Neutral Citation: [2023] UKFTT 00695 (TC)

Case Number: TC 08887

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/02455, 02456, 02457, 02458 and 02549

CAPITAL GAINS TAX – section 137 TCGA 1992 – did an exchange form part of arrangements with a main purpose of CGT avoidance? – appellants 2 and 5, majority shareholders in private company, transferred some of their shares to their daughters (appellants 1, 3 and 4) before third party sale – at sale, daughters received loan notes and shares in third party buyer in a section 135 'exchange' – daughters held for one year to enable them to qualify for entrepreneurs relief – Snell, Coll *and* Euromoney *considered – Held on the facts: the exchange formed part of a scheme or arrangements – the deal with the third party – but it was not the main purpose of the deal, or one of its main purposes, to enable the CGT planning – appeals allowed*

Heard on: 9-12 May 2023 (with further submissions received on 25 May 2023)
Judgment date: 4 August 2023

Before

TRIBUNAL JUDGE ZACHARY CITRON

Between

(1) OLIVIA WILKINSON
(2) ROBERT WILKINSON
(3) HARRIETT MORRIS
(4) GEORGINA WILKINSON
(5) SUSAN WILKINSON

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Alun James of counsel, instructed by MHA

For the Respondents: James Henderson and Harry Winter of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. The form of the hearing was V (video) on the tribunal's video hearing service platform. A face to face hearing was not held because the directions for listing were issued during the Covid pandemic and it was considered fair and just to have a video hearing. The documents to which I was referred included a hearing bundle and a supplemental bundle of (together) 1,880 pdf pages and an authorities bundle of 581 pdf pages.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. References in what follows to

(1) "**sections**" (or "**s**") are to sections of Taxation of Chargeable Gains Act 1992 as it applied at relevant times

(2) "**CGT**" are to capital gains tax

(3) "**ER**" are to entrepreneurs relief (under, at relevant times, Chapter 3, Part V Taxation of Chargeable Gains Act 1992)

(4) the "**daughters**" are to the first, third and fourth appellants (as they are daughters of Mr Wilkinson and Mrs Wilkinson)

(5) "**Mr Wilkinson**" are to the second appellant

(6) "**Mrs Wilkinson**" are to the fifth appellant

(7) "**Mr Tate**" are to Jonathan Tate

(8) "**P Ltd**" are to Paragon Automotive Limited.

THE ISSUE IN THIS APPEAL

4. This appeal is about one of the questions posed by s137: did an exchange (the "**exchange**") of shares in one company (P Ltd) for loan notes and shares in another company (TF1 Ltd), that took place on 18 July 2016, form part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to (in this case) CGT? If it did, then s137 is engaged, preventing the application of s135 to the exchange, and the appeals in this case fall to be dismissed. If it did not, then s137 is not engaged (HMRC did not argue that the exchange was effected other than for bona fide commercial purposes) and the appeals fall to be allowed.

5. I will approach this question by making findings of fact in the course of this decision:

(1) describing the exchange in more detail;

(2) giving context for the exchange;

(3) deciding if the exchange formed part of a scheme or arrangements, and if it did

(4) deciding whether the main purpose, or one of the main purposes, of that scheme or those arrangements was avoidance of liability to CGT.

THE ASSESSMENTS AND THE APPEALS

6. HMRC raised discovery assessments dated 29 March 2021 on the basis that s135 did not apply to the exchange, and so CGT was payable by the appellants on chargeable gains accruing in the 2016-17 tax year at the rate of 20%. In the case of the daughters, this meant further tax (CGT) of £1.9 million (approximately), as they had claimed ER, as well as the CGT becoming due in an earlier tax year (2016-17 rather than 2017-18). For Mr Wilkinson and Mrs Wilkinson,

this did not change the amount of tax due, but did mean that it became due for the earlier tax year.

7. It was against these discovery assessments that the appellants appealed to this tribunal.

APPROACH TO MAKING FINDINGS OF FACT

8. I had extensive contemporaneous documentary evidence about the exchange and its context, including

(1) an agreement (the "**SPA**") dated 18 July 2016 for the sale and purchase of the share capital of P Ltd, running to 122 pages, between TF1 Ltd as buyer and the shareholders in P Ltd as sellers;

(2) final agreed "heads of terms", in the form of a letter from BCA Trading Ltd (the parent of TF1 Ltd) to the board and shareholders of P Ltd, signed on 3 and 4 July 2016;

(3) contemporaneous emails;

(4) a Grant Thornton report for Mr Wilkinson and Mrs Wilkinson on the tax implications of the disposal of their shareholdings in P Ltd, dated 14 July 2016;

(5) a document dated 14 July 2016 addressed to the daughters from Mr Wilkinson and Mrs Wilkinson and headed "Wishes of the Gift".

9. I also had witness statements of

(1) Mr Wilkinson, the principal entrepreneur behind P Ltd and, with his wife, Mrs Wilkinson, and daughters, the majority shareholder in it prior to completion of the SPA on 18 July 2016, and

(2) Mr Tate, a shareholder in P Ltd at that time who played a significant role in negotiation of the SPA and other strategic transactions for P Ltd,

both dated 28 March 2022. They both attended the hearing and were cross examined.

10. The witnesses' evidence was about high-value business deals that had taken place six years prior to their witness statements, and seven years prior to their oral evidence. Given the extensive contemporaneous documentary evidence relating to those transactions, in part summarised above, I have relied relatively heavily on the documentary evidence, and relatively lightly on the oral evidence, in making findings of fact in this case. Adopting the language of *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) at [22], I have, in general,

(1) placed little if any reliance at all on Mr Wilkinson's and Mr Tate's recollections of what was said in meetings and conversations in 2016 and prior,

(2) based factual findings on inferences drawn from the documentary evidence and known or probable facts, and

(3) used oral evidence at the hearing to gauge the personality, motivations and working practices of Mr Wilkinson and Mr Tate.

MORE DETAILS ABOUT THE EXCHANGE

11. P Ltd's issued share capital comprised 88,000 ordinary shares and 4,500 ordinary A shares. The shareholdings just prior to 14 July 2016 were:

(1) Mr Wilkinson: 26,000 ordinary shares

(2) Mrs Wilkinson: 25,000 ordinary shares

(3) Mark Wilkinson (Mr Wilkinson's brother): 5,000 ordinary shares

(4) Mr Tate: 5,000 ordinary shares and 4,500 A ordinary shares

(5) Stephen Hucklesby: 27,000 ordinary shares.

Thus, just prior to 14 July 2016, Mr Wilkinson and Mrs Wilkinson together owned about 58% of the ordinary shares in P Ltd.

12. On 14 July 2016, Mr Wilkinson and Mrs Wilkinson gave each of their three daughters 6,951 ordinary shares in P Ltd.

13. This meant that on 18 July 2016, just before completion of the SPA, the shareholdings in P Ltd were:

(1) Mr Wilkinson: 15,573 ordinary shares

(2) Mrs Wilkinson: 14,574 ordinary shares

(3) Mark Wilkinson: 5,000 ordinary shares

(4) Mr Tate: 5,000 ordinary shares and 4,500 A ordinary shares

(5) Stephen Hucklesby: 27,000 ordinary shares.

(6) Harriett Wilkinson: 6,951 ordinary shares

(7) Georgina Wilkinson: 6,951 ordinary shares

(8) Olivia Wilkinson: 6,951 ordinary shares

14. On completion of the SPA (on 18 July 2016) TF1 Ltd issued the following to the shareholders in P Ltd (as set out immediately above), in exchange for their shareholdings:

(1) to each daughter:

(a) £10 million 'nil rate deferred payment A loan notes'; and

(b) 500 B ordinary shares of 10p each;

(2) to Mr Wilkinson:

(a) £2,856,122 'nil rate deferred payment B loan notes'; and

(b) 'earn out loan notes' in the following amounts: A: £2,856,121; B: £2,856,122; C: £1,428,061; D: £1,428,061;

(3) to Mrs Wilkinson:

(a) £2,672,720 'nil rate deferred payment B loan notes'; and

(b) 'earn out loan notes' in the following amounts: A: £2,672,720; B: £2,672,719; C: £1,336,360; D: £1,336,360;

(4) to Mark Wilkinson:

(a) £542,043 'nil rate deferred payment B loan notes'; and

(b) 'earn out loan notes' in the following amounts: A: £542,044; B: £542,043; C: £271,022; D: £271,021;

(5) to Mr Tate:

(a) £542,043 plus £460,038 'nil rate deferred payment B loan notes'; and

(b) 'earn out loan notes' in the following amounts: A: £542,043 plus £460,038; B: £542,044 plus £460,038; C: £271,021 plus £230,019; D: £271,022 plus £230,019;

(6) to Stephen Hucklesby:

(a) £2,927,034 'nil rate deferred payment B loan notes'; and

(b) 'earn out loan notes' in the following amounts: A: £2,927,034; B: £2,927,034; C: £1,463,517; D: £1,463,517.

The nil rate deferred payment A and B loan notes issued by TF1 Ltd at completion of the SPA

15. The nil rate deferred payment A and B loan notes were payable 12 months after issuance. No interest was payable on them.

16. Under clause 3.3(f) of the SPA, on completion, TF1 Ltd was to deposit £40 million into a bank account controlled by a Solicitors' Account Agreement, to be used as collateral for the nil rate deferred payment A and B loan notes. £30m of this related to the deferred payment A loan notes (issued to the daughters in the exchange). The main difference between the A and B deferred payment loan notes was that claims were to be set against the B loan notes in priority to the A loan notes.

17. The nil rate deferred payment A and B loan notes were expressed to be secured by the cash in the Solicitors' Account, but otherwise an unsecured obligation of TF1 Ltd.

The earn out loan notes issued by TF1 Ltd at completion of the SPA

18. The liability to pay on the 'earn out loan notes' depended on whether the 'Earn Out Consideration' became payable. Schedule 10 of the SPA set out the circumstances in which 'Earn Out Consideration' would be payable. Very broadly, the 'Earn Out Consideration' was an amount up to £30 million which would be paid subject to the EBITDA of P Ltd and/or other business criteria.

19. If payable, the 'Earn Out Consideration' would be paid by the repayment of the A, B, C and/or D earn out loan notes. If the relevant 'hurdles' were not met then, as set out at paragraph 4 of Schedule 10 to the SPA, the relevant earn out loan notes would be cancelled.

The B ordinary shares issued by TF1 Ltd at completion of the SPA

20. The B ordinary shares in TF1 Ltd had no entitlement in a winding up beyond the nominal value of each share; holders of B ordinary shares would only be entitled to dividends once the shareholders had been paid dividends of £10 million, after which 99.85% of any further dividends would be paid to ordinary shareholders, and 0.15 % to B ordinary shareholders.

21. Only the daughters received B ordinary shares in TF1 Ltd in the exchange. No other shareholders in P Ltd received shares in TF1 Ltd (or any other company in the buyer group), as part of the exchange.

OTHER TERMS OF THE SPA AND EVENTS AT COMPLETION

22. By way of consideration for their P Ltd shares (in addition to what they received in the exchange), the following shareholders in P Ltd received cash at completion, as follows:

(1) Mr Wilkinson: £10,978,741

(2) Mrs Wilkinson: £10,273,760

(3) Mark Wilkinson: £5,024,770

(4) Mr Tate: £5,024,770 and £4,264,573

(5) Stephen Hucklesby: £27,133,756.

23. Under clause 9 of the SPA, TF1 Ltd was entitled to set off amounts attributable to any claims by it under the transaction documents (for example, claims for breach of warranty), against amounts payable by it (TF1 Ltd) under (inter alia) the nil rate deferred payment loan

notes; and, to that extent, TF1 Ltd could withdraw from the cash deposited in the bank account controlled by the Solicitors' Account Agreement.

24. Under clause 24 of the SPA, Mr Wilkinson was appointed as the sellers' representative.

25. On the date of completion of the SPA, each of the daughters was appointed as a non-executive (and unpaid) director of company that was a 100% subsidiary of P Ltd. The appointment letters stipulated that their appointments would run until 18 July 2017 (i.e., for one year) or, "if later, the date of repayment of all loan notes due to you from TF1 Limited".

RELATED SUBSEQUENT EVENTS

26. On 19 July 2017 (one year and one day after completion of the SPA), each of the daughters redeemed their nil rate deferred payment A loan notes for £10 million. On the same day, each of the daughters sold their 500 ordinary B shares in TF1 Ltd to an affiliated company of TF1 Ltd at their nominal value (£50). On 20 July 2017, each of the daughters resigned their directorships.

27. In their self-assessment tax returns for the 2017-18 tax year, each of the daughters claimed ER on the full amount of the gain arising on their disposals of the nil rate deferred payment A loan notes and ordinary B shares in TF1 Ltd (the effect of which was to reduce the rate of CGT on the gain from 20% to 10%).

THE WIDER CONTEXT

28. The wider context to the exchange was that

(1) P Ltd was the parent company of a group of companies in the business of provision of logistics and vehicle processing services to car manufacturers and operators of large fleets of cars;

(2) Mr Wilkinson, an experienced businessman in the sector, had played the lead entrepreneurial role in building the business operated by P Ltd since it was founded (2005);

(3) Mr Tate had also been involved in the business since 2005; at times relevant to this appeal, Mr Tate did not have a day to day operational role in P Ltd but, rather, had input into strategic decisions and coordinated the management of acquisitions and disposals, including the sale of P Ltd itself in July 2016; his background was as a chartered accountant;

(4) when it came to decisions about their shareholdings in P Ltd, Mr Wilkinson and Mrs Wilkinson acted as a 'unit', with Mr Wilkinson as the principal decision-maker;

(5) the business deal (the "**deal**") consummated in the SPA – by which P Ltd was sold to the BCA group, an established business in the same sector as P Ltd – was a life-changing opportunity for Mr Wilkinson and Mrs Wilkinson to monetise their investment in P Ltd.

Abortive transactions involving P Ltd in the year before the deal

29. This section briefly describes a number of transactions involving P Ltd that were discussed in the year or so before the deal, but which did not go ahead. They provide some context for the deal, in that they show

(1) the interest of Mr Wilkinson and Mrs Wilkinson, and the other shareholders in P Ltd, in monetising their investments in P Ltd, during this period of time;

(2) the tentative valuations of P Ltd which were being discussed with third parties, during this period of time;

(3) the attention paid by Mr Wilkinson to tax matters, in particular securing ER on disposal of his and Mrs Wilkinson's P Ltd shares.

The 2015 negotiations for BCA to buy P Ltd

30. BCA Marketplace plc wrote to the board and shareholders of P Ltd on 18 June 2015 saying that, further to recent discussions, the letter set out the principal terms and conditions on, and subject to which, BCA as buyer was willing to purchase the entire issued share capital of P Ltd from its five shareholders, subject to contract. Subject to certain assumptions, the consideration would be £100 million, of which a minimum of £80 million would be paid in cash at completion, and the balance of £20 million could be paid (at the sellers' election) in cash or in shares of BCA.

31. KPMG, on behalf of P Ltd, submitted an application for clearance under s138 to HMRC on 25 June 2015. In response to questions from HMRC, KPMG sent a further letter on 27 July 2015. HMRC responded by letter of 25 August 2015, refusing clearance under s138.

32. An email from Tim Lampert of BCA to Mr Tate of 14 August 2015 referred to the "operator's licence" issue and said that BCA strongly disagreed with Mr Tate's views on certain financial issues identified by PwC.

33. An email from Mike Warburton, tax director at Grant Thornton (and longstanding trusted adviser to Mr Wilkinson), to Grant Thornton colleagues of 2 September 2015 said that BCA wanted a price chip of £15 million due to the "operator's licence" issue; that Mr Wilkinson was not inclined to accept the price reduction; and that a further factor in Mr Wilkinson's decision was that KPMG had failed to obtain a clearance from HMRC for the "tax scheme" they proposed. The email said that Mr Wilkinson was "back with us [Grant Thornton] again" and "keen to find out what we suggest next".

"Equity release" 2015

34. On 13 October 2015, Grant Thornton, on behalf of P Ltd, submitted a clearance application under section 701 Income Tax Act 2007, related to a proposed "equity release" arrangement. HMRC ultimately gave clearance under section 701, in a letter dated 20 January 2016.

LDC management buyout March 2016

35. On 23 March 2016 LDC wrote an "indicative offer" letter to Mark Farlow of Catalyst Corporate Finance, on the subject of a management buyout of P Ltd. The letter referred to an enterprise value of P Ltd of £100 million on a debt-free, cash-free, tax-free basis, with a normal level of working capital.

36. On 28 April 2016 Mike Warburton of Grant Thornton, on behalf of P Ltd, wrote to HMRC applying for clearance under s138 and under section 701 Income Tax Act 2007, in respect of the LDC transaction. Amongst other things, the letter from Grant Thornton said that immediately before completion, Mr Wilkinson and Mrs Wilkinson would gift a combined total of 25,000 of their shares in P Ltd to the daughters, who would become directors of P Ltd. The P Ltd shareholders would sell their shares for cash, loan notes in the buyer, and shares in the buyer; the daughters and Mrs Wilkinson would retain approximately £27 million of buyer loan notes, and also hold the shares in the buyer.

37. Clearance was given, by letter from HMRC dated 6 May 2016 (which included a statement that HMRC were satisfied that s137 would not apply to the transaction as described in the clearance application).

How the deal was negotiated

38. A one-page email from Mr Tate to Tim Lampert of BCA of 22 June 2016 (a Wednesday), sent further to a conversation that morning, showed the genesis of the deal. The email had the following four headings, all "subject to contract":

(1) "Information" – this said BCA had "completed a substantial exercise last year" – and that Mr Tate would send updated financials, and key changes in the business since last year;

(2) "Consideration components" – this said: cash of circa £60 million and bank guaranteed loan notes of circa £40 million (circa £30 million of which to be held by the daughters). It said that the loan element needed to ensure ER was triggered by the daughters, and so directorships and minimum 5% each voting rights may be needed subject to finessing tax advice. It then laid out, in bullet points, the deferred consideration structure and hurdles;

(3) "Geddington Road lease" – this said Mr Tate's side would propose terms for a new "combined" lease;

(4) "Process" – this spoke of BCA reviewing information to be sent by Mr Tate "with urgency", so that a meeting "on Friday" to brief the lawyers on the "headline legal principles of the deal" could be confirmed; BCA was expected, "by Monday", to confirm price and structure, and "short timetable", and lodge a deposit; an exclusivity agreement would be signed on Monday; Mr Tate's side would provide a full set of warranties, with full disclosures, a cap of £30 million, and set-off of proven warranty claims against the deferred revenue in the first instance.

39. The heads of terms (signed about 10 days later, on 3/4 July 2016) framed the deal as a sale of all the shares of P Ltd for £130 million, payable as

(1) initial cash payment of £60 million,

(2) £40 million by the issue of loan notes issued at completion, and

(3) an earn-out amount of up to £30 million.

40. The heads of terms said that the loan notes would be (at the option of the buyer) either guaranteed by a bank or cash collateralised.

41. The heads of terms said that the proposed acquisition was conditional on 12 listed conditions, such as due diligence, approval by the buyer board, signing of an SPA, and so forth. One of the conditions (the last in the list) was:

> the Buyer being comfortable with the tax planning measures (both ER and EI related) proposed by the Sellers to the Buyer before the date of this Agreement (the "Tax Planning") such that they do not expose the [P Ltd group] or the Buyer's group to any potential substantive liability and does not fetter the Buyer's absolute control of the [P Ltd group]. In addition, it is understood that the 15% equity in the bidco entity to be issued to certain of the sellers will have no substantive value (and will be capable of being purchased for a nominal price under the put/call arrangements). Subject to there being no such liability, the Buyer being happy with the control position described above and the equity in bidco being of the nature expected, the Buyer shall co-operate with the Sellers to achieve the Tax Planning in the implementation of the Proposed Acquisition.

42. As majority shareholder (with Mrs Wilkinson) in P Ltd, Mr Wilkinson was the lead negotiator on behalf of the P Ltd shareholders, during the negotiation of the deal.

43. In general, the deal was negotiated speedily (four weeks from genesis to consummation) and at a valuation of P Ltd (£130 million) significantly higher than the £100 million that had been considered in the abortive transactions of the previous year.

44. The daughters had no material role in the negotiation of the deal or the terms of the SPA. I make this finding based on the contemporaneous documentary evidence (which indicates no material role for the daughters in the deal negotiation), corroborating the oral evidence of Mr Wilkinson, as well as intuitive common sense, given the circumstances: the daughters became shareholders (i) only 4 days before the SPA was signed, and (ii) solely due to the beneficence of their parents (i.e. they played no significant role in the business).

45. Mrs Wilkinson also had no material role in the negotiation of the deal or the terms of the SPA. I again make this finding based on the contemporaneous documentary evidence (which indicates no material role for Mrs Wilkinson in the deal negotiation), corroborating the oral evidence of Mr Wilkinson, as well as intuitive common sense, given the relationship between her and Mr Wilkinson in matters relating to the P Ltd business (see finding at [28(4)] above).

The Wilkinsons' CGT planning

46. During the negotiation of the deal, Mr Wilkinson was aware that selling his and Mrs Wilkinson's shares in P Ltd would give rise to a charge to CGT; he was also aware (and this is well illustrated by the "Wishes of the Gift" letter he and Mrs Wilkinson wrote to the daughters on 14 July 2016) that, under certain conditions, the CGT payable by him, Mrs Wilkinson and the daughters (viewed a single economic unit, given the close family ties between them) would be significantly reduced. The conditions were:

(1) that he and Mrs Wilkinson transfer ordinary shares in P Ltd to the daughters, prior to those shares being sold to TF1 Ltd;

(2) that the daughters exchange their P Ltd shares for loan notes or shares of TF1 Ltd, which could be redeemed or sold after a one-year holding period;

(3) that the daughters

(a) receive shares equating to 5% of the ordinary share capital of TF1 Ltd and allowed for 5% of the voting rights in TF1 Ltd; and

(b) be appointed to directorships in trading companies with the P Ltd group; and

(4) that the daughters hold their notes, shares and directorships for one year.

47. These conditions were known to Mr Wilkinson from professional advice (principally from Mike Warburton of Grant Thornton) and were intended to entitle the daughters to claim ER on their subsequent disposals of the loan notes and shares (received in exchange for their P Ltd shares).

48. Mr Wilkinson took steps to ensure that conditions (1) and (3) in [46] above were satisfied:

(1) condition (1) was entirely within his (and Mrs Wilkinson's) control – it was satisfied by Mr Wilkinson and Mrs Wilkinson transferring ordinary shares in P Ltd to the daughters on 14 July 2016;

(2) condition (3) had to be agreed through negotiation with BCA in the course of the deal.

49. Condition (4) in [46] above was within the control of the daughters, who (in the event) ensured it was satisfied.

50. It is less clear whether Mr Wilkinson had to take steps to ensure that condition (2) in [46] above was satisfied, or whether this aspect of the deal was (fortuitously, from the point of view

of the Wilkinsons' CGT planning) imposed on the P Ltd shareholders by BCA. I shall now make findings of fact on this matter.

Why the consideration was partly in deferred payment loan notes

51. Mr Wilkinson's evidence was that the reason part of the consideration was in deferred payment loan notes – overall (and this is how the deal was presented in the heads of terms), the consideration was £60 million cash, £40 million deferred payment loan notes, and £30 million earn out loan notes – was that this was the way the deal was initially presented to him by Avril Palmer-Baunack, the chief executive officer of BCA, a day or so prior to the exchange of emails between Mr Tate and Tim Lampert of BCA on 22 June 2016; and because he was happy with the overall price of £130 million, Mr Wilkinson did not try to negotiate this aspect of the deal.

52. Ms Palmer-Baunack wrote an email to Mr Wilkinson on 24 September 2021 stating that the £40 million loan element of the consideration was included at BCA's instigation, to provide BCA with "sufficient commercial protection". I place little evidential weight on this email, given that

(1) it was written five years after the event, at Mr Wilkinson's request; and

(2) Ms Palmer-Baunack did not attend the hearing for cross examination.

53. I make the following findings:

(1) Mr Wilkinson was aware that the loan note element of the consideration satisfied one of the conditions for the Wilkinsons' CGT planning (see [46(2)] above);

(2) the £40 million loan element of the consideration was an agreed term from a very early stage in the deal negotiations: it was in the email of 22 June 2016 from Mr Tate to Tim Lampert of BCA; it was in the draft heads of terms (annotated by the sellers' lawyers on 28 June 2016), as well as in the signed heads of terms of 3 July 2016;

(3) Mr Wilkinson did not therefore have to ask that the deal be "changed" so that part of the consideration was paid in deferred payment loan notes – this was the terms of the deal from inception;

(4) the reason it was a term of the deal from inception was not that BCA "imposed" it, solely for reasons of its own commercial interests. Rather, at inception, both parties knew that this was term was mutually advantageous:

(a) it suited BCA as it gave it some element of commercial protection, if a claim was made on the warranties given by the sellers. I accept HMRC's point that there would have been other ways BCA could have secured this commercial protection (such as by structuring the "solicitors' account" as an "escrow" arrangement) – but that does not detract from the point that the loan note mechanism gave it some element of commercial protection. Mr Wilkinson was aware of this; and

(b) it suited Mr Wilkinson and Mrs Wilkinson, the majority shareholders in P Ltd, as it enabled them to pursue the Wilkinsons' CGT planning. I find that BCA was aware of this from inception of the deal: the way the 22 June 2016 email from Mr Tate to Tim Lampert is expressed, indicates that BCA were already, at that early stage, aware of the Wilkinsons' CGT planning.

54. In making this finding, I have taken into account Mr Tate's 11 July 2016 email to Mike Warburton, copying Mr Wilkinson, saying that, if the deal could not be structured in line with the condition of the Wilkinsons' CGT planning set out in [46(3)] above, then:

> I haven't had this discussion with BCA, but I would anticipate that we would then simply get an additional £30m in cash, leaving just £10m in loan notes.

I am not persuaded that this email indicates that £30 million of the deferred payment loan note element in the deal was there *only* because Mr Wilkinson wanted it – I read the statement as Mr Tate's speculation as to what he could agree with BCA, in the context of BCA having refused to accommodate the Wilkinsons' CGT planning; crucially, however, Mr Tate had not actually discussed the matter with BCA.

Would Mr Wilkinson have scuppered the deal if the Wilkinsons' CGT planning could not have been achieved?

55. The emails of 11 July 2016 from Mr Tate to Mike Warburton, copying Mr Wilkinson, make it clear that if the deal could not be structured so as to achieve the condition in [46(3)] above – such that the Wilkinsons' CGT planning would not be achieved – then the deal should not be put in jeopardy; in the words of one of the emails, Mr Wilkinson would "walk past" the CGT saving for his family, rather than scupper the deal.

56. This makes intuitive sense: the value of the savings from the Wilkinsons' CGT planning was approximately £3 million. The value of the consideration due to Mr Wilkinson, Mrs Wilkinson and the daughters under the SPA was about £73 million.

Significance of s135 treatment for other shareholders in P Ltd (apart from the appellants) involved in the exchange

57. The parties were in agreement that

(1) s135 potentially applied in relation to shareholders in P Ltd (other than the appellants) who took part in the exchange (e.g. by their receiving earn out loan notes in exchange for their P Ltd shares). However,

(2) some of those shareholders had subscribed for their P Ltd shares under the enterprise investment scheme, which potentially would qualify for relief from CGT on disposal under s150A. In such circumstances, s135 is disapplied by s150A(8); instead, a gain arises to the individual on which no CGT is payable;

(3) a shareholder who expected to qualify for ER in relation to their original shareholding in P Ltd at the time of the sale (but would not have so qualified at the date of the repayment of the earn out loan notes), may have made an election under s169Q. The effect of such an election would be to disapply s127/s135 so that they realised a gain on the disposal of their shares in P Ltd which qualified for ER.

PARTIES' ARGUMENTS IN BRIEF

Some cases referred to in argument

Snell

58. In *Snell v HMRC* [2007] STC 1279 (a decision of the High Court), the taxpayer beneficially owned 91% of a company, and on 21 December 1996 entered into an agreement to sell his shares for about £7.3 million, payable as to about £6.6 million in loan stock to be issued by the buyer company. The taxpayer left the UK in April 1997. In July 1997 the taxpayer redeemed about £5.6 million of the loan stock.

59. Most relevantly to the issues in this case, it was held at [28] that:

> The ordinary meaning of the word 'scheme' is 'a plan of action devised in order to attain some end'. Similarly an arrangement is 'a structure or combination of things for a purpose', see for both meanings the *Shorter Oxford English Dictionary*. Accordingly unless [the taxpayer] had the purpose of becoming non-resident as at 21 December 1996 so as to link the acceptance of loan notes on that day with their redemption when non-resident after 5 April 1997 there cannot be a relevant scheme or arrangement for the purpose of s137.

60. Although the summary of the facts at [1] of the judgement referred only to the *taxpayer's* exchange of shares for loan stock, it is evident from the case report (and, in particular, from the decision of the Special Commissioners which was being appealed), that, per an agreed statement of facts, the other 9% of the company being sold was held by the taxpayer's two sons, and that they, too, sold their shares as part of the 21 December 1996 sale agreement. The sons received ordinary shares and preference shares in the buying company, as well as some loan stock. I mention this detail here because it is an aspect of the case picked up in HMRC's submissions in this case.

Coll

61. In *Coll v HMRC* [2010] STC 1849 (a decision of the Upper Tribunal), Mr and Mrs C were the shareholders and sole directors of a business. They sold their shares in the 1997-98 tax year to N in consideration for £2.5 million, to be satisfied by the issue and allotment of loan notes in N. Mr and Mrs C became resident in Belgium in September 1998, and the loan notes were redeemed in October 1998 and March 1999. HMRC assessed on the basis that s137 applied to the exchange. The First-tier Tribunal dismissed the appeal. One of the taxpayers' contentions on appeal was that s137 and s135 had to apply *in relation to a particular person*. HMRC contended that if s137 applied to Mr C, *it applied to all the shareholders*, including Mrs C.

62. The Upper Tribunal held as follows at [10] (the underlining is mine, as it relates to points argued in this case):

> … The starting point is that if there is a reorganisation of a company's share capital within s126 then by s127 the original shares and the new holding are treated as a single asset. Either there is a reorganisation of the share capital of a company or there is not; <u>if there is, the same treatment must apply to all the shares.</u> Section 135(3) applies the same approach to a share exchange by treating both companies involved as a single company and the exchange as a reorganisation of the share capital of that deemed single company. <u>Again, this treatment must apply to all the shares if it applies to any of them.</u> The reference … to the company issuing shares or debentures to a person is part of defining what is an exchange, but having determined that there is an exchange then the consequences apply to all the shareholders. Section 137 says that s135 shall not apply to any issue in the exchange unless the conditions there set out are satisfied, except that an unconnected shareholder holding 5% or less will in any event qualify under s135. This also points to all the shareholders being treated in the same way. Further, s138 provides for the ability of either company to apply for a clearance which is a further indication that the provisions relate to all the shares involved in the exchange. If s137 applied to each shareholder separately a clearance application by one of the companies on behalf of all the shareholders in s138 would make no sense. On the plain words therefore <u>s137 is an all-or-nothing provision applying to all the shareholders</u> (other than unconnected shareholders holding 5% or less). <u>The point was not considered in *Snell* in which the only appeal was by Mr Snell holding 91% of the shares and so the application of s137 to his sons was not in issue.</u> We therefore hold that if there is such a scheme or arrangement as is mentioned in s137 then none of the shareholders qualify for treatment under s135, other than unconnected shareholders holding 5% or less.

Euromoney

63. In *Euromoney Institutional Investor plc v HMRC* [2022] STC 1457 (a decision of the Upper Tribunal), the taxpayer agreed in principle to transfer its shares in a company to an acquiror for consideration of $21 million cash and $59 million in the form of shares in the acquiror. After the deal was signed, the tax director of the taxpayer's parent company set out a

proposal to make the transaction more tax efficient for the taxpayer: by the acquiror issuing redeemable preference shares to the taxpayer instead of part of the cash consideration. The intention was to treat the entire transaction as a share for share exchange under s135. In that way, the capital gain on the taxpayer's disposal of the shares in the company, would be "rolled over" into its new shares in the acquiror and, after a year, when those new shares were redeemed, the disposal would qualify for the substantial shareholding exemption. The First-tier Tribunal held that s137 did not apply and the Upper Tribunal upheld that decision.

64. At [44], the Upper Tribunal gave the following guidance (references to the "second limb" of s137 are to the limb at issue in this case – whether the exchange forms part of a scheme or arrangements of which a main purpose was avoidance of liability to tax):

> We draw the following conclusions on the second limb of s137(1) derived from the limited assistance provided by *Snell* and the ordinary meaning of the statutory words used:
>
> (1) The first question to be addressed is whether the exchange 'form[s] part of a 'scheme or arrangements' and, if so, what the scheme or arrangements consist of. These questions involve ordinary words of the English language and it is a question of fact for the FTT to determine how they should be answered in any particular case.
>
> (2) If an exchange forms part of a scheme or arrangements, there is then a second question of fact for the FTT to determine, namely whether the main purpose, or one of the main purposes of that scheme or those arrangements is avoidance of liability to capital gains tax or corporation tax. That requires an examination of the purpose or purposes of the totality of the scheme or arrangements. Identification of the purpose or purposes of individual steps or constituents of the scheme or arrangements is not irrelevant as it may help to ascertain the purposes of the scheme or arrangements as a whole. However, it is the purpose or purposes of the overall scheme or arrangements that matter.
>
> (3) We express no view as to whether ascertaining the 'purpose' of any scheme or arrangements involves a subjective test, an objective test, or a combination of the two. That issue was not argued before us as both parties were content to proceed on the basis that it was a purely subjective test.

65. At [57], the Upper Tribunal said:

> The [First-tier Tribunal]'s task was simply to make findings on the nature and extent of any scheme or arrangements of which the exchange formed part and the purpose or purposes of that scheme or those arrangements.

66. Dismissing certain propositions put forward by HMRC as over-complicated and apt to confuse, the Upper Tribunal said of the limb of s137 in question (at [44]):

> There is no substitute for the words of the statute which set out a straightforward test.

Appellants' case

67. The appellants' case in outline was that s137 does not apply to the exchange because the avoidance of CGT was not a main purpose, or even a purpose, of the relevant arrangements under s137 on the following grounds:

(1) the relevant 'arrangements' to be considered in the context of s137 comprise the transfer of the entire share capital of P Ltd to TF1 Ltd, for cash of £60m, loan notes with a face value of £40m, and an earn out potentially worth £30m, plus B ordinary shares in

TF1 Ltd for the daughters. Specifically, as in *Euromoney*, consideration cannot be restricted simply to the daughters' exchange of shares for loan notes;

(2) the 'main purpose' of the sale as a whole (and indeed their own disposals) was to realise the value of P Ltd. The ER secured by the daughters was not a main purpose because

(a) the daughters obtaining ER on their shares was regarded as being just a bonus by the architect and deciding voice of the sale, Mr Wilkinson; it was not something which would have stopped the deal going ahead on the same terms; and as such, subjectively, it was not a 'main' purpose of the deal;

(b) the value of the tax saving via the ER on the daughters' P Ltd shares relative to the deal as a whole, being approximately £3 million in the context of a deal worth around £130 million, was very small (less than 2.5%) and, as in *Euromoney*, this objective factor confirms that the tax saving was not a main purpose of the transaction;

(c) the relatively low legal and commercial effort and expense put into the ER-structuring compared to that involved in the deal as a whole, as is going to be almost invariably the case with all deals of this commercial magnitude, similarly confirms the fact that this was not essential to the deal and not a main purpose, again as in *Euromoney*;

(d) further and in any event, and unlike *Euromoney*, the loan notes were not sought by the P Ltd shareholders whether as part of the tax planning or otherwise; they were simply part of the consideration offered by BCA and indeed a non-negotiable part – cash instead was never on offer; accepting the loan notes was therefore an exclusively commercial matter and ensuring that the loan notes went to some of the vendors exclusively such that they were ER-qualifying on disposal involved no material change to the deal and was not a main purpose of the transaction, but rather an incidental benefit;

(e) the prior gift of P Ltd shares to the daughters by Mr Wilkinson and Mrs Wilkinson is irrelevant in this context, because it does not on any view involve tax saving or avoidance by Mr Wilkinson and Mrs Wilkinson, the donors, who are in fact worse off, having given assets away (as part of their family succession planning);

(f) further and in the alternative, and noting that this argument appears to be contrary to the First-tier Tribunal decision in *Euromoney* but was not considered by the Upper Tribunal (as it was unnecessary to do so) - seeking to secure potentially applicable reliefs from taxation on a commercial disposal to a third party through the context of the deal itself is not tax avoidance: see *IRC v Willougby* [1997] STC 995 per Lord Nolan at para 1004.

HMRC's case

68. HMRC argued that the exchange formed part of a scheme or arrangements of which a main purpose was avoidance of liability to CGT.

69. HMRC submitted that it was for the appellants to prove that there were no arrangements, of which the exchange formed part, that had a main purpose of avoidance of liability to CGT. They cited *Coll* at [8]:

> We agree with [counsel for HMRC] that there is no obligation on HMRC to identify the scheme or arrangements and it is for the appellants to prove that there is no scheme or arrangements.

70. HMRC submitted that that it is not necessary for arrangements to include the *entirety of the exchange*, because:

(1) the scope of any arrangements is a question of fact for the tribunal: see *Euromoney* at [44(1)]. *Euromoney* is not authority that all relevant arrangements must include the entirety of the exchange;

(2) as a matter of ordinary language, for X to form part of Y, it is not necessary for the entirety of X to form part of Y. X can still form part of Y if merely an element of X forms part of Y. HMRC gave the following examples:

(a) mathematics "forms part" of computer science despite there being elements of mathematics that are not relevant to computer science;

(b) Russia "forms part" of Europe, even though not all of Russia is in Europe;

(3) in *Snell*, the High Court identified arrangements that did not include *the entirety of* an exchange. The exchange there involved the sale of the taxpayer's 91% shareholding for loan stock, and the sale of his two sons' 9% holding for shares as well as loan stock. The High Court identified arrangements by reference to (only) *the taxpayer's* exchange (which it found, upholding the Special Commissioners, to be linked to the taxpayer's purpose of becoming non-resident and redeeming the loan stock while non-resident).

71. On the basis of the above, HMRC submitted that one set of arrangements consisted of the following:

(1) the gift of ordinary shares in P Ltd by Mr Wilkinson and Mrs Wilkinson to the daughters just prior to the exchange, with accompanying holdover relief claims;

(2) the daughters each exchanging those shares for consideration of £10 million 'nil rate deferred payment A loan notes' and 500 B ordinary shares in TF1 Ltd (with the daughters being the only shareholders to get either 'nil rate deferred payment A loan notes' or B ordinary shares). This is an element (or elements) of the exchange;

(3) the daughters becoming directors of subsidiaries of P Ltd;

(4) one year and one day after the exchange, the daughters redeeming their 'nil rate deferred payment A loan notes', selling their 500 B ordinary shares, and, the following day, resigning their directorships.

72. HMRC submitted that the next stage of the analysis is to ask whether identified arrangements had a main purpose of avoiding liability to CGT. They submitted that this requires a subjective enquiry into the intentions of individuals

73. HMRC submitted that, in arrangements (such as here) involving multiple individuals, the tribunal should ask whether *any of them* had an objectionable main purpose:

(1) in *Euromoney*, the Upper Tribunal held at [57] that the First-tier Tribunal had been entitled to arrive at the essentially factual conclusion that it ought to focus on the subjective purposes of the taxpayer (as just one of the persons involved in the exchange or transaction), since the initiative for the creation of the preference shares (i.e. structuring the transaction as an exchange) came from the taxpayer. The Upper Tribunal, in the same paragraph, held: "In different cases, it may be that a wider examination of the subjective intentions of a wider number of counterparties will be relevant";

(2) In *Coll*, Mr C had intended, at the time of the exchange, to become non-resident, whereas Mrs C had not so intended. The Upper Tribunal decided at [11] that it could safely concentrate on Mr C's intention and, at [10], that if there were arrangements that fell foul of s137 then Mrs C's exchange of shares would also be caught. It follows from this that, whether or not Mrs C had a main purpose of avoiding liability to CGT, the arrangements (for both of them) would still be tainted if only Mr C had an objectionable main purpose.

74. HMRC therefore submitted that a factual finding that any of those five individuals had a main purpose of avoiding liability to capital gains tax is enough, in law, for the identified arrangements which form part of the exchange to trigger s137.

75. HMRC submitted that the daughters had "a case to answer" as to their main purposes – and, given their previous lack of involvement with and shareholding in P Ltd, one that is distinct from that of their father, Mr Wilkinson (who did give evidence). Citing *Hannah and Hodgson v HMRC* [2021] UKUT 0022 at [169] – [172], HMRC submitted that the tribunal may take into account the fact that a relevant witness has not been called to give evidence about a relevant matter and in appropriate circumstances draw an adverse inference.

76. HMRC submitted that the daughters' non-involvement in the business made it obvious that their involvement (as parties to the SPA) had a main purpose of avoiding liability to CGT which could only potentially be achieved by their insertion. Their insertion was unnecessary for any commercial purpose behind the deal. Equally, their insertion was unnecessary for passing down family wealth – Mr Wilkinson and Mrs Wilkinson could simply have given money to the daughters once the deal had been done.

DISCUSSION

Parameters of the exchange for s135 and s137 purposes

77. Per *Coll* at [10], the exchange in this case was the transfer by all the shareholders in P Ltd of some or all of their shares in P Ltd to TF1 Ltd, in exchange for loan notes and/ or B ordinary shares issued by TF1 Ltd.

Did the exchange form part of a scheme or arrangements and, if so, what did they consist of?

78. Per the definitions in *Snell* at [28], a scheme or arrangement has to have an *end* or a *purpose*. In this case, the obvious scheme or arrangement of which the exchange formed part was that aimed at selling P Ltd to TF1 Ltd for a total consideration whose value was £130 million. The exchange formed part of that scheme or arrangements because it was a very significant component of achieving that aim. In short, *the deal* was the scheme or arrangements of which the exchange formed part

79. The question is whether the exchange also formed part of another scheme or arrangements: a scheme or arrangements aimed at securing the Wilkinsons' CGT planning, as explained at [46] above. This is HMRC's submission. I do not accept that submission, for the following reasons:

(1) on a realistic view of the facts, the Wilkinsons' CGT planning was not a self-standing scheme or arrangements separable from the deal as a whole. The Wilkinsons' CGT planning was a plan for reducing the family's overall CGT liability *in the event of a sale of their shares in P Ltd to a third party*. It cannot therefore, realistically, be viewed as a scheme or arrangements distinct from the wider scheme or arrangements aimed at selling all the shares in P Ltd to a third party;

(2) contrariwise, if it were the case that the Wilkinsons' CGT planning was a scheme or arrangements in its own right, then, on a realistic view of the facts, the exchange did

not *form part* of it: the exchange was a significantly "larger" endeavour than the Wilkinsons' CGT planning, not least because it involved shareholders that had no part or interest in the Wilkinsons' CGT planning; and

(3) in any case, it seems wrong on the statutory wording – which, as the Upper Tribunal said in *Euromoney*, sets out a *straightforward test* – to posit subsidiary or part-related schemes or arrangements of which a given exchange may, arguably, form part where, as here, there is one scheme or arrangements of which that exchange, quite obviously, formed part.

80. I do not accept HMRC's submission that, because in *Snell*, the arrangements identified by the court were those involving the 91% shareholder (and not his sons, the 9% shareholders), I should here identify a scheme or arrangements by reference only to the daughters' part in the exchange. As the Upper Tribunal made clear in *Euromoney*, the question of whether an exchange forms part of a scheme or arrangement is one of fact for the tribunal to determine in the particular case before it; and the facts here are materially different from those in *Snell* (principally, the involvement in the exchange of a large bloc of shareholders uninterested in the putative 'scheme or arrangements'). Moreover,

(1) *Snell* was decided before *Coll*, the case which established that there is a single "exchange" for the purposes of s135; this point was not before the court in *Snell* (as was acknowledged in *Coll* itself at [10], penultimate sentence), so one should be cautious of interpreting Snell as deciding that if *part* of single exchange forms part of a scheme or arrangements, then the exchange as whole forms part of that scheme or those arrangements; and

(2) the Upper Tribunal in *Euromoney* commented on *Snell* at [39] and [40], observing that the case offers relatively little by way of guidance as to how to ascertain the precise scope of any scheme or arrangements; it did not need to, and did not, lay down any detailed test for establishing the constituent elements of any scheme or arrangements.

81. Nor am I persuaded that HMRC's submission that *Coll* at [8], where the Upper Tribunal said that they agreed with HMRC's counsel "that there is no obligation on HMRC to identify the scheme or arrangements and it is for the appellants to prove that there is no scheme or arrangements", has any particular significance this case: there is sufficient evidence before the tribunal for me to find, in this case, that there *was* a scheme or arrangements of which the exchange formed part; the nature and extent of that scheme are, as the Upper Tribunal said in *Euromoney*, matters on which this tribunal is called upon to make findings of fact.

82. Finally on this point, it will be evident from [79(2)] above that I do not share HMRC's view that it is a natural use of language to say that Russia "forms part of" Europe, or that the field of mathematics "forms part of" the field of computer science; it would be more natural to say that *part of* Russia is in Europe, and *parts of* maths feature in computer science.

83. Having found that the scheme or arrangements of which the exchange formed part was the deal, I now address whether avoidance of liability to CGT was the main purpose, or one of the main purposes, of the deal.

Was avoidance of liability to CGT the main purpose, or one of the main purposes, of the deal?

84. I find that, although the goal of enabling the Wilkinsons' CGT planning, as explained at [46] above, to proceed, affected the deal in a number of ways, it was not the main purpose, or one of the main purposes, of the deal. I make that finding for the following reasons, cumulatively and in the round:

(1) the pre-eminent “main purpose” of the deal was that the shareholders in P Ltd sell their shares to TF1 for a value of £130 million

(2) the large minority shareholding bloc – those who held approximately 42% of P Ltd’s ordinary shares – had no stake in the Wilkinsons’ CGT planning

(3) even for the Wilkinsons, as the majority shareholders, viewed in isolation, the value of the CGT planning – about £3 million – was small: about 4% of their approximately £73 million (anticipated) proceeds

(4) under the heads of terms, the buyer could effectively “walk away” if it was not “comfortable” with the sellers’ proposed tax planning in terms of its commercial effects (see [41] above); in other words, it was *not* one of the agreed terms, at ‘heads of terms’ stage, that the structuring required for the Wilkinsons’ CGT planning be adopted;

(5) the emails of 11 July 2016 involving Mr Tate, Mr Wilkinson and Mr Warburton, Mr Wilkinson’s tax adviser, show that Mr Wilkinson was not prepared to scupper the deal even if the structuring required for Wilkinsons’ CGT planning could not be achieved; this reflects the points made at (1) to (3) above

(6) the SPA gave no protection or price adjustment in the event that the Wilkinsons’ CGT planning did not have the desired effect.

85. I have not accepted HMRC’s argument that, because neither the daughters, nor Mrs Wilkinson, gave evidence, I should draw an “adverse inference” and regard them as having a main purpose of avoiding liability to CGT, that would in turn transpose to a main purpose of the deal. This is because:

(1) there was plentiful contemporaneous documentary evidence about the deal before the tribunal; this was sufficient basis on which to make a finding of fact as to the main purposes of the deal;

(2) the daughters and Mrs Wilkinson had no material part in the negotiation of the deal and delegated decision-making as regards the deal to Mr Wilkinson – see my findings of fact at [44-45] above; their oral evidence would therefore have added little to the material evidence before the tribunal as to the main purposes of the deal; I therefore draw no “adverse inference” from the fact that the appellants did not call them to give evidence;

(3) the question of what the main purposes of a scheme or arrangements are, is clearly one of fact; and the evidence relevant to making such a finding of fact will vary, depending on the circumstances. The fact that, in *Coll*, the purpose of one actor in the exchange in that case (Mr C), was found to determine the main purpose of the scheme or arrangements of which that exchange formed part, does not create a legal rule to the effect that the main purpose of any one actor in an exchange is always a main purpose of the scheme or arrangements of which that exchange forms part. Everything depends on the facts of the individual case.

86. For completeness, I also find that enabling the Wilkinsons’ CGT planning, as explained at [46] above, to proceed, was “a” purpose of the deal (albeit not a main purpose). I find this because the deal was influenced, in material ways, to achieve that end:

(1) the daughters became shareholders and therefore parties to the SPA

(2) the condition at [46(3)] was, as a result of negotiation, reflected the SPA and related documentation

(3) it was a term of the deal from inception (for the reason found at [53(4)] above) that loan notes would be issued, enabling satisfaction of the condition at [46(2)].

87. I make the further finding, again for completeness, that the purpose of enabling the Wilkinsons' CGT planning to proceed, was a purpose of avoidance of liability to CGT. I do not therefore accept the appellants' argument that the Wilkinsons' CGT planning was (per *Willoughby* at p1004c) merely "the acceptance of an offer of freedom of tax which Parliament had deliberately made" – as

(1) securing the CGT planning affected the deal in the material ways just outlined; and

(2) one of those ways – satisfying the condition at [46(3)] – went against the commercial grain of the deal – being, to have BCA take over P Ltd from its former shareholders; that element therefore

(a) required significant negotiation (and, as the emails of 11 July 2016, caused there to be some risk of the deal failing) and

(b) led to the insertion into the deal of significant features that otherwise would not have been present (the daughters' post completion holding of B ordinary shares and directorships).

All this is a far cry from the concept described in *Willoughby* at p1004c.

CONCLUSION

88. The appeals are allowed: the exchange did not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to CGT; accordingly, s137 is not engaged and s135 applies to the exchange.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

89. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 4 August 2023