on which the appellant is provided with HMRC's "view of the matter" or "such other period as may be agreed". Ms Vickerman did not contact Mr Buckingham until day 46; she then said she would assume he had agreed to an extension unless he objected.

14. We decided that TMA s 49E(6) could not have retrospective effect, so that an extension has to be agreed before the end of the 45 day period; in addition there had to be a positive agreement between the parties, so HMRC could not rely on an appellant's silence. The effect of that conclusion is that the statutory review decision issued by Ms Vickerman is replaced by a deemed decision that Mr Butler's assessment is upheld, see TMA s 49(8).

15. However, the Tribunal only became aware of this time limit issue after the hearing. We considered whether to ask the parties to provide any further evidence and submissions, but decided it was not in the interests of justice to do so for the reasons given at ¶146.

Overall conclusion

16. We confirm the assessment issued by Mr Butler, so that Mr Buckingham's liability remains as there set out. We refuse to increase that assessment to reflect the review decision issued by Ms Vickerman.

EVIDENCE

17. The Tribunal was provided with a Bundle of Documents prepared by HMRC which ran to 726 pages (including 30 pages of legislation and a single case law authority), together with a supplementary bundle of 514 pages, and a separate link to parts of "the Delaware Code Online".

18. The Bundles included the following:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) DPSG's Form 8-K dated 30 January 2018, see further ¶26 below;

(3) DPSG's section 14(a) "proxy statement" addressed to shareholders and dated 29 May 2018, setting out details of the merger and the proposals to be put the DPSG annual general meeting;

(4) a press release dated 26 June 2018 issued by DPSG about the merger;

(5) documentation issued by KDP to Mr Buckingham about the Special Dividend;

(6) KDP's Form 8937 about the merger (see further ¶30); and

(7) KDP's 2018 Annual Report.

19. Mr Butler provided a witness statement and gave evidence-in-chief led by Mrs Donnelly; he was cross-examined by Ms McSweeney and answered questions from the Tribunal. We found him to be an entirely honest and credible witness.

20. Ms Vickerman also provided a witness statement, gave evidence-in-chief led by Mrs Donnelly, was cross-examined by Ms McSweeney and answered questions from the Tribunal. Her evidence about the process she had gone through in making her review decision was vague, and parts were difficult to reconcile with the statements made in that decision. Overall, we did not find her to be an entirely reliable witness, and we make related findings of fact at ¶54ff.

21. Mr Buckingham did not provide a witness statement and relied on the documents provided in the Bundle to support his case for the income/capital split of the Special Dividend.

THE FACTS

22. The facts in this part of our decision are based on the evidence summarised above, including our findings about the reliance which could be placed on Ms Vickerman's evidence. There is a further finding of fact about Delaware law at ¶120.

The Special Dividend

23. DPSG was a leading US listed coffee and beverage company established under the laws of Delaware in 2007. It included well-known brands such as Dr Pepper, Snapple, 7UP, and Canada Dry. Over time it had made a series of acquisitions, including the "Schweppes" part of the former Cadbury Schweppes plc. DPSG was listed on the New York Stock Exchange ("NYSE") and filed annual, quarterly and current reports with the US Securities and Exchange Commission ("SEC").

24. Keurig was a leading producer of speciality coffee and related coffee-making machines; like DPSG it was incorporated under the laws of Delaware.

25. On 29 January 2018, Keurig announced it was acquiring DPSG and would pay $18bn in exchange for 87% of the stock of a newly created merged company. Those who had been shareholders of DPSG would thus own 13% of KDP, the new company. Under the merger proposal, those shareholders would receive a Special Dividend of $103.75 per share and shares in KPD. This was funded as to $29.50 from DPSG's earnings and profits, with the balance of $74.25 being provided by the other investors in exchange for the right to shares in the merged company, together with various debt funding arrangements.

26. Companies listed on the NYSE are required to notify the SEC about major events of which shareholders should be aware, and to do so using Form 8K. On 30 January 2018, DPSG filed form 8K with the SEC; it was signed by James Baldwin, DPSG's Executive Vice President and General Counsel. It said that the merger agreement "provides that the Company will declare and pay a cash dividend of $103.75 per share", and that DPSG "expects that only a minority of the amount of the SD [Special Dividend] will be out of earnings and profits".

27. DPSG also published a list of questions and answers for its shareholders. In answer to the question "Will the special cash dividend be taxed like other dividends on DPSG common stock?" the company said:

> "DPSG expects that the aggregate amount of the special cash dividend will exceed E&P [Earnings and Profits]. Thus, only a minority of the amount of the special cash dividend will be characterized as a dividend, currently estimated as between $29 and $32 per share. DPSG's prior regular dividend distributions were paid out of E&P, and the entire amount of each such distribution was characterized as a dividend for U.S. federal income tax purposes."

28. In answer to the question "How do I calculate the change in tax basis resulting from the portion that is a return of capital and any subsequent adjustments to E&P", the company said:

> "The combined company will be required to complete IRS Form 8937 for each distribution that affects stockholder basis and post it on the Investor Relations portion of its website within 45 days of the dividend payment date. This form will provide details on the expected changes in the tax basis of the shares and the portion of the special cash dividend paid out of E&P."

29. The merger took place on 9 July 2018, following which KDP was listed on the NYSE. The day after the merger, KDP declared the Special Dividend of $103.75. The value of each share held by DPSG shareholders dropped, as they each owned significantly less of the new merged KDP entity than they had done of DPSG as a stand-alone company.

30. In August 2018, KDP filed a Form 8937 with the US Internal Revenue Service ("IRS"). An amended version of that Form was filed on 2 January 2019. It began by saying:

> "The information provided herein is a summary of the quantitative effect on basis to US common stock shareholders with respect to the Special Dividend (defined below) and is for general information only. The information provided herein is with respect to US Federal Income Tax Laws. Non-US common stock shareholders should consult their own tax advisers regarding the potential consequences of the Special Dividend, including the effects of US Federal, State, and Local, Foreign and Other tax laws.
>
> This information updates the Form 8937 originally filed in August 2018. As updated for further information, this amended Form 8937 confirms the portion of the $103.75 Special Dividend (defined below) that was paid out of the earnings and profits of Keurig Dr Pepper Inc (i.e. $29.50 per share)…"

31. Having defined the Special Dividend, the Form then said, under the heading "Describe the quantitative effect of the organisational action on the basis of the security in the hands of a US taxpayer as an adjustment per share or as a percentage of old basis":

> "In general, a corporate distribution is treated as a 'dividend' for US federal income tax purposes, but only to the extend of the distributing corporation's current and accumulated earnings and profits ('E&P'). If the distribution exceeds the distributing corporation's E&P, such excess is applied against and reduces the recipient shareholder's basis in their stock…
>
> Of the $103.75 per share Special Dividend, $29.50 was paid out of the E&P of the Company and will be treated as a taxable dividend under [Internal Revenue Code] section 301(c)(1)…The remainder of the Special Dividend, such remainder being $74.25 per share ($103.75 minus $29.50) is treated as a non-dividend distribution…"

32. The KDP Annual Report includes the following passage on page 1:

> "Upon consummation of the DPS Merger, KDP declared a special cash dividend equal to $103.75 per share, subject to any withholding of taxes required by law, payable to holders of its common stock as of July 6, 2018. Refer to Note 3 of the Notes to our Audited Consolidated Financial Statements for further information related to the DPS Merger."

33. The Note 3 there referenced is part of KDP's Consolidated Financial Statements, which were included within the Annual Report. Note 3 sets out the financial information relating to the merger, including an analysis of the sources of the consideration by which it was funded, as follows:

> "• A $9,000 million equity investment from JAB [the company which held the controlling interest in Keurig].
>
> • The issuance by the Company of $8,000 million of senior unsecured notes under a private offering Rule 144A. Refer to Note 8 for additional information.
>
> • Proceeds of $2,700 million borrowed under the term loan agreement and proceeds of $1,900 million borrowed under the revolving credit facility. Refer to Note 8 for additional information.
>
> • Proceeds of $124 million from the Company's structured payables.
>
> • The remainder of the total consideration exchanged in the DPS Merger was funded by cash on hand."

Mr Buckingham's position

34. Mr Buckingham is 84 years old. He had purchased shares in Cadbury plc in 1988, shortly before the Cadbury-Schweppes merger, and continued to hold the shares through the various restructurings; he thus held shares in DPSG at the time of the KDP merger. The value of his shareholding dropped from $175,280 to $39,102 following the merger.

35. KDP provided Mr Buckingham with two Forms 1042-S "foreign person's US Source Income Subject to Withholding" relating to the Special Dividend. One stated that $44,712 was a "dividend", subject to US withholding tax, and the second that $107,781 was a "return of capital". The total was thus $152,493, or £114,526. Mr Buckingham received £109,812.75 on 2 November 2018; the difference between this figure and £114,526 was accounted for by US withholding tax and bank charges.

The SA return

36. Before completing his 2018-19 SA return, Mr Buckingham sought advice from two firms of accountants in his local area, but both declined on the basis that they had no specialist knowledge of foreign shareholdings. However, he understood their informal view to be that the most likely treatment was as a capital gain. He then looked at various internet forums to see if they provided assistance. In the past, he had visited his local tax office if he had difficult questions about his tax affairs, but that office had closed and his previous experience of phoning HMRC was that they provided "no real help".

37. Mr Buckingham completed his 2018-19 SA return on the basis that the full £114,526 of the Special Dividend was capital, because of (a) the significant fall in value of his shareholding, which had been compensated for by the Special Dividend, (b) his own research and (c) the informal comments from the firms of accountants. He did not add any further explanation of the transaction in what is called the "white space".

38. The SA return was submitted in paper form; it was registered as received by HMRC on 19 September 2019, well before the filing date for a paper return of 31 October 2019. In addition to the Special Dividend, the SA return also included other share-related amounts.

Mr Butler's "enquiry"

39. On 13 July 2020, HMRC received information from the US tax authorities under the FATCA about Mr Buckingham's US dividends, including the "dividend" part of the Special Dividend, being $44,712.

40. On 2 October 2020, Ms Kiran Klare of HMRC wrote to Mr Buckingham asking for information about money received from shareholdings in US companies ("the opening letter"). She described this as a "compliance check", and said she believed Mr Buckingham's 2018-19 SA return "may be inaccurate". She did not refer to TMA s 9A or to any other UK tax provisions.

41. Mr Buckingham responded to the opening letter, and on 2 February 2021, Ms Klare wrote again, asking Mr Buckingham to reconcile the figures provided via FATCA with those on his tax return. At that point, Mr Butler took over the case from Ms Klare, and Mr Buckingham provided him with both Forms 1042.

42. On 12 May 2021, Mr Butler told Mr Buckingham that his preliminary view was that the Special Dividend was split into identifiable income and capital elements, with the $44,712 identified as a "dividend" by DPSG being taxable as such in the UK. On 10 June 2021, he told Mr Buckingham he was seeking internal specialist technical advice; he took that advice from within the Wealthy/Mid-sized Business Compliance team at HMRC. The specialist agreed with Mr Butler, noting that Form 8937 confirmed the capital/income split. Mr Butler also considered the legislation at s 402 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") see ¶109, as well guidance in the HMRC Company Tax Manual at CTM15205, see ¶106.

43. On the basis of Form 8937 and both Forms 1042-S, the legislation, the technical advice, and the guidance in CTM15205, Mr Butler wrote to Mr Buckingham on 8 July 2021, saying he was amending his 2018-19 SA return on the following basis:

> "it was correct for you to include the capital element of the payment ($107,881[1]/£83,551) in your capital gains calculation. However, the dividend element of $44,712/£32,234 should not have been included in your Capital Gains calculation but instead should have been included on the Foreign Income pages of your 2019 tax return as 'dividends from foreign companies', with a claim to Foreign Tax Credit Relief for the tax deducted by US authorities."

44. In the same letter, Mr Butler said:

> "For your information, the technical advisor informed me that he had another case where the customer claimed that all of the payment should be treated as capital in the UK. However, that particular customer accepted HMRC's contention that the element at $29.50 a share should be treated as a dividend for UK tax purposes."

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[1] We noted that there was a typographical error in Mr Butler's letter, in that the amount of the 'capital' element was in fact $107,781, but neither party drew this to our attention during the hearing, and we considered it was unlikely to have made any difference to the outcome, which was based on the correct sterling figures.

45. On 27 August 2021, Mr Butler issued a letter headed "final closure notice" relating to the "check" of Mr Buckingham's 2018-19 tax return; this stated that it had been issued under TMA s 28A and constituted a "formal notification" that the enquiry had been closed. The substance of the notice reflected the changes explained in Mr Butler's earlier letter. The extra tax due was £10,599.15: this took into account foreign tax credit relief, and the fact that one of the consequences of the amendments was that Mr Buckingham lost his personal allowance for that year.

The first statutory review and the discovery assessment

46. On 13 September 2021, Mr Buckingham requested a statutory review of Mr Butler's decision. On 10 November 2021, Ms J Laube, the review officer, wrote to Mr Buckingham saying:

> "You submitted your 2018/19 tax return to HMRC on 19 September 2019 which allows an enquiry window up to 19 September 2020 and the caseworker did not send their opening letter until 2 October 2020 therefore, the enquiry was out of time to be opened under Section 9A Taxes Management Act 1970.
>
> The Closure Notice for 2018-19 issued to you on 21 August 2021 will be cancelled for procedural reasons as set out above and the original self assessment will be restored by the caseworker.
>
> The caseworker will then be able to consider the issue of a Notice of Assessment under the correct legislation which is Section 29 Taxes Management Act 1970 – Assessment where loss of tax discovered."

47. On 9 December 2021, Mr Butler reviewed the facts of the case and decided that a discovery assessment could be raised because he had "discovered" that "an amount of income tax…ought to have been assessed but has not been assessed" and as Mr Buckingham had not provided any information about the Special Dividend in the "white space", the condition in TMA s 9(5) had been met, namely that Mr Butler "could not have been reasonably expected, on the basis of the information made available to him" before the discovery, to be aware of the insufficiency.

48. On 15 December 2021, Mr Butler wrote to Mr Buckingham, cancelling the closure notice and issuing a discovery assessment under TMA s 29 which mirrored the changes made by the closure notice, so that the extra tax due was again £10,599.15. Under the heading "what to do if you disagree", the letter said:

> "If you disagree with this notice of assessment, you can appeal. If you want to appeal, you must write to us within 30 days of the date of this assessment, telling us why you disagree. If we cannot reach an agreement, you can then ask for:
>
> - [an] HMRC officer not involved in the case to review our decision
> - [an] independent tribunal to consider your appeal
>
> If you choose a review and are not satisfied with the outcome of that review, you can still ask the tribunal to consider your appeal."

49. On 29 December 2021, Mr Buckingham appealed the discovery assessment and asked for it to be "reviewed by an independent tribunal". On 5 January 2021, Mr Butler emailed Mr Buckingham, saying that if he wished to appeal to the Tribunal he had to do that directly and not via HMRC, but that if he wanted an HMRC statutory review, he was to confirm this as soon as possible. Mr Buckingham wrote back on 10 January 2022, asking for a statutory

review. In an email dated 24 January 2022 timed at 11.09 am, Mr Butler emailed Mr Buckingham; the "Attachments" line of the header reads "20220125 Buckingham J letter re appeal and independent review.docx (58.24 KB)". The text reads:

> "Dear Mr Buckingham
>
> I attach a copy of a letter I'm obliged to send you through the post. The letter confirms HMRC's view of the matter under appeal which has been sent for independent review. The letter also outlines what your rights and options are regarding the review and how to appeal to the independent tribunal should you so wish. The letter is for information purposes only. You do not need to take any further action at the moment, as you have already requested a review of the decision and your case has been forwarded to our Reviews and Litigation team who will be in touch in due course."

50. The attached letter is dated 25 January 2022, but was plainly sent to Mr Buckingham on 24 January 2022.

51. In Mr Buckingham's appeal letter, he also complained about HMRC's delay in opening a timely enquiry; their delay in cancelling the closure notice and their further delay before issuing the discovery assessment. On 5 January 2022, Mr Butler said that he had passed a copy of Mr Buckingham's letter to HMRC's complaints officer, who would respond separately in relation to these delays.

Ms Vickerman's review

52. On 10 March 2022, Ms Vickerman, the review officer, emailed Mr Buckingham a copy of a letter in which she said "I have been unable to complete the review by the statutory deadline", adding:

> "Unless I hear to the contrary from you, I will assume that you have no objection to the review period being extended so that it expires on 31 March 2022."

53. Mr Buckingham did not write back to say he objected. On 30 March 2022, Ms Vickerman issued her review letter. It said that the conditions for making a discovery assessment had been met, both because TMA s 29(5) was satisfied, but also because Mr Buckingham had been "careless" within the meaning of TMA s 29(4) because he had failed to seek advice "from an agent or other knowledgeable person".

54. Ms Vickerman went on to say that Mr Buckingham had not "provided any information regarding the nature of the payment or any information suggesting, for example, which reserve the [Special Dividend] payment was made out of and under which mechanism" and thus the "only information" she had considered was "that which Keurig Dr Pepper have made available publicly"; she then referred only to the Annual Report, saying:

> "Dr Pepper's annual report describes the payment as follows: 'Upon consummation of the DPS Merger, KDP declared a special cash dividend equal to $103.75 per share, subject to any withholding of taxes required by law, payable to holders of its common stock as of July 6, 2018'."

55. This citation is from page 1 of the Annual Report, which we have already set out at ¶32. Ms Vickerman's extract omits the final phrase, which read "Refer to Note 3 of the Notes to our Audited Consolidated Financial Statements for further information related to the DPS Merger". When asked in the hearing whether she had looked at Note 3, Ms Vickerman first said she was unable to recall, and then that she did not look at KDP's financial accounts because they were

not “available”. Since Note 3 is part of the financial accounts which are contained within the Annual Report (see ¶33), we find as a fact that Ms Vickerman did not look at that Note, although it was available to her.

56. Ms Vickerman’s review decision also said that in the Annual Report, the Special Dividend “appears to be described as a straightforward dividend”. The Tribunal was unable to locate any reference in the Annual Report to the Special Dividend being so described, and asked Ms Vickerman if she was able to assist, but she too was unable to find any reference to that term, and we find as a fact that it was not so described.

57. There was no reference in Ms Vickerman’s review decision to:

(1) Forms 1042-S, which had been provided by Mr Buckingham to Mr Butler; instead Ms Vickerman said he had not “provided any information regarding the nature of the payment”. In her witness statement, Ms Vickerman accepted that Forms 1042-S had been provided to Mr Butler, but did not say that she had considered them when coming to her decision but instead that those Forms would not have changed her decision because they relate to returns made to the IRS.

(2) Form 8937, which had also been considered by Mr Butler. In her oral evidence Ms Vickerman said that she “did not recall” seeing this Form, but added that “if it was available” she “would have” read it.

58. We find as facts that when Ms Vickerman made her review decision, she did not consider the information on Forms 1042-S or on Form 8937. We come to that conclusion because had she done so, it is highly improbable that she would not have made reference in her review decision to those documents and the information they contained. Instead, she explicitly stated that Mr Buckingham did not provide any relevant information, and the only “publicly available” information to which she made reference was one incomplete citation from the KDP Annual Report.

59. In addition to considering page 1 of the Annual Report, Ms Vickerman took into account certain provisions of the Delaware Code. These also formed part of HMRC’s submissions for the hearing and we return to them at ¶115 below.

60. Ms Vickerman concluded that:

> “I believe that the payment was a distribution of income, made under a dividend mechanism, rather than a return of capital which reduced the ‘corpus’ of the company and as such chargeable under Section 402 ITTOIA05. It is my conclusion that the total amount received by you from Keurig Dr Pepper is chargeable under Section 402 ITTOIA05.”

61. She then said:

> “I conclude that HMRC Officer Butler had the right to raise a discovery assessment on the basis that a there had been a loss of tax, however, the amount was incorrect. I have varied the amount due upwards by £26,267.21. The discovery assessment issued in respect of the year 2018/19 is varied to £64,347.38.”

62. No further discovery assessment was issued. On the following day, Ms Vickerman wrote again to Mr Buckingham, saying that the figures in the passage set out above were incorrect, and that:

> "the discovery assessment has been varied upwards by £26,267.21. This means the discovery assessment issued in respect of the year 2018/19 is varied to £36,866.36 not £64,347.38 as previously stated."

Appeal to the Tribunal

63. On 2 April 2022, Mr Buckingham notified his appeal to the Tribunal. He said he now accepted that Mr Butler had been correct that the Special Dividend consisted of a capital element of £83,551 and an income element of £32,234, and he was appealing against Ms Vickerman's review decision.

WHETHER THE CLOSURE NOTICE WAS INVALID

64. As noted above, the closure notice was cancelled by HMRC following a statutory review carried out by Ms Laube. We confirm for completeness that we agree with her decision. This is because TMA s 9A includes the following provisions:

> "(1) An officer of the Board may enquire into a return under section 8…of this Act if he gives notice of his intention to do so ("notice of enquiry")
>
> (a) to the person whose return it is ("the taxpayer"),
>
> (b) within the time allowed.
>
> (2) The time allowed is
>
> (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered;
>
> (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered; "

65. Mr Buckingham delivered his 2018-19 return on 19 September 2019, well before the filing date of 31 October 2019. Any enquiry had thus to be opened before 20 September 2020. Ms Klare's opening letter was issued on 2 October 2020. It was thus out of time, as Ms Laube correctly decided.

MR BUTLER'S DISCOVERY ASSESSMENT

66. The burden was on HMRC to show that the conditions existed for a discovery assessment to be made under TMA s 29. Unfortunately, the version of that section (and of TMA s 8 and s 34) included in the Bundle was that originally promulgated in 1970, despite the section having been entirely replaced by provisions included in Finance Act 1994, and those replacement provisions having subsequently been significantly amended.

67. Mrs Donnelly apologised and arranged for the current version to be emailed to Mr Buckingham and the Tribunal. Ms McSweeney did not object to the late provision of the correct legislative provision.

Section 29

68. TMA s 29 is headed " Assessment where loss of tax discovered" and so far as relevant to this appeal, reads as follows:

> "(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment
>
> (a) that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed;

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

(3) Where the taxpayer has made and delivered a return under section 8… of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8…of this Act in respect of the relevant year of assessment;

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if

(a) it is contained in the taxpayer's return under section 8…of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b)…

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (*a*) to (*c*) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) – (9) …"

69. The references in TMA s 29 to tax returns which have been "made and delivered…under section 8…of this Act in respect of the relevant year of assessment" are to SA tax returns. As it was not in dispute that Mr Buckingham had "made and delivered" an SA tax return for 2018-19, we did not ask HMRC to provide the current version of TMA s 8 (rather than the 1970 version which had been included in the Bundle).

Whether there was a "discovery"

70. The first requirement before an assessment can be made under TMA s 29 is that an officer of the Board (or the Board) "discover" that "an amount" of income tax or CGT had not been assessed, or an assessment already made is or has become insufficient, or that any tax relief is or has become excessive.

71. Mrs Donnelly's skeleton argument clearly set out the reasons why they considered Mr Butler had made a "discovery" when, having received information under FATCA about the Special Dividend, he established that this had been treated in its entirety as capital; that this was not the correct tax treatment, and thus "an amount" of income tax had not been assessed; she went on to say that it was irrelevant that Mr Butler had previously purported to issue a closure notice on the same basis.

72. She confirmed in her oral submissions that HMRC were relying on *Tooth v HMRC* [2021] UKSC 17, in which the Supreme Court said, *obiter,* that discovery assessments which met the other requirements of TMA s 29 were validly made as long as they were issued within the relevant time limit, and that there was no requirement for the discovery to be "new" or not "stale".

73. The Tribunal agrees with Mrs Donnelly that this is the effect of *Tooth.* We note that, shortly before the hearing of Mr Buckingham's appeal, the Upper Tribunal ("UT") in *Harrison v HMRC* [2023] UKUT 00038 (TC) considered whether *Tooth* was binding on lower courts in relation to its *dicta* on staleness, and found that it was. We respectfully agree with that judgment. As a result, we also agree with Mrs Donnelly that Mr Butler made a "discovery" within the meaning of TMA s 29.

Conditions in TMA s 28(4) and (5)

74. Where, as here, the taxpayer filed an SA return for the relevant year, a discovery assessment can only be made if either TMA s 28(4) or (5) is met. The former is that the taxpayer acted "carelessly or deliberately"; the latter that the officer "could not have been reasonably expected" to have been aware of the tax shortfall on the basis of information which:

> (1) was made available in the SA return, or in documents attached to that return;
>
> (2) was contained in "any documents, accounts or particulars which for the purposes of any enquiries into the return…are produced or furnished by the taxpayer to the officer"; or
>
> (3) could reasonably have been inferred from the above.

75. Mr Butler did not make his discovery assessment under TMA s 29(4) on the basis that Mr Buckingham had acted carelessly or deliberately. Instead, he relied on TMA s 29(5), holding that he "could not have been reasonably expected" to have been aware of the tax shortfall on the basis of the information contained within Mr Buckingham's SA return.

76. It was common ground that this return contained no further information, such as a description in the "white space" which would have alerted a reasonable officer to the nature of the Special Dividend.

77. However, by TMA s 29(6)(c), information "made available" includes that "contained in any documents…which, for the purposes of any enquiries into the return…are produced or furnished by the taxpayer to the officer". In this case, Mr Buckingham provided Mr Butler with Forms 1042-S, which contained key information about the Special Dividend. At the time that information was provided, Mr Butler plainly considered he was undertaking an enquiry into Mr Buckingham's return under TMA s 9A, because he went on to issue a closure notice under TMA s 28A.

78. We considered whether documents provided by a taxpayer at a time when the HMRC officer in question considers he is undertaking an enquiry into a return under s 9A, was information contained in documents provided "for the purposes of any enquiries into the return". However, we decided that the word "enquiries" in that subsection has to be read as meaning those opened in accordance with HMRC's s 9A powers. The Forms 1042-S were therefore not provided by Mr Buckingham in the course of a s 9A enquiry, because no such enquiry had been validly opened, and in consequence TMA s 29(6)(b) does not assist Mr Buckingham.

79. As a result, we agreed with HMRC that the condition in TMA s 29(5) was met, and that in consequence Mr Butler had met all relevant conditions for the discovery assessment which he issued on 15 December 2021.

INTERACTION OF DISCOVERY AND STATUTORY REVIEW PROVISIONS

80. We next considered how TMA s 29 interacts with the powers of an officer carrying out a statutory review.

Relevant facts

81. As is clear from our findings of fact:

(1) Ms Vickerman did not consider all the steps taken by Mr Butler in arriving at his decision, as required by TMA s 49E(3), because she did not take into account Forms 1042-S or Form 8937.

(2) She did not uphold Mr Butler's decision, she instead "varied" the decision.

(3) She decided that the amount of the discovery assessment was "incorrect" and that tax due was now £36,866.36 rather than the £10,599.15 in Mr Butler's assessment, a difference of £26,267.21.

(4) Mr Butler issued his discovery assessment on the basis that TMA s 29(5) was satisfied because he "could not have been reasonably expected" to have been aware of the tax shortfall on the basis of the information contained within Mr Buckingham's SA return. Ms Vickerman decided that Mr Buckingham had also been "careless" so that TMA s 29(4) was satisfied.

(5) She did not issue a further discovery assessment.

Discussion and consideration

82. The statutory review provisions in TMA s 49A to 49I apply to the great majority of HMRC's direct tax decisions; materially identical legislation applies in relation to VAT and some other indirect taxes.

83. By TMA s 49C(5), the review officer has the power to uphold, cancel or vary the decision which has been appealed. In this case, Ms Vickerman varied Mr Butler's decision by increasing the amount of tax, and did so in reliance on both TMA s 29(4) and (5). HMRC's

Statement of Case asked that Tribunal to "confirm the discovery assessment in the increased amount of £36,866 in accordance with the review conclusion".

84. However, the decision under appeal was made on the basis that Mr Butler had "discovered" that "an amount" of income tax "ought to have been assessed but has not been assessed". By the review decision, Ms Vickerman decided that a higher "amount" of income tax had not been assessed,

85. Mr Butler also decided that he "could not have been reasonably expected" to have been aware of the tax shortfall on the basis of the information contained within Mr Buckingham's SA return. Ms Vickerman held that Mr Buckingham had also been "careless".

86. TMA s 34 provides that HMRC can issue an assessment "not more than four years after the end of the year of assessment to which it relates"; TMA s 36 provides for a longer time limit of six years if a person has been careless, and 20 years if a person has acted deliberately.

87. We asked HMRC whether they had any submissions on how the discovery powers in TMA s 29 interacted with TMA s 49C(5), and in particular:

(1) whether a statutory review conclusion which makes an upward variation of a discovery assessment so as to change the "amount" which had been "discovered" by the officer in question:

(a) must itself meet the requirements of s 29; and

(b) must also meet the statutory time limit requirements; or whether

(c) a separate discovery assessment is required, which again has to meet those requirements; and

(2) whether a statutory review conclusion can change the basis on which the discovery assessment was issued so as to include "carelessness" or deliberate behaviour, given the effect on the statutory time limits.

88. The Tribunal said that it had no view on the answer to those questions, but invited Mrs Donnelly's comments. She asked for an adjournment, which we granted. At the end of the period of time she had requested, she did not give direct answers to our questions, but asked us to use our powers under TMA s 50 to vary Mr Butler's discovery assessment upwards in line with the review decision.

89. TMA s 50(6) reads:

> "If, on an appeal notified to the tribunal, the tribunal decides…
>
> (c) that the appellant is overcharged to tax by an assessment other than a self-assessment
>
> the assessment…shall be reduced accordingly, but otherwise the assessment…shall stand good."

90. TMA s 50(7) reads:

> "If, on an appeal notified to the tribunal, the tribunal decides…
>
> (c) that the appellant is undercharged to tax by an assessment other than a self-assessment
>
> the assessment…shall be increased accordingly."

91. The Tribunal confirmed to the parties that if we decided Mr Buckingham had been undercharged by Mr Butler's assessment, so that it should be varied upwards in line with Ms Vickerman's review decision, we would increase the assessment, but that as Mr Buckingham had accepted Mr Butler's assessment it would otherwise "stand good", in other words, remain unchanged.

Careless?

92. We have already found that Mr Butler was correct to decide that TMA s 29(5) was satisfied, because no information had been provided on Mr Buckingham's return as to the nature of the Special Dividend.

93. Ms Vickerman's review letter said she also considered "the failure to seek advice from an agent or other knowledgeable party to be careless"; she used the same wording in her witness statement. Mrs Donnelly similarly submitted that Mr Buckingham had been careless because "he believed he required professional input to complete his return and failed to acquire that input".

94. Ms McSweeney strongly contested Ms Vickerman's decision that Mr Buckingham had been "careless". She said he had sought advice, but had been unable to find anyone with the expertise to help him, and had also looked at various online forums. She did not accept that HMRC would have been able to give him a definitive answer, pointing out that Mr Butler and Ms Vickerman had both consulted separate internal experts, who had come up with two entirely different conclusions

95. The term "careless" is defined elsewhere in the tax code as "lack of reasonable care", see FA 2007, Sch 24, and we find that it has the same meaning in the TMA. We do not accept that Mr Buckingham was careless because "he believed he required professional input to complete his return and failed to acquire that input". He sought professional advice but was unable to find anyone with the requisite skills. As he said, it is clear from the differing views within HMRC that the issue is not straightforward. The burden is on HMRC to show that a person has acted carelessly, and we find that they have not met that burden in relation to Mr Buckingham.

THE CASE LAW ON FOREIGN DIVIDENDS

96. HMRC relied on *First Nationwide v HMRC* [2012] EWCA Civ 728 ("*First Nationwide*"). That case refers to earlier judgments, some of which are also further considered below.

First Nationwide

97. First Nationwide was a subsidiary of the Nationwide Building Society. In 2003, it entered into a complex series of structured finance transactions to raise funds. The relevant issue for the purposes of this appeal was whether preference dividends paid out of the share premium account of a Cayman Island company called Blueborder Cayman Ltd ("Blueborder") were "income" or "capital" for UK tax purposes.

98. Moses LJ, giving the only judgment with which Rix LJ and Briggs J (as he then was) concurred, said this:

> "[7] The essential question…is whether the Preference Dividends, payable as they were exclusively out of share premium, were income payments or were, as the Revenue contended, payments of capital. There was no dispute between the experts that, for the purposes of Cayman Islands company law, the Preference Dividends constituted dividends…But that is not determinative of the answer, as a matter of United Kingdom tax law, (see Upjohn LJ in *Rae v*

> *Lazard Investment Co Ltd* (1963) 41 TC 1 at 20). The taxpayer contended that the distinction between capital and income turned on the legal machinery employed to make the two distributions of £25.5m. The Revenue argued that Blueborder's Articles of Association engrafted the share premium onto the *corpus* of the shares and that *corpus* was diminished on payment of the First and Second Preference Dividends. The distributions, in short, amounted to return of the share premium as capital forming the body of the foreign possession.
>
> [8] The starting point must be the legal mechanism by which the First and Second Issues Preference Dividends were paid. They were dividends paid out of the share premium account. That, contends First Nationwide, is not merely the starting point; it is the finishing point. The mechanism by which the payments of £51m were made, namely the payment of dividends, determines the character of the payments. They were, as dividends, necessarily income payments.
>
> [9] This simple and clear proposition rests on two foundations: the treatment of share premium in United Kingdom jurisprudence and its treatment under Cayman Islands' Companies Law.
>
> [10] The jurisprudence is well-established. Payments made by a company in respect of shares are either income payments, or, if the company is not in liquidation, by way of an authorised reduction of capital. The courts have recognised no more than that dichotomy. The distinction has depended upon the mechanics of distribution. If the payments are made by deploying the mechanisms appropriate for reduction of capital, then they are payments of capital. Such mechanisms can be readily identified as designed to protect the capital of a company. If the payments are not made by such mechanisms but are made by way of dividend, they are income payments."

99. At [16] Moses LJ referred to the judgment of Lord Reid in *IRC v Reid's Trustees* (1949) 30 TC 431 ("*Reid*") where capital profits realised on the sale of properties were distributed to shareholders by way of dividend. Moses LJ said that "this was crucial to the identification of the payments as income", adding that Lord Reid had said at p 450:

> "if a foreign company chooses to distribute its surplus profits as dividend, the nature and origin of those profits do not and cannot be made to affect the quality of the receipt for the purposes of Income Tax."

100. At [17] Moses LJ referred to Lord Reid's later judgment in *Rae v Lazard Investment Co Ltd* (1963) 41 TC 1, [1963] 1 WLR 555 ("*Lazard*"), saying:

> "A Maryland company had hived off part of its business by a process, unknown to English company law, of partial liquidation; shares in a new company to which the hived-off business was sold were distributed to an English investment company which held shares. The Court of Appeal and the House of Lords concluded that shares which the English company shareholders received on the partial liquidation were capital and not, as the Revenue contended, income. That conclusion was dictated by the machinery by which the shares were distributed. Lord Reid said (41 TC 1 at 26, [1963] 1 WLR 555 at 567):
>
> > 'In deciding whether a shareholder receives a distribution as capital or income our law goes by the form in which the distribution is made rather than by the substance of the transaction. Capital in the hands of the company becomes income in the hands of the shareholders if distributed

> as a dividend, while accumulated income in the hands of the company becomes capital in the hands of the shareholders if distributed in a liquidation'.
>
> By the law of Maryland, which recognised the transaction as a partial liquidation, the shares distributed were capital. Both Lord Guest (41 TC 1 at 29, [1963] 1 WLR 555 at 570) and Lord Pearce (41 TC 1 at 30, [1963] 1 WLR 555 at 572) reiterated that it was the machinery by which assets were distributed which determined the question whether the assets were received as capital or income."

101. At [18] Moses LJ considered *Courtaulds Investments Ltd v Fleming* (1969) 46 TC 111 ("*Courtaulds*"), which concerned a distribution made by an Italian company to its shareholders out of share premium reserve; the payment was not effected by way of dividend but instead by exercise of a specific procedure under Italian law whereby surplus capital may be returned to shareholders. Buckley J had held in that case that the nature of the shareholders' rights, and by extension the nature of the payment made by the company, had to be determined by application of Italian law. The result was that for the purposes of English law and UK taxation, the distribution was capital.

102. Moses LJ went on to note that under Cayman Island law, payments out of share premium account were income, not capital as had been the position in the UK before the law changed in 1948. At [26] he said that:

> "There are cases, where, on a true analysis of the facts, it is possible to identify a declaration of a dividend as being other than a payment of income. In *Sinclair v Lee* [1993] 3 All ER 926, [1993] Ch 497, the declaration of a dividend by ICI by the allotment of fully paid-up shares in the new company Zeneca was no more than part of a company reconstruction by way of de-merger, whereby a single company was replaced by two head companies and the trading entity divided into two smaller trading entities ([1993] 3 All ER 926 at 936, [1993] Ch 497 at 513)."

103. He then said at [27]:

> "But no such analysis is possible on the facts of the instant case. Nothing can be discerned by invoking examples of cases where capital has been returned (as in *Courtaulds* (1969) 46 TC 111, [1969] 1 WLR 1683, under the Italian view of share premium, or in *Lazard*, a partial liquidation under Maryland law)…The reality was the distribution of share premium as dividends, as Blueborder was free to do under Cayman Islands Companies Law. That mechanism establishes that the payments were income. The correct identification of the dividends as income, notwithstanding that they were paid out of share premium account, mirrors the situation in United Kingdom company law prior to 1948... For that reason…I would dismiss the appeal on this point."

Lazard

104. As noted above, Lord Reid's leading judgment in *Lazard* was followed in *First Nationwide*. In addition to the passages already cited above, his judgment concluded by saying:

> "…after the partial liquidation the corpus of the Respondent Company's capital asset did not remain intact. And I do not find it surprising that the law of Maryland should so hold; I would expect that after a partial liquidation the corpus would be different…The shares after partial liquidation were not the same in substance as they had been before. So, on the findings of fact as to the

> law of Maryland, I have no difficulty in holding that this appeal should be dismissed."

105. Both Lord Guest and Lord Pearce similarly rejected the submission that the distribution must be treated as income of the shareholders, even though had the Maryland company been an English company, it could only have effected the distribution by way of dividend. The issue of whether the payment was of an income or capital nature was, the court held, a question of fact, to be determined by considering its characterisation under the law of Maryland. Lord Pearce stated at p 573:

> "A corporation being a *persona ficta* owes its existence to the law under which it is created and cannot act except in accordance with it. It is, therefore, impossible to assess the behaviour of a Maryland company on the hypothesis that it has been created by and acts in accordance with English law. By the law of Maryland this Maryland corporation has made a distribution of capital. In the hands of the shareholder the distribution is received as capital and not as income."

HMRC'S GUIDANCE

106. Mr Butler had referred to and relied on the guidance in HMRC's Company Tax Manual at CTM15205 relating to "distributions: general: dividends, distributions and company law. Under the heading "dividends", the Chapter says:

> "As there is no definition of dividend in UK tax or company law the question has to be answered by reference to the facts.
>
> Some foreign jurisdictions may provide for a definition, and that definition may be relevant if a particular payment is made by a company in that jurisdiction. *HMRC v First Nationwide* [2012] EWCA Civ 278 concerned dividends paid by a Cayman Islands registered company. The Court of Appeal rejected the idea of dividends as necessarily payments out of income (based on the historical system of retaining tax from payments out of income, which had applied to dividends) and decided, in the context of a payment directly out of share premium (permissible under Cayman Islands law) that it is the form or mechanism of the payment and not its origin which determines whether a payment is a dividend."

107. HMRC's Savings and Investment Manual at SAIM5210 is headed "Foreign Dividends" and begins:

> "Dividends from non-UK resident companies are taxable under ITTOIA05/PART4/CHAPTER4. Before Tax Law Rewrite, the charge on foreign dividends was under Case IV or Case V of Schedule D.
>
> The rewritten legislation largely integrates the charge on foreign dividends with the taxation of the equivalent income from a UK source. But there are some differences. The UK charge includes other distributions, as well as dividends. These may include amounts of a capital nature and can treat interest as a distribution in certain circumstances."

108. Under the heading "dividends of a capital nature" SAIM5210 says:

> "ITTOIA05/S402 (4) excludes 'dividends of a capital nature'. This phrase was inserted on Tax Law Rewrite to reflect the decisions in *CIR v Trustees of Joseph Reid (dec'd)* (1949) 30TC431 and *Rae v Lazard Investment Co Ltd* (1963) 41TC1. Whether a dividend is income or capital in nature is determined by reference to the mechanism of distribution under the constitutive law of the

> territory where the company is incorporated or registered and its implications for the company making the distribution.
>
> The question is whether or not the 'corpus of the asset' is left intact after the distribution. If not, the receipt will be a capital receipt; if it is, the payment will be chargeable as income. The corpus is not disturbed by payment of a large dividend simply because it is large - see *HMRC v First Nationwide* [2012] EWCA Civ 278: Moses LJ said 'the reality was the distribution of share premium as dividends' (this type of distribution is possible under Cayman Islands company law though it is not under UK law). But it will be disturbed by some form of capital reduction, as with the partial liquidation under Maryland law in *Rae v Lazard*. Another example of a dividend of capital nature is found in the trust-law case *Sinclair v Lee* [1993] Ch 497, where Nicholls VC held that shares distributed by way of dividend in specie as part of an indirect or '3-cornered' demerger should be regarded as giving rise to a distribution of capital. The importance lies not in what is distributed (shares, in this case) but rather in the effect of that distribution on the distributing company, its 'corpus'."

THE LEGISLATION

109. ITTOIA Chapter 5, Part 4 sets out the charging provisions for Savings and Investment Income. Chapter 4 of that Part is headed "Dividends from non-UK resident companies". Within that Part, s 402 is headed "charge to tax on dividends from non-UK resident companies. So far as relevant, it reads:

> "(1) Income tax is charged on dividends of a non-UK resident company
>
> (2)-(3)…
>
> (4) In this Chapter "dividends" does not include dividends of a capital nature."

110. As correctly identified in HMRC's Savings and Investment Manual, section 402(4) was introduced as part of the Tax Law Rewrite process. The Notes issued at the time said at [1634]:

> "*Subsection (4)* ensures that dividends of a capital nature do not fall within the charge to tax under this Chapter. In determining whether a payment is income in nature, it is necessary (as it is under the source legislation) to analyse the payment under local law (see *CIR v Trustees of Joseph Reid (dec'd)* (1949), 30 TC 431 HL and *Rae v Lazard Investment Co Ltd* (1963), 41 TC 1 HL). Whiteman on Income Tax, Third Edition, on page 1107, comments in this context 'the proper test in such circumstances is, applying the local law, whether or not the corpus of the asset is left intact after the distribution. If it is not, the receipt will be a capital receipt; if it is, the payment will be chargeable'."

DELAWARE LAW

111. Questions of foreign law are questions of fact for the Tribunal. By way of example, in *Lazard,* the Special Commissioners at first instance had found as a fact that under the law of Maryland the dividend was capital in nature, see the judgment of Lord Reid at page 25. Similarly, in this case it is for the Tribunal to determine whether the Special Dividend paid under Delaware law was income, capital, or part income and part capital.

Expert evidence?

112. In the courts, questions of foreign law are determined as facts after the hearing of expert evidence, see s 4 of the Civil Evidence Act. However, Rule 15(2)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules") provides that the

Tribunal may "admit evidence whether or not the evidence would be admissible in a civil trial in the United Kingdom". Rule 2 of the Tribunal Rules provides that the Tribunal "must seek to give effect to the overriding objective" of "dealing with cases fairly and justly" when it "exercises any power under these Rules", and that this includes:

> "(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;
>
> (d) using any special expertise of the Tribunal effectively; and
>
> (e) avoiding delay, so far as compatible with proper consideration of the issues."

113. Neither party sought to rely on expert evidence. We considered whether to adjourn the case with directions for this to be provided, but decided not to do so, for the following reasons:

(1) It was unlikely that the parties would agree on a single joint expert.

(2) The costs of instructing an expert was likely to be significant in the context of the £26,267.21 at stake in this appeal.

(3) The process of obtaining a final expert report is lengthy: the parties must identify and instruct experts, and usually will need to agree on the questions to be asked. Having drafted an opinion, the experts then discuss their opinions to try to narrow the issues in dispute; this usually results in further drafting. In the experience of the Tribunal, this process would be likely to lead to a delay of at least four to six months, and possibly longer.

(4) Mr Buckingham's case would need to be relisted, so that the experts could give evidence and be cross-examined. This would lead to further delays.

(5) Mr Buckingham is 84 years old, and has already complained to HMRC about the delays in their handling of his case. A further ten months have elapsed since he notified his appeal to the Tribunal.

(6) Mr Buckingham's appeal was not designated as a "lead case" under Rule 18, so it is not binding on other appellants who similarly received a Special Dividend.

(7) HMRC have not asked that Mr Buckingham's appeal against Ms Vickerman's review decision be treated as an informal test case on the tax treatment of the Special Dividend; in fact Mr Butler said in his letter of 8 July 2021 that HMRC had settled another case on the same split income/capital basis used in his discovery assessment, see ¶44.

Mr Buckingham's case on the meaning and effect of Delaware law

114. On behalf of Mr Buckingham, Ms McSweeney said that DPSG and KPD were both incorporated under Delaware law, and in accordance with that law, the Special Dividend had been split as between income of $29.50 and capital of $74.25. She relied in particular on the following points, which to avoid repetition we have where relevant cross-referenced to our earlier findings of fact:

(1) It is clear from Form 8937 that:

(a) the dividend portion was paid out of "earnings and profits";

(b) there were insufficient earnings and profits to fund the capital portion, see ¶20 and ¶31; and therefore

(c) the balance of the Special Dividend could not be a income payment because there was no income in the company to fund it.

(2) This was in marked contrast to all previous dividends from DPSG, which had been paid out of earnings and profits, see ¶28.

(3) The capital portion of the Special Dividend had been funded by the other investors in the new merged company, as is clear from the Annual Report, see ¶33.

(4) All the documentation provided by DPSG and KDP stated that the Special Dividend was part income and part capital.

(5) The Annual Report and other documents were issued by a company listed on the NYSE. These documents must first have been "subject to careful review" by experts, which must have included ensuring they were compliant with Delaware law.

(6) The income/capital split had been agreed by the IRS, who deducted withholding tax only from the income portion of the Special Dividend. It was, she said, not credible that the IRS would have signed off on a capital/revenue split which was not in accordance with the applicable company law.

(7) The income/capital split was also consistent with the fact that the capital value of Mr Buckingham's shares had fallen significantly as the result of the merger, see ¶34.

HMRC's case on the meaning and effect of Delaware law

115. Mrs Donnelly asked the Tribunal to confirm the position taken by Ms Vickerman in her review letter, which was as follows:

> "As far as Delaware corporate law is concerned, I understand that distributions can be paid out of surplus (broadly, the amount by which net assets exceed capital) or, in some circumstances, out of net profit. I understand that if a payment has been made under this mechanism, it would be a dividend for UK tax purposes. Ways in which a Delaware corporation can reduce its capital are limited and described at para 244 of the Delaware Code.
>
> From the annual report or Dr Pepper, it does not appear that the payment was a result of a reduction of capital, a partial liquidation or some other mechanism for returning capital to the shareholders – it appears to be described as a straightforward dividend."

116. In support of Ms Vickerman's statements about Delaware law, on 25 January 2023, HMRC provided Mr Buckingham and the Tribunal with a link to an extract from the online version of the Delaware Code, being Title 8, §241 to §246. Mr Buckingham did not object to the late provision of the intranet link to this document. Within those provisions, §244 is headed "reduction of capital", and reads:

> "(a) A corporation, by resolution of its board of directors, may reduce its capital in any of the following ways:
>
> (1) By reducing or eliminating the capital represented by shares of capital stock which have been retired;

> (2) By applying to an otherwise authorized purchase or redemption of outstanding shares of its capital stock some or all of the capital represented by the shares being purchased or redeemed, or any capital that has not been allocated to any particular class of its capital stock;
>
> (3) By applying to an otherwise authorized conversion or exchange of outstanding shares of its capital stock some or all of the capital represented by the shares being converted or exchanged, or some or all of any capital that has not been allocated to any particular class of its capital stock, or both, to the extent that such capital in the aggregate exceeds the total aggregate par value or the stated capital of any previously unissued shares issuable upon such conversion or exchange; or
>
> (4) By transferring to surplus (i) some or all of the capital not represented by any particular class of its capital stock; (ii) some or all of the capital represented by issued shares of its par value capital stock, which capital is in excess of the aggregate par value of such shares; or (iii) some of the capital represented by issued shares of its capital stock without par value.
>
> (b) Notwithstanding the other provisions of this section, no reduction of capital shall be made or effected unless the assets of the corporation remaining after such reduction shall be sufficient to pay any debts of the corporation for which payment has not been otherwise provided. No reduction of capital shall release any liability of any stockholder whose shares have not been fully paid."

117. Mrs Donnelly submitted that ways in which a Delaware corporation can reduce its capital are limited to those set out at §244, and she repeated the statement made by Ms Vickerman that KDP's Annual Report did not say that the Special Dividend was "the result of a reduction of capital, a partial liquidation, or some other mechanism for returning capital to shareholders", but instead "appears to be described as a straightforward dividend". However, Mrs Donnelly (like Ms Vickerman, see ¶56) was unable to locate any reference in the Annual Report to the Special Dividend being described as a "straightforward dividend".

118. When asked by the Tribunal how her submissions could be reconciled with the documentation issued by KDP, Mrs Donnelly said that the income/capital split on Form 8937 and on Forms 1042-S were for IRS purposes and did not reflect the position under Delaware law; the two were, she said "different".

119. She also emphasised that KDP's information about the income/capital split was addressed to US residents and that other holders had been advised to "consult their own tax advisers", see ¶30; she submitted that this further supported HMRC's position.

The Tribunal's finding of fact

120. On the basis of the evidence provided, we find as a fact that $29.50 of the Special Dividend was income and $74.25 was capital under Delaware law. We come to that finding because:

(1) Those facts are derived from the documentation provided by DPSG and KDP, As both companies were listed on the NYSE, it is not remotely credible that the Special Dividend was split in a way which was inconsistent with the Delaware law under which it was incorporated.

(2) It was also not credible that the IRS would have signed off on a capital/revenue split which was not in accordance with the applicable company law.

(3) Only the income portion of the Special Dividend was funded by earnings and profits; the balance was funded by external investors.

(4) The capital value of the shares owned by DPSG shareholders fell sharply after the Special Dividend.

(5) We also reject HMRC's reliance on the fact that KDP's advice was aimed at US shareholders. No company can reliably give advice as to the tax position of all its overseas shareholders, and that entirely reasonable caveat does not change the nature of the Special Dividend under Delaware law.

THE TREATMENT OF THE SPECIAL DIVIDEND FOR UK TAX PURPOSES

121. We first set out the parties' submissions on how the Special Dividend was to be classified for UK tax purposes, followed by our view.

Ms McSweeney's submissions on behalf of Mr Buckingham

122. Ms McSweeney submitted that the UK tax treatment followed that in the US. In consequence, $29.50 was an income dividend taxable under ITTOIA s 402(1), and the balance was excluded by s 402(4) as a "dividend of a capital nature". Referring to *First Nationwide,* she said that "the legal mechanism" and "mechanics of distribution" by which the Special Dividend was paid were that only the $29.50 was paid out of earnings and profits, with the balance being capital. Moreover, that capital element was plainly a payment which reduced the "corpus" of the company because the capital value of investors' holdings in the new KDP shares were worth significantly less than their previous holdings in DPSG.

Mrs Donnelly's and Ms O'Reilly's submissions on behalf of HMRC

123. Mrs Donnelly and Ms O'Reilly both made submissions on this issue. Although they had initially said, consistently with Ms Vickerman's review decision, that no part of the Special Dividend was capital under Delaware law, they then submitted that the treatment in the overseas jurisdiction was not a relevant consideration.

124. This was, they said, consistent with the citation from *IRC v Reid's Trustees* at [16] of *First Nationwide,* which says:

> "if a foreign company chooses to distribute its surplus profits as dividend, the nature and origin of those profits do not and cannot be made to affect the quality of the receipt for the purposes of Income Tax."

Application to make further submissions

125. At this point, we told Mrs Donnelly and Ms O'Reilly that we were finding HMRC's case hard to follow, and agreed to a short adjournment so they could consider their position. When we reconvened, Ms O'Reilly said that HMRC "apologised for confusing everyone" and asked for permission to make written submissions after the hearing to allow them to explain their case.

126. We indicated that we were very unlikely to agree to this application and outlined our reasons, but said we would consider it more fully after the hearing. Having done so, we confirm that the application is refused. This is because:

(1) The submissions in question would relate to whether the Special Dividend was income or capital under UK law. This had always been the key issue between the parties. It was not a new point, but instead the very heart of the dispute.

(2) As Lewison LJ memorably said in *Fage v Chobani* [2014] EWCA Civ 5, a hearing of the substantive dispute "is not a dress rehearsal. It is the first and last night of the show".

(3) Mrs Vickerman made her review decision on 30 March 2022, some ten months before the hearing, and the Statement of Case was filed and served on 15 August 2022, some six months before the hearing. Had HMRC wished to clarify or change their position, they had had plenty of time to do so.

(4) Despite Mr Buckingham having provided both Forms 1042-S to Mr Butler, who had also considered Form 8937, the Statement of Case repeats the following passage from Ms Vickerman's review decision:

> "The Appellant has not provided any information regarding the nature of the payment or any information suggesting, for example, which reserve the payment was made out of and under any mechanism, the only information HMRC have seen is that which Keurig Dr Pepper have made available publicly [followed by the same reference to the Annual Report".

It is too late for HMRC now to rework their submissions to take that evidence properly into account.

(5) As already noted, Mr Buckingham is 84 years old, and has already complained to HMRC about the delays in their handling of his case. Another ten months have elapsed since he notified his appeal to the Tribunal. Granting HMRC's application would lead to a further delay, particularly as Mr Buckingham would have to be given the opportunity to respond to such further submissions, and another hearing might be required.

127. In short, it is plainly not in the interests of justice to adjourn the hearing to allow HMRC to provide a further explanation of their case.

The Tribunal's view

128. Our starting point, as required by *First Nationwide,* is "the legal mechanism" by which the Special Dividend was paid. In *Lazard,* the payment was capital under Maryland law, and received as such by shareholders in the UK, see Lord Pearce's summary cited at ¶105. In *First Nationwide,* the distribution was out of a share premium account and would have been capital had it been made by a UK company, but was income under the laws of the Cayman Islands and likewise income in the hands of UK shareholders.

129. On the facts of this case, $29.50 of the Special Dividend was paid out of DPSG's earnings and profits, and the balance was paid as capital. It could not have been paid as a distribution of earnings or profits because there were insufficient funds of that nature to do so; in that respect it was entirely different from all previous DPSG dividends. As Ms McSweeney said, the "corpus" or value had been reduced: this is reflected in the lower value of Mr Buckingham's shareholding in the merged company. This too supports classification of the $74.25 as capital.

130. We also note that ITTOIA s 402(4) was introduced in order to reflect the position set out in *Lazard* and *Reid,* in other words, specifically to exclude "dividends of a capital nature" from taxation as income. This is clear from the Explanatory Notes and reflected in HMRC's guidance at SAIM5210. The $74.25 was such a capital dividend and so not taxable as income.

131. We have already rejected HMRC's submission that the capital/income split shown on the documentation was not in accordance with Delaware law. We also reject their later submission that treatment of the dividend in the overseas jurisdiction is irrelevant to its classification for

UK tax purposes: that submission is entirely inconsistent with the *ratios* of *Nationwide* and *Lazard.* The citation on which Mrs Donnelly and Ms O'Reilly relied (see ¶123) does not assist. It says (emphasis added):

> "if a foreign company chooses to distribute **its surplus profits** as dividend, the nature and origin of those profits do not and cannot be made to affect the quality of the receipt for the purposes of Income Tax."

132. In this case, DPSG's profits were exhausted in payment of the income part of the dividend; the balance did not come from "surplus profits".

133. For all the above reasons, we refuse to increase the amounts taxable on Mr Buckingham under TMA s 50(7) to reflect Ms Vickerman's review decision.

134. We add that HMRC's case was also:

(1) vitiated by the failure to take into account the evidence in Form 8937 and both Forms 1042-S, see Ms Vickerman's review decision at ¶54 to ¶56, and the passage from the Statement of Case cited at ¶126(4); and

(2) inconsistent with the guidance set out in CTM15205 and in SAIM5210, to which no reference was made either by Ms Vickerman or in HMRC's submissions for this hearing, despite Mr Butler having explicitly referred to the former.

WAS MS VICKERMAN'S REVIEW DECISION MADE TOO LATE?

135. The above is sufficient to decide the appeal in Mr Buckingham's favour. However, when considering the documents after the hearing, it appeared to us that Ms Vickerman may have been out of time to issue her review decision. This possibility was not identified by the parties, so we had no related submissions. We first set out the law and the facts, followed by a discussion and our conclusions.

The law

136. The key relevant provision is TMA s 49E, which is headed "Nature of review etc" and reads:

> "(1) This section applies if HMRC are required by section 49B or 49C to review the matter in question.
>
> (2) The nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances.
>
> (3) For the purpose of subsection (2), HMRC must, in particular, have regard to steps taken before the beginning of the review
>
> > (a) by HMRC in deciding the matter in question, and
> >
> > (b) by any person in seeking to resolve disagreement about the matter in question.
> >
> > (4) The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them.
>
> (5) The review may conclude that HMRC's view of the matter in question is to be
>
> > (a) upheld,
> >
> > (b) varied, or

> (c) cancelled.
>
> (6) HMRC must notify the appellant of the conclusions of the review and their reasoning within
>
> (a) the period of 45 days beginning with the relevant day, or
>
> (b) such other period as may be agreed.
>
> (7) In subsection (6) "relevant day" means
>
> (a) in a case where the appellant required the review, the day when HMRC notified the appellant of HMRC's view of the matter in question,
>
> (b) in a case where HMRC offered the review, the day when HMRC received notification of the appellant's acceptance of the offer.
>
> (8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that HMRC's view of the matter in question (see sections 49B(2) and 49C(2)) is upheld.
>
> (9) If subsection (8) applies, HMRC must notify the appellant of the conclusion which the review is treated as having reached."

Application to Mr Buckingham

137. As is clear from the foregoing, TMA s 49E requires that a statutory review decision be issued within 45 days of the "relevant day", unless another period "has been agreed". The definition of "relevant day" depends on whether (a) the appellant asked for review, or (b) HMRC offered the review.

138. In this case Mr Buckingham asked for a review; it was not offered by HMRC. The "relevant day" was thus 45 days from the date on which HMRC provided their "view of the matter" letter or "such other period as may be agreed". As is clear from our findings of fact, see ¶49 and ¶50; the "view of the matter" letter was provided on 24 January 2022, not 25 January 2022. Day 45 was therefore 9 March 2022.

139. Mr Buckingham heard nothing from Ms Vickerman on or before 9 March 2022. However on 10 March 2022, Ms Vickerman emailed him a copy of a letter in which she said "I have been unable to complete the review by the statutory deadline", adding:

> "Unless I hear to the contrary from you, I will assume that you have no objection to the review period being extended so that it expires on 31 March 2022."

140. Mr Buckingham did not write back to say he objected. Ms Vickerman issued her review decision on 30 March 2022.

141. As is clear from TMA s 49E(8), where HMRC do not issue the statutory review to the appellant within the 45 days, or within "such other period as may be agreed", the review "is to be treated as having concluded that HMRC's view of the matter in question…is upheld"; in other words, the reviewer is deemed to have confirmed the decision appealed against.

142. In Mr Buckingham's case, this means that if Ms Vickerman missed the statutory deadline, the review decision she issued is a nullity; instead, she is deemed to have confirmed Mr Butler's discovery assessment.

Such other period as may be agreed?

143. However, that will not be the position if a different period has been agreed instead of the 45 days. We therefore considered whether:

(1) HMRC can "agree" an extension of time *after* the end of the 45 day period; and

(2) the appellant can be assumed to have agreed an extension in the absence of an objection.

144. In our view, the natural reading of the relevant provisions is that HMRC must issue their statutory review within the 45 day period, unless *before* the expiry of that period, the appellant has positively *agreed* to an extension of time and not simply failed to respond. We come to that conclusion for the following reasons:

(1) It is a matter of "central importance" when interpreting legislation to identify the purpose of the provision in question. That exercise must be carried out "in the context of the statute as a whole"; this in turn must take into account the "historical context" and "the general scheme by which [the purpose] is to be put into effect", see *Rossendale Borough Council v Hurstwood Properties Ltd* [2021] UKSC 16 at [10].

(2) Section 49E is part of suite of provisions introduced into the TMA by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, which coincided with the introduction of the Tribunal which replaced the General and Special Commissioners. The new provisions introduced a stepped sequential approach to appeals and reviews which is marked throughout by time limits. In particular:

(a) Section 49C provides that unless an appellant accepts the review offer within 30 days, the decision under appeal is deemed to have been settled by agreement under TMA s 54; the appellant cannot resile from that deemed agreement.

(b) Section 49F similarly provides that if an appellant does not notify its appeal to the Tribunal within 30 days of the review conclusion, the parties are deemed to have settled the matter by agreement under TMA s 54 on the basis of the conclusions of that review decision, and the appellant cannot resile from that deemed agreement.

(c) These strict time limits can only be displaced if the Tribunal gives permission for the appeal to be notified late, see TMA s 49H(3) and s49G(3)

(3) The deeming provision in TMA s 49E(8) is automatically triggered if HMRC do not give notice of their conclusions within the 45 day period or within "such other period as may be agreed". If it were possible for HMRC retrospectively to agree a longer period with the appellant, the effect would be to unwind that deemed decision. This would be a surprising outcome, particularly in the light of the finality imposed on the appellant if other time limits are missed.

(4) The wording of TMA s 49E(6) can be contrasted with the flexibility provided by s 49B(5), which provides that the date for HMRC to notify an appellant of its view of the matter is either 30 days from the date on which the appellant asks for the review or "such longer period as is reasonable". TMA s 49E does not allow HMRC to take "such longer period as is reasonable"; instead, the longer period must be "agreed" with the appellant.

(5) Our understanding of TMA s 49E is supported by the Explanatory Notes to the Order, which say that where HMRC do not give notice of the review conclusions within the time specified, subsection (8) "finalises the review…ensuring that the taxpayer may

notify their appeal to the tribunal once that period of time has passed, and providing a basis on which to do so". If it were possible for HMRC retrospectively to seek agreement to a longer time period, that finality would not be achieved.

(6) Similarly, it is not possible for HMRC simply to write and say (as happened in this case) that "Unless I hear to the contrary from you, I will assume that you have no objection to the review period being extended". That is because:

(a) HMRC cannot know for sure that there is an agreement: the letter could have been lost in the post or the email could have gone into spam.

(b) Under the law of contract it is well-established that the silence of one party does not bring about an agreement, see *Chitty on Contracts,* Volume 1, Part 2, Chapter 4(3)(f).

(7) HMRC's published view also indicates that positive agreement is required: their Appeals Reviews and Tribunals Guidance at ARTG4850 says that officers should make contact "by phone if possible and negotiate an extension to the review period".

Conclusion on this issue

145. We therefore conclude that Ms Vickerman's statutory review decision was out of time, and was instead displaced by a deemed decision that Mr Butler's discovery assessment was to be upheld.

146. However, this point was only identified by the Tribunal after the hearing, and the parties had not had the opportunity to make submissions. We nevertheless decided that it was not in the interests of justice to ask for further submissions, for the following reasons:

(1) Having considered the evidence and submissions related to the review decision issued by Ms Vickerman, we rejected her conclusions for the reasons already set out. Mr Buckingham thus succeeded in his appeal, whether or not Ms Vickerman's review was out of time.

(2) Had Mr Buckingham been aware of this before the hearing, he might have sought to withdraw his appeal. However, HMRC have a statutory right to object to a withdrawal, as long as they exercise that right within 30 days, see TMA s 54(4)(b). That is what happened in *HMRC v CM Utilities Ltd* [2017] UKUT 305 and *Albert House v HMRC* [2020] UKUT 373 (TC), because HMRC considered that the amount assessed was too low, and asked the FTT to increase the assessments under TMA s 50(7). Mrs Donnelly had already asked us to take this approach in Mr Buckingham's case, see ¶88.

(3) As we have already noted elsewhere in this decision, Mr Buckingham is 84 years old, and has already complained about delay. If we directed submissions on this issue, there would be a further delay, particularly as another hearing might be required.

OVERALL CONCLUSION AND APPEAL RIGHTS

147. For the reasons set out above, we confirm the discovery assessment made by Mr Butler. We add for completeness that neither party sought to adjust the split he had calculated for UK tax purposes, namely that allowing for exchange differences and withholding taxes, the income element of the Special Dividend was £32,234 and the capital element £83,551. In addition, neither party sought to argue that any adjustments were required to the calculation of capital gains based on that lower figure. We therefore uphold his assessment in its entirety.

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 Rules. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 04TH APRIL 2023