[2018] UKFTT 137 (TC)

TC06390

Appeal number: TC/2017/02069

CAPITAL GAINS TAX – Taxation of Chargeable Gains Act 1992 - Income Tax Act 2007 - Share loss relief - Moneys advanced to company for purchase of shares - Shares oversubscribed - Company issued 10% of shares which had been requested and retained balance of money – Company went into liquidation - Nature of the transaction relating to the balance of the moneys - Whether a loan to the company? - Yes - Whether a share premium? - No - Whether a capital contribution? - No - Whether a purchase of goodwill? - No - Whether a trading loss? - No - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DR HARMINI K SIDHU **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MR DEREK ROBERTSON JP

Sitting in public at Tribunal Hearing Centre, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on Monday 8 January 2018, with further written submissions on behalf of the Appellant on 18 January 2018 and the Respondent on 30 January 2018.

Mr Brian Tanney FCA of B P Tanney & Co, Accountants, for the Appellant

Mr Dermot Ryder, an Officer of HMRC, for the Respondents

DECISION

1. This appeal was made by way of a Notice of Appeal dated 2 March 2017. The Notice of Appeal was out of time, but HMRC indicated at the hearing that it did not object to the Tribunal, of its own initiative, extending the time for appealing. We do so accordingly.

2. The Appeal is brought against a closure notice issued on 30 September 2016 pursuant to sections 28A(1) and (2) of the *Taxes Management Act 1970* which determined that tax of £10,078.80 was due for the year 2012/13. That decision was upheld by departmental review on 4 January 2017.

The background

3. On 10 January 2014, Dr Sidhu submitted a self-assessment return for the year 2012/13. The Capital Gains pages of that return showed total losses for the year of £28,051 (Box 6), losses against other income of £28,051 (Box 12), and total allowable costs of £28,051 (Box 24).

4. The return included the following additional notes, explaining the £28,051:

> *"253 ordinary shares subscribed for cash 1 December 2005 - Cost £25,000*
>
> *"102 ordinary shares subscribed for cash 3 May 2006 - Cost £3,051"*

The Grounds of Appeal

5. The Grounds of Appeal, in full, are as follows:

> "1. Client subscribed £28051 for shares in Balmoral Clinic Ltd (BCL) and claimed relief under s24(2) *Taxation of Chargeable Gains Act 1992*. BCL issued shares for £2855 and informed client balance of £25695 was a loan. HMRC decision not to accept that the £25695 qualifies for loss relief is wrong for following reasons:
>
> 2. In the absence of 'fresh consideration', BCL, now in liquidation, could not simply change the nature of original subscription (as confirmed in The Official Receiver of Northern Ireland v Stranaghan [2010] NICh 8, Hart J). The case was not accepted by HMRC because it was not a 'UK' case;
>
> 3. "loan" terms i.e. interest free - no fixed redemption date - unsecured, bear hallmarks of equity, perhaps a share premium, rather than a loan;
>
> 4. Alternatively the £28051 was purchased goodwill on behalf of a partnership between client, who has a private practice (conducted through her 100% owned company) and her consultant husband who also has a private practice;

5. Alternatively, the £28051 is a trading loss as the expenditure was incurred in order to reduce costs by consolidating the two practices at one location rather than the many sites then in use."

6. In summary, HMRC's position is that only £2,855 was subscribed for shares and that share loss relief was available on £2,855. HMRC's position is that the balance (£25,695) represented a loan to the Company, and as such was outside the scope of section 24 TCGA 1992.

7. The arithmetic of the figures - as between the Company's records, the return, and the public record of shareholdings - does not fully reconcile. We have been unable to resolve certain arithmetic discrepancies. But the discrepancies are minor and do not stand in the way of us deciding this appeal.

The legislation

8. Section 24 of the *Taxation of Chargeable Gains Act 1992* deals with "Disposals where assets lost or destroyed, or become of negligible value." Section 24(1) deals with the situation where an asset has been entirely lost, destroyed, dissipated, or has become extinct. Section 24(2) deals which the situation where 'a negligible value claim is made'. In principle, section 24 can apply to the situation where shares have been purchased in a company which enters liquidation such that the value of those shares is negligible.

9. Section 131 of the *Income Tax Act 2007* relates to "Share Loss Relief". An individual is eligible for relief if the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year, and the shares are qualifying shares: s 131(1). Shares are qualifying shares if EIS relief is attributable to them, or they are shares in a qualifying trading company which have been subscribed for by the individual: s 131(2). Section 131(1) only applies if the disposal of shares is (inter alia) 'a deemed disposal under section 24(2) of TCGA 1992'.

10. Section 135 of the ITA 2007 relates to 'subscription for shares'. An individual subscribes for shares in a company *'if they are issued to the individual by the company in consideration of money or money's worth'*: s 135(2).

The facts and some remarks on the evidence

11. The following facts are not in dispute:

(1) The Balmoral Clinic Limited ('**BCL**', or '**the Company**') was a limited company (limited by shares) registered in Northern Ireland in January 2003;

(2) On 12 December 2015, the Appellant, pursuant to an application for shares, was issued with 253 shares;

(3) On 3 May 2016, the Appellant, pursuant to an application for shares, was issued with a further 102 shares;

(4) The Company commenced trading, providing private medical procedures and treatments, in June 2006;

(5) BCL's Annual Return, dated 18 December 2006, and certificated on 17 February 2007, records Dr Sidhu as having a shareholding of 2,855 shares as at 3 May 2006;

(6) By way of an Order dated 4 April 2008 an administrator was appointed over the Company;

(7) The Company's Statement of Affairs made on 4 April 2008 records that Dr Sidhu was a shareholder as to 2,855 shares (with a nominal value of £2,855) and was a creditor in the sum of £25,695;

(8) On 30 September 2010, BCL went into liquidation;

(9) Dr Sidhu did not practice as part of BCL;

(10) Dr Sidhu had made payments to BCL of in the region of £28,000 (whilst the arithmetic of the figures does not fully reconcile, the differences are relatively minor, and do not affect the overarching principles to be applied);

(11) The liquidation of BCL meant that money was lost to Dr Sidhu.

12. There are considerable gaps in the evidence to the Tribunal put forward by the Appellant. In particular, the Appellant did not put before the Tribunal any of the following:

(1) The prospectus or other material soliciting share purchases;

(2) Her application for shares;

(3) Any shareholders' agreement or share subscription agreement;

(4) The Company's Articles of Association or Memorandum.

13. We were not given any explanation as to why these documents were not provided. The evidential inadequacies present the Appellant (who bears the burden) with a number of difficulties, which we discuss in more detail below.

14. We heard evidence from Mr Jonathon Hair, an Officer of HMRC, who confirmed his witness statement and was cross-examined. His witness statement was largely a recapitulation of the long series of letters which had passed between the parties. We accept his evidence.

The nature of the payments

15. The key issue in this appeal is the juridical nature of the payments.

16. Our task is to objectively identify the nature of the transactions, as they stood at the time.

17. Although there was a direction for witness statements, no statement was filed by or on behalf of Dr Sidhu. The Appellant did not personally attend the hearing and no application was made for an adjournment in order to allow her to do so. Therefore, we

did not have the opportunity to receive or hear any evidence from her as to the transactions in which she had been involved, and which had given rise to the loss claimed. But, and as explained to the parties at the hearing, submissions as to Dr Sidhu's state of mind or belief - especially when that was said to be at variance with the objective meaning conveyed by the contemporary documents - would be of little evidential weight and unlikely to be helpful to the Tribunal.

18. In our view, the Grounds of Appeal, overall, are largely an elaborate attempt to re-characterise, after the event, the actual transactions which the Appellant entered into. That approach is not permissible. Neither the Tribunal nor the Appellant can 'back-engineer' the transaction so as to change its taxation consequences. To do so would be to fall foul of the binding guidance given by the Court of Appeal in *Henriksen (Inspector of Taxes) v Grafton Hotel Ltd* [1942] 2 KB 184, where Lord Greene MR remarked that the Tribunal must look to the contract which the parties actually made, going on to observe:

> *"It frequently happens in income tax cases that the same result in a business sense can be secured by two different legal transactions, one of which may attract tax and the other not. This is no justification for saying that a taxpayer who has adopted the method which attracts tax is to be treated as though he had chosen the method which does not or vice versa."*

A loan

19. We find that the balance of the moneys paid to the Company and retained by it was a loan. This is for the following reasons.

20. It was expressly described as such, by the Company, on several occasions, in contemporary documents.

The December 2005 letter

21. On 12 December 2005, Eamonn McCann, on behalf of the Board of Directors of BCL, wrote to the Appellant, as follows:

> "Re: Balmoral Clinic Limited - Sale of Venture Shares
>
> I am writing on behalf of the Board to inform you that the sale of shares was approved by the Board on Friday 9 December. The shares were allocated in accordance with the Company's Memorandum and Articles of Association.
>
> The sale was several times oversubscribed.
>
> You have been allocated 2,530 shares, @ £1.20 + 0.5% transfer tax = £3,051.18
> Please issue a cheque for this amount by return, payable to The Balmoral Clinic Ltd.

In line with your existing investment, 10% of this amount will represent shares (you will therefore be issued 253 shares) and 90% will represent a loan to the Company."

22. Consistently with this letter, the Company issued a share certificate for 253 fully-paid ordinary £1 shares dated 1 December 2005.

The May 2006 letter

23. On 3 May 2006, Anita Gibney, the Company Secretary, wrote to the Appellant as follows:

"Re: The Balmoral Clinic Limited - Sale of Venture Shares

I am writing to you regarding the current sale of 30,000 shares. They have been allocated in accordance with the Company's Memorandum and Articles of Association.

The sale was oversubscribed several times.

You have been allocated 1,020 shares, @ £1.20 + 0.5% transfer tax and the amount due to be paid is £1,231.48.

Please forward a cheque for this amount [...]

If payment is not received by this date, it is understood that you do not wish to proceed with this transaction and your shares will be reallocated.

In line with your investment, 10% of this amount will represent shares (you will therefore be issued 102 shares) and 90% will represent a loan to the Company."

24. Consistently with this letter, the Company issued a share certificate for 102 fully-paid ordinary £1 shares dated 3 May 2006.

25. The evidence before us does not contain any response by Dr Sidhu to either letter. In particular, there is no evidence that Dr Sidhu did not wish the Company to consider the money as a loan and/or that she wanted the balance of her investment returned to her. Therefore, and by necessary inference, Dr Sidhu was content, during that period, for the Company to treat the balance of her investment as a loan.

26. In this regard, we note that this was not a 'one-off'. The Appellant, knowing in December 2005 how the Company had treated her first application for shares, and her money, was nonetheless undeterred in making a second application some months later. This reinforces our finding that she not only knew but also accepted the Company's treatment of her money at the time.

The unsecured loan note

27. Consistently with the second letter, the Company issued an Unsecured Loan Note (described as part of Series 2) in the Principal Sum of £3,195. Clause 3 of that Note is a covenant to pay the Principal Sum '*on such date as the Principal Sum shall become payable in accordance with this Note'*. Clause 5 provides for payment by the Company upon the Company giving not less than 5 days' notice. Clause 6 is an acceleration clause providing, inter alia, for repayment if an order is made or an effective resolution is passed for winding-up.

28. On 9 May 2007, C & H Jefferson Solicitors, acting on behalf of the Company, wrote to Dr Sidhu referring to share certificates and loan notes in respect of the shares transferred to her on 1 December 2005 and 3 May 2006. That letter is consistent with the earlier letters, and shows a clear segregation not only in terms of the description but also in terms of the treatment of the moneys, as between shares on the one hand, and a loan on the other.

29. Again, there is nothing from Dr Sidhu in evidence which responds to that letter, or which controverts it. Again, and by necessary inference, we find that Dr Sidhu was content, at that time, for the Company to treat the balance of her investment as a loan, which loan was supported by loan notes.

The Company's Statement of Affairs

30. The Company's Statement of Affairs made on 4 April 2008 records that Dr Sidhu was a shareholder as to 2,855 shares and was a creditor in the sum of £25,695. That document records the Company's view of the relationship between it and Dr Sidhu. Again, there is a clear segregation between the shares and the loan.

31. These are all contemporary documents, produced by the recipient of the money. They all point in one direction. There is no suggestion in any of the contemporary documents or correspondence that the balance was being treated as anything other than a loan. There is no evidence before us which shows Dr Sidhu, at the time, taking issue with the Company either (i) as to its retention of her money in general, or (ii) as to its characterisation of that money.

32. We do not consider that the absence of features such as an interest rate detract from the essential quality as a loan. Loans can be interest free. Loans do not need to be secured. Loans do not need to have a fixed redemption date.

33. We reject the suggestion that the description of 'loan' in the letters could have meant *'temporary loan, pending the issue of fresh shares'*. This is simply not what the Company's letters say. We do not accept this attempt to retrospectively recharacterise or gloss the transactions.

34. In the Skeleton Argument, but not in the Grounds of Appeal, the Appellant argues that the situation is governed by, or analogous to, *Re Meade* [1951] Ch 774.

35. We disagree. All that *Re Meade* decides, on that facts of the case, is that a person who provided part of the capital of a business operated by a person who subsequently entered bankruptcy cannot call for payment until the creditors of the

business are paid. In *Re Meade* the moneys advanced did not constitute, and were never intended to constitute, a loan at all. The creditor had been living with the bankrupt, and was running the bankrupt's riding school business with him: see p783 *per* Romer LJ. Harman LJ agreed. All *Re Meade* shows is that there is a difference between a capital contribution and a loan. The present appeal, on the evidence, is one of loan.

Fresh consideration

36. We reach our conclusion notwithstanding the Appellant's argument that the moneys were not originally advanced as a loan, but to buy shares, and that the Company could not unilaterally change the way in which it treated the money.

37. The Appellant argues that "*it is a general principle of commercial law that there must be some agreed fresh consideration if the basic terms of a contract are to be altered. The solicitor acting for the clinic should have been aware of this. However, as there appears to be no fresh consideration in this case then the full amount must be regarded as a subscription for shares by my client*": emphasis added by us.

38. In support of this proposition, the Appellant seeks to rely on *Re McVeigh (a Bankrupt): The Official Receiver of Northern Ireland v Stranaghan* [2010] NICh 8. We do not regard *McVeigh* as relevant or instructive. The factual context is strikingly different. It does not involve shares. It turns on certain provisions of the law of insolvency. The High Court decided that a mortgage executed in favour of Mr Stranaghan by his nephew, the bankrupt, was void because it was a transaction at an undervalue. It was at an undervalue since it was not supported by consideration, within the meaning and effect of Article 312(3)(c) of *The Insolvency (NI) Order 1989*. Hart J held that the consideration for the mortgage (which was entered into in 2004) was past consideration (being moneys advanced by the uncle to his nephew in 2000) and hence the mortgage was void. That is a conventional application of the rules of 'past' consideration. We simply do not discern any factual or legal similarity to the appeal which is before us.

39. For the sake of completeness, we were not taken to anything in evidence which showed that HMRC had ever (as alleged in the Grounds of Appeal) refused to consider *Re McVeigh* on the basis that it was 'not a UK case'. The proposition, if indeed ever advanced by HMRC, makes neither factual nor legal sense.

40. The emphasis which we have applied to the Appellant's submission simply begs the point as to what were '*the basic terms of the contract*'. By inference, the Appellant's argument must proceed on the premise that 'the basic contract' (sic) was one to buy shares, *and only to buy shares*, and which could not be altered by the Company.

41. However, the Appellant's argument in this respect faces, and does not overcome, two obstacles. The first is that the terms upon which the Appellant advanced her money – that is to say, and to adopt the Appellant's own submissions, 'the basic terms of the contract' - have not been put before us in evidence. The

second, independently of the first, is that, when the Company declared - on two, successive, occasions, within a matter of months of each other - that it was retaining the balance, the Appellant acquiesced in that treatment. Had circumstances been different, and the Company still been in operation, there would have been a powerful argument that *it* would have been estopped or barred from claiming that the moneys were something other than a loan.

42. In our view, either of those reasons suffices, in and of themselves, to dispose of the Appellant's argument as to 'fresh consideration'.

Subscription

43. Mr Tanney tries to retrieve the Appellant's position with an argument that the entirety of the moneys advanced were, as a matter of law, subscribed for shares. He argues that '*it is only necessary that shares have been subscribed for. It is not a requirement to subscribe for 'the' i.e. specific numbered shares*'.

44. In our view, the argument is not viable.

45. Firstly, we do not consider this to be an accurate reading of ITA 2007 section 135.

46. Secondly, it seems to us that the argument as to when a share can be said to be 'subscribed for' within the proper meaning and effect of ITA s 135 is an academic one in the circumstances of this appeal. This is because there is clear, unequivocal (and indeed, by the Appellant, uncontroverted) evidence that the balance of the moneys advanced by her to the Company were treated and retained by the Company as a loan. The Company's description of the balance of the moneys was not an arid, technical point or 'the tail wagging the dog' (to adopt the remarks of Lord Neuberger in *HMRC v Alan Blackburn Sports Limited* [2008] EWCA Civ 1454).

47. The Respondents sought to rely on the decision of the House of Lords in *National Westminster Bank plc v IRC* [1994] STC 580 as binding authority for when shares are 'issued'. The majority of the House of Lords, affirming a majority of the Court of Appeal, and applying long-standing and unchallenged law (*Re Ambrose Lake Tin and Copper Co (Clarke's Case)* (1878) 8 ChD 635 *per* Sir Alexander Cockburn LCJ) held that the issue of shares involved the completion of legal title in the allottee, which could only take place by registration. Shares were issued when registered.

48. In the present appeal, the only shares which were issued, in that sense, by the Company to the appellant were those certain shares which were in the Appellant's name in its register. Not only had the Company not issued any other shares to the appellant, but it had put forward – twice – the positive proposition that the balance of the moneys was to be treated as a loan. The Appellant had not subscribed to any shares other than those which she had bought.

49. We reject the Appellant's argument that *Natwest* can and should be distinguished. In our view, it makes no material difference in this case that *Natwest*

dealt with a PLC; nor do we consider the position 'in small companies' to be 'much more informal'.

50. The passage in *Natwest* relied upon by the Appellant ([1994] STC 580 at 591) does not assist the Appellant:

(1) It is part of the minority speech of Lord Jauncey;

(2) Even if (for the sake of argument) it were correct, as a matter of principle, that there is nothing to support the view that a share can never be issued until the allottee's name has been registered, that view - a general one - would still inevitably yield to the particular facts of this particular appeal.

51. In his further written submissions, Mr Tanney also sought to rely on the decision of the Tribunal in *Murray-Hession v HMRC* [2016] UKFTT 612 (TC). In that case the Tribunal (Judge Richard Thomas) considered the meaning of 'subscribed' under ITA section 135(2). For the reasons already set out, and given our findings on the loan point, we do not consider the analysis in *Murray-Hession* to be fruitful in this case. Moreover, that was a very different case to this one. The Tribunal was able to make findings of fact (i) on the basis of a significant amount of relevant documents of the kind which are missing in this appeal, and (ii) having heard evidence from Mr Murray-Hession. The Tribunal found that there was a binding agreement to buy 22.5% of the share capital, which could be married up to the sums advanced so as to entitle the taxpayer to treat the moneys advanced as something other than a loan. Moreover, and unlike in this case, the draft accounts showed the existence of a share premium.

52. The Appellant also seeks to rely on *RKW Ltd v HMRC* [2014] UKFTT 151 (TC). That case does not bind us. Nor do we find it of much assistance. It dealt with different legislation, and the meaning of loan within section 419 of ICTA 1988. Moreover, the Tribunal's findings were in the context of the the Shareholders' Agreement and the Articles of Association. We have not seen either of those documents in this appeal. We are not persuaded that *RKW* can be read more widely than on its particular facts.

53. Ultimately, her argument still fails to surmount the feature that the Company, without apparent demur or objection from Dr Sidhu, treated the balance of the money as a loan. Dr Sidhu had only been alloted certain shares.

Share Premium

54. Our primary finding is that this was a loan, and the Revenue's treatment of the sum was therefore right. However, in order to do justice to the totality of the arguments which have been presented to us both orally and in writing, and in case our conclusion on the primary point should subsequently fall for consideration, we consider it appropriate to express our views on the Appellant's subsidiary arguments.

55. We reject the suggestion that the balance of the money should be treated as a share premium.

56. The Grounds of Appeal deal with this in a somewhat equivocal way: "*perhaps a share premium, rather than a loan."* The 'perhaps' is revealing. Similarly equivocal language is used in Mr Tanney's letter of 15 October 2016 (*'The 90% rump was essentially a share premium'*).

57. In his letter of 8 October 2015, Mr Tanney asserted that "*as a matter of fact*", the £25,695 "*seems to fall as part of the acquisition cost of the shares, irrespective of the temporary treatment in the books of the company".*

58. There are four difficulties with this approach. The first is that it is the Appellant's interpretation, and not the Company's. The second is that it seeks to gloss or qualify, long after the event, the Company's treatment of the moneys which it had received. The third is that there is nothing to suggest that the Company - as a matter of fact - regarded its treatment of the balance of the moneys (whether a loan, or otherwise) as 'temporary'. The fourth is that it runs clearly counter to what the Company said – in its letters – and what it did, not least in terms of the issue of loan notes.

59. Mr Tanney also sought to place reliance on a document from 'Moneyterms.co.uk' in which 'Share Premium Account' is described as a difference between the par value of shares and the amount which the company actually received for newly issued shares. That goes on to say:

> *"Suppose a company issues 100 shares of £1 each, but is paid £3 per share. It then has £300 of equity capital. Only £100 of this is share capital. The rest is clearly of the same nature as the share capital in that it is funding raised from shareholders in return for their ownership of the company. It is shown on the balance sheet as part of the shareholders' funds called the share premium account'.*

60. The definition, even if correct (being a matter upon which we do not make any findings) does not engage in this appeal since there is simply no evidence that the Company operated a 'share premium account' (contrast the position in *Murray-Hession*). The evidence in fact points the other way - the Company regarded the surplus as a loan, and not as a capital contribution.

61. The Appellant seeks to rely on the decision of the Judicial Committee of the Privy Council in *Kellar v Stanley Williams* [2000] UKPC 4; [2000] 2 BCLC 390, but that decision, on a full reading, does not assist the Appellant. That case simply held that there was nothing in the law of the Turks and Caicos Islands, or in the company law of England, which prevented giving effect to an agreement between the shareholders of the company to increase its capital without a formal allocation of shares. Giving the judgment of the Committee, Lord Mackay of Clashfern (at p 395e-f) accepted that, in such an event, such capital "*would become like the share premium part of the owner's equity*".

62. As we understand it, HMRC does not dissent from the proposition but in fact endorses this approach, in that HMRC points to the need for it to be evidentially

established that, in the circumstances of this appeal, Dr Sidhu had entered into a agreement with the other shareholders which entitled the Company to increase its capital without a formal allocation of shares, thereby permitting Dr Sidhu's overpayment to be treated like the share premium part of the owner's equity.

63. However, and as already observed, no such evidence was put before us. There is no evidence as to the complete terms upon which the shares were purchased, and in particular how the Company was to treat any overpayment in the event of an oversubscription.

64. We were also asked to consider *HMRC v Alan Blackburn and Alan Blackburn Sports Ltd* [2008] EWCA Civ 1454, in which the Court of Appeal (Lord Neuberger MR, Sedley and Wilson LJJ) considered whether Mr Blackburn was entitled to relief under the Enterprise Investment Scheme in respect of certain tranches of shares allotted to him by the company. By the time the case reached the Court of Appeal, HMRC no longer disputed that Mr Blackburn was entitled to relief where he had applied for shares and the Company had resolved to allot them to him, albeit before he made any payment in respect of those shares: see Paragraph [10].

65. But that is not the case here, because there is evidence of any resolution to allot shares to the value of the balance. There is insufficient evidence to show that the Company had accepted and held the money on the basis that it was bound (or at least entitled), as against Dr Sidhu, to allot shares to her in return for the payment (with the possibility of having to repay the money if the shares were not then allotted): see Paragraph [29] of *Alan Blackburn*

66. The facts of *Alan Blackburn* illustrate the true legal position. There were several tranches of shares under consideration by the Court of Appeal. The important tranche for the purposes of the present discussion was the first tranche (149,998 shares): see Paragraphs [32]-[37]. The Special Commissioner at first instance (Dr John Avery Jones CBE) considered that the money paid on 1 September 1998 was repayable as a debt (SPC 00606, at Para [12]). That conclusion was reversed by Peter Smith J [2008] EWHC 266 (Ch), but the Court of Appeal allowed HMRC's appeal in relation to that first allotment.

67. A further difference between that case and this one is that Mr Blackburn was a 100% controlling shareholder in the company and therefore had a substantial degree of control over how the money was to be treated in the hands of the company. He was effectively in a position to increase the share capital. In contrast, there is no evidence here that the present Appellant could have increased the share capital of her own initiative.

Capital contribution

68. The money was not contributed as capital.

69. Capital contribution is not recognised as part of UK company law unless expressly part of the terms upon which the shares were issued. We do not know those

terms, since they have not been put before us. But the Company's treatment of the moneys as a loan is compelling evidence that the terms upon which the shares were issued did not expressly provide for capital contribution.

Trading loss

70. We reject this argument. In our view, the loss does not constitute a trading loss. This is an application of section 33 of the *Income Tax (Trading and Other Income) Act 2005* (where, in calculating the profits of a trade, no deduction is allowed for items of a capital nature).

Goodwill

71. We reject the argument that this was a purchase of goodwill. The argument is misconceived. In order for goodwill to exist, there would have had to have been purchase of a business, with the goodwill reflected in a fair value exercise. That has not taken place here.

72. We also reject the suggestion that this was a purchase of goodwill on the basis that the Appellant '*was not buying goodwill previously purchased by the Company, [but] was merely tapping into the benefit of casually networking with the many highly regarded consultants who would be using the consulting rooms, etc'*.

Conclusion

73. For the above reasons, the Appeal is dismissed.

74. 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.

Dr Christopher McNall

TRIBUNAL JUDGE
RELEASE DATE: 13 MARCH 2018