[2020] UKFTT 0026 (TC)

TC07532

PROCEDURE – enquiry into returns made following automated notice requiring return – whether s12D TMA 1970 applies to treat notice of enquiry under s9A TMA 1970 and closure notice under s28A TMA 1970 as valid – yes – appeal dismissed

CAPITAL GAINS TAX – entrepreneurs' relief – property development and investment company – whether "trading company" – s165A(3) TCGA 1992 – no – appeal dismissed

INCOME TAX – transactions in securities – whether main purpose or one of the main purposes of person being a party was to obtain an income tax advantage – s684(1)(c) ITA 2007 – no – appeal allowed

INCOME TAX – remittance basis – business investment relief – whether unpaid or reinvested dividends treated as an investment –whether payment of unpaid or reinvested dividends was a "potentially chargeable event" – s809VG ITA 2007 – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal numbers: TC/2016/05008
TC/2016/05009
TC/2017/07357

BETWEEN

ASSEM ALLAM **Appellant**

-and-

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

TRIBUNAL: JUDGE ASHLEY GREENBANK
MRS RAYNA DEAN

Sitting in public at Leeds on 26 and 27 February 2019 and 17 September 2019

Keith Gordon, counsel, instructed by Jacksons Chartered Accountants, for the Appellant

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, and Dr Jeremy Schryber, litigator of HM Revenue and Customs' Solicitor's Office for the Respondents

DECISION

INTRODUCTION

1. This decision notice relates to appeals made by Dr Assem Allam against various decisions of the Commissioners for Her Majesty's Revenue & Customs ("HMRC").

(1) The first appeal (under reference TC/2016/05008) relates to a closure notice issued by HMRC on 8 April 2016 at the conclusion of an enquiry into Dr Allam's tax return for the tax year 2011-12. In that closure notice, HMRC disallowed a claim by Dr Allam for relief from capital gains tax under Chapter 3 of Part V of the Taxation of Chargeable Gains Act 1992 ("TCGA") (commonly referred to as "entrepreneurs' relief") in relation to a disposal of shares by Dr Allam in Allam Developments Limited ("ADL"). The resulting adjustments to Dr Allam's tax return charged Dr Allam to additional capital gains tax of £524,034.72.

(2) The second appeal (under reference TC/2016/05009) relates to another closure notice issued by HMRC on 8 April 2016 at the conclusion of an enquiry into Dr Allam's tax return for the tax year 2013-14. In that closure notice, HMRC charged Dr Allam to income tax on income and gains remitted to the UK in respect of which Dr Allam had previously claimed relief under s809VA of the Income Tax Act 2007 ("ITA") (commonly referred to as "business investment relief"). The resulting adjustments to Dr Allam's tax return charged Dr Allam to additional income tax of £1,305,000.

(3) The third appeal (under reference TC/2017/07537) is against a counteraction notice issued by HMRC under s698 ITA on 20 March 2017. The counteraction notice relates to the same disposal of shares in ADL that is the subject of the first appeal. The notice seeks to charge Dr Allam to additional income tax on the consideration for the sale of the shares. The related income tax assessment is in the amount of £1,318,298.10.

2. In addition to his separate challenges to each of the decisions in the closure notices (i.e. in relation to the first appeal and the second appeal), Dr Allam raised a further challenge to the closure notices on the grounds that the relevant returns were not made in response to notices issued by an officer of HMRC. We have set out this argument in more detail under the heading "The Section 12D issue" below, but, in summary, Dr Allam asserted that the enquiry processes initiated by HMRC under s9A of the Taxes Management Act 1970 ("TMA") and the subsequent closure notices were invalid and that this defect is not cured by s12D TMA, which was introduced by s87 of the Finance Act 2019 ("FA 2019"). We have referred to this ground of appeal as the "Section 12D issue" in this decision notice.

3. The Section 12D issue is affected by the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Nigel Rogers and Craig Shaw* [2019] UKUT 0406 (TCC) ("*Rogers and Shaw*") which was issued after the hearing in this case but before the issue of this decision notice.

THE HEARING AND THE EVIDENCE

4. The initial hearing took place in Leeds on 26 and 27 February 2019. At that hearing, we heard an application from Mr Gordon, on behalf of Mr Allam, to introduce the Section 12D issue as a further ground of appeal in relation to the first and second appeals.

5. Having heard argument from the parties, we agreed to admit the further ground of appeal. We did so on the basis that HMRC would be entitled to make further representations in writing following the hearing, if necessary, in response to that ground of appeal.

6. Following the initial hearing, and having received further representations from the parties, we convened a further hearing, primarily to hear submissions from the parties on the Section 12D issue. This hearing took place on 17 September 2019, also in Leeds.

7. Dr Allam was represented by Mr Gordon at both the initial hearing and the hearing on 17 September 2019. HMRC was represented by Dr Schryber at the initial hearing and by Ms Choudhury at the hearing on 17 September 2019. We are grateful to them all for their submissions.

8. We were provided with agreed bundles of documents. In the course of the hearings, we also accepted other documents in evidence. The documents included two witness statements from the appellant, Dr Allam, and witness statements from Mr Ehab Allam, the son of the appellant and a director of relevant companies, and Mr Mark Jackson of Jacksons Chartered Accountants, advisers to Dr Allam and some of the relevant companies.

9. Dr Allam, Mr Ehab Allam and Mr Jackson all gave evidence and were cross-examined on their statements at the initial hearing.

THIS DECISION NOTICE

10. We have addressed the issues in the following order.

(1) First, we have dealt with the Section 12D issue.

The issue is essentially an issue of law. The relevant facts were agreed and can be stated shortly.

(2) Second, we have addressed some issues that are common to both the first appeal and the third appeal as they derive from the same underlying transaction.

This section includes some of our findings of fact in so far as they are common to both appeals.

(3) Third, we have dealt with the first appeal, which relates to the claim for entrepreneurs' relief.

This section includes further findings of fact which are relevant to the first appeal, taking into account the witness evidence, in particular the evidence of Mr Ehab Allam.

(4) Fourth, we have dealt with the third appeal, which relates to the counteraction notice under s698 ITA.

This section includes further findings of fact which are relevant to the third appeal, taking into account the witness evidence, in particular the evidence of Dr Allam.

(5) Finally, we have addressed the issues arising from the second appeal, namely that relating to business investment relief.

This section includes further findings of fact which are relevant to the second appeal, taking into account the witness evidence, in particular, the evidence of Dr Allam and Mr Jackson.

THE SECTION 12D ISSUE

11. We will deal first with the Section 12D issue.

Background and relevant legislation

12. It will assist our explanation of the Section 12D issue if we first set out some of the legislative background.

13. Under s8 TMA, a person may be required to make and deliver a tax return by a notice "given to him by an officer of the Board".

14. Whether or not a return is made in response to a notice under s8 TMA is important for the purposes of various other provisions of the TMA. For present purposes, the key provision is s9A TMA which sets out the powers of HMRC to enquire into a return. Section 9A TMA provides, so far as relevant:

> **9A Notice of enquiry**
>
> (1) An officer of the Board may enquire into a return under section 8 or 8A 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;
>
> (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.
>
> For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.
>
> …
>
> (6) In this section "the filing date" means, in relation to a return, the last day for delivering it in accordance with section 8 or 8A.

15. Whether or not an enquiry is made under s9A TMA is also important for the purposes of the provisions which enable HMRC to issue a closure notice which amends a return. The relevant provision – s28A TMA – applies "in relation to an enquiry under s9A(1)" (s28A(1) TMA).

16. As can be seen from the wording of s8 TMA, the legislation appears to assume that a taxpayer will make a return in response to a notice issued by HMRC. This may not always be the case. Some taxpayers will file a return without having previously received a notice from HMRC. These returns are commonly referred to as "voluntary returns". Taxpayers may make voluntary returns for various reasons: some will be motivated simply by a desire to keep their tax affairs in order and up-to-date; others may wish to make a repayment claim; others may wish to avail themselves of some of the protections which filing a tax return affords to taxpayers, for example, in relation to the subsequent issue of discovery notices (under s29 TMA) or information notices (under Schedule 36 to the Finance Act 2008 ("FA 2008")).

17. It was the long-standing practice of HMRC to treat voluntary returns as if they had been made in response to a notice under s8 TMA. However, this practice was called into question by a decision of the First-tier Tribunal (Judge Brannan) in *Patel and Patel v Revenue and Customs Commissioners* [2018] UKFTT 0185, in which the FTT decided that a voluntary return was not "made under s8 TMA". Following that decision, the Government decided to introduce legislation to clarify the status of returns made otherwise than pursuant to a notice under s8 TMA in Finance (No. 3) Bill 2018 (which was enacted as FA 2019). We have described that legislation at [19] below.

18. It has also been the practice for HMRC for some time to issue notices to taxpayers to file a return through an automated process without the notice having been reviewed or specifically

authorized by an actual officer of HMRC. At the time of the hearing, there were appeals pending before the Upper Tribunal against decisions of the First-tier Tribunal which called into question the validity of automated notices, and in particular, whether an automated notice could be regarded as a notice to file a return "given to [a person] by an officer of the Board" within s8 TMA.

19. As we have mentioned above, legislation was introduced in FA 2019 which sought to clarify the status of returns made otherwise than pursuant to a notice under s8 TMA. Section 87 FA 2019 introduced a new s12D into the TMA. It provides, so far as relevant:

> **12D Returns made otherwise than pursuant to a notice**
>
> (1) This section applies where—
>
> (a) a person delivers a purported return ("the relevant return") under section 8, 8A or 12AA ("the relevant section") for a year of assessment or other period ("the relevant period"),
>
> (b) no notice under the relevant section has been given to the person in respect of the relevant period, and
>
> (c) HMRC treats the relevant return as a return made and delivered in pursuance of such a notice.
>
> (2) For the purposes of the Taxes Acts—
>
> (a) treat a relevant notice as having been given to the person on the day the relevant return was delivered, and
>
> (b) treat the relevant return as having been made and delivered in pursuance of that notice (and, accordingly, treat it as if it were a return under the relevant section).
>
> (3) "Relevant notice" means—
>
> (a) in relation to section 8 or 8A, a notice under that section in respect of the relevant period;
>
> (b) in relation to section 12AA, a notice under section 12AA(3) requiring the person to deliver a return in respect of the relevant period, on or before the day the relevant return was delivered (or, if later, the earliest day that could be specified under section 12AA).
>
> (4) In subsection (1)(a) "purported return" means anything that—
>
> (a) is in a form, and is delivered in a way, that a corresponding return could have been made and delivered had a relevant notice been given, and
>
> (b) purports to be a return under the relevant section.
>
> (5) Nothing in this section affects sections 34 to 36 or any other provisions of the Taxes Acts specifying a period for the making or delivering of any assessment (including self-assessment) to income tax or capital gains tax.

20. Section 12D therefore seeks to treat returns which are not made in response to a notice which meets the requirements of s8 TMA as having being made pursuant to such a notice (see s12D(2) TMA). It potentially applies both to returns that have been made where no notice has been issued (i.e. voluntary returns) and to returns which are made in response to a notice which does not meet the requirements of s8 TMA.

21. The Finance Act 2019 received Royal Assent on 12 February 2019. However, s12D applies both prospectively and retrospectively with the exception of cases where a person has

made an appeal or a claim for judicial review before 29 October 2018 on the ground that the relevant return was not a return under s8 TMA. In this respect, s87(3) and (4) FA 2109 provide:

> (3) The amendments made by this section are treated as always having been in force.
>
> (4) However, those amendments do not apply in relation to a purported return delivered by a person if, before 29 October 2018—
>
> (a) the person made an appeal under the Taxes Acts, or a claim for judicial review, and
>
> (b) the ground (or one of the grounds) for the making of the appeal or claim was that the purported return was not a return under section 8, 8A or 12AA of TMA 1970 or paragraph 3 of Schedule 18 to FA 1998 because no relevant notice was given.

Relevant facts

22. Dr Allam filed his tax return for the 2011-12 tax year on 13 November 2012. The return was filed in response to an automated notice to file a tax return for that tax year.

23. HMRC opened an enquiry into Dr Allam's return by notice, purportedly under s9A TMA, issued on 5 November 2013.

24. That enquiry was closed by a closure notice, which purported to be made under s28A TMA and which was issued on 8 April 2016.

25. Dr Allam filed his tax return for the 2013-14 tax year on 8 August 2014. The return was filed in response to an automated notice to file a tax return for that year.

26. HMRC opened an enquiry into Dr Allam's return by notice, purportedly under s9A TMA, issued on 14 November 2014.

27. The enquiry was closed by a closure notice under s28A TMA, which purported to be made under s28A TMA and which was issued on 8 April 2016.

The effect of the decision in *Rogers and Shaw*

28. Dr Allam's returns were made in response to automated notices issued by HMRC. The question as to whether or not returns made by taxpayers in response to automated notices met the requirements of s8 (without the need for them to be treated as returns under s8 TMA by s12D TMA) was in issue in the *Rogers and Shaw* case before the Upper Tribunal. The Upper Tribunal (Zacaroli J and Judge Richards) decided that a notice did not have to be given by an identified "flesh and blood" officer of HMRC in order to meet the requirements of s8 TMA; it was sufficient that the giving of the notice was under the authority of an officer of HMRC (*Rogers and Shaw* [32]).

29. We are bound by the decision of the Upper Tribunal in *Rogers and Shaw* and, in any event, we agree with it. On the basis of that decision, unless there is some other defect in the notice, a return made in response to an automated notice, such as those made by Dr Allam in this case, remains a return made under s8 TMA and the Section 12D issue does not arise. Dr Allam has not raised any other concern about the notices which were issued to him.

30. On that basis, and for these reasons, we dismiss this ground of appeal.

31. As we have mentioned above, the Upper Tribunal's decision in *Rogers and Shaw* was issued between the date of the hearing and the issue of this decision notice. We had therefore heard full argument from both parties on the Section 12D issue. In case there is any prospect of this issue becoming live at any stage, we have set out the parties' submissions on it and our conclusions below.

The issue before the Tribunal

32. The parties' submissions were made on the assumption that, absent the effect of the deeming rule in s12D TMA, at the time at which Dr Allam made his returns for the two tax years in question, the returns were not made in response to a notice which met the requirements of s8 TMA. (This is, of course, contrary to the Upper Tribunal's decision in *Rogers and Shaw*.)

33. The Section 12D issue only arose in this case because Dr Allam did not make an appeal or a claim for judicial review on the grounds that returns were not returns under s8 TMA before 29 October 2018. As a result, even if the notices issued by HMRC did not otherwise meet the requirements of s8, Dr Allam's returns would be treated by s12D(2) TMA "for the purposes of the Taxes Acts" as having being made in pursuance of a notice under s8 TMA.

34. The issue before the Tribunal went to the scope of that deeming rule. In summary, Mr Gordon, for Dr Allam, says that the deeming rule in s12D is limited: it only treats the returns made by Dr Allam as made under s8 TMA; it does not extend to treating the enquiry notices which were issued by HMRC in relation to the first and second appeals as having been issued in relation to returns made under s8 TMA. Ms Choudhury, for HMRC, says that the deeming rule is sufficiently broad to treat the enquiry notices as having been issued in relation to returns made under s8 TMA.

The parties' submissions

35. Mr Gordon's submissions on behalf of Dr Allam were in summary as follows.

(1) Section 12D TMA provides that returns which were not made pursuant to a notice under s8 TMA are now treated as if they were made pursuant to a notice under s8 TMA. It is retrospective. The deeming rule treats what was otherwise an invalid return as a valid return.

(2) There are some inevitable consequences flowing from this deemed state of affairs.

(a) This treatment affords some important protections to taxpayers who have filed returns which were not made in response to a notice within s8 TMA. For example, it affords the taxpayer some protection from the service of information notices (under paragraph 21 Schedule 36 FA 2008) and from discovery assessments (s29(3) TMA).

(b) Section 12D permits HMRC to issue a notice of enquiry under s9A TMA after 12 February 2019 in relation to a return made before that date (and which was not made in response to a notice within s8 TMA) because it retrospectively treats the return as having been made under s8 TMA, albeit subject to the time limits on the issue of a notice of enquiry in s9A(2).

(3) The deeming rule, however, has limitations in the context of the issue of enquiry notices under s9A TMA. Section 12D does not seek to treat a notice of enquiry that was issued before 12 February 2019 in respect of a voluntary return as a valid notice of enquiry under s9A TMA. Those notices were issued in respect of returns which, at the time at which the notices of enquiry were issued, were not returns made under s8 TMA. Nothing in s12D changes that position. It does not apply to validate a previously invalid notice of enquiry.

(4) This is because s12D is effectively a relieving provision: it affords the protections provided by the Taxes Acts to taxpayers who have submitted returns but without imposing upon them the adverse consequences of retrospectively validating what would otherwise be invalid enquiries. That this is the appropriate interpretation can be seen from:

(a) the fact that the effect of the deeming provision is subject to HMRC discretion: it only applies where HMRC has accepted a voluntary return;

(b) the relevant Parliamentary materials for FA 2019 including the Explanatory Notes and extracts from Hansard, which emphasise the narrow purpose of the change;

(c) the various absurdities to which HMRC's interpretation would produce (which we discuss in more detail below).

(5) If therefore, Dr Allam's returns were, at the time at which they were made, not returns made under s8 TMA, the notices of enquiry issued to Dr Allam were not valid and it follows that the closure notices which purported to amend Dr Allam's self-assessment returns for the relevant tax years were equally not valid. (This is the case notwithstanding that, by virtue of s12D, Dr Allam's returns are now treated as made under s8 TMA.)

36. Ms Choudhury's submissions for HMRC were in summary as follows.

(1) It was common ground that the scope of any statutory deeming provision should be determined in accordance with the guidance given by the House of Lords in *Marshall v Kerr* [1994] STC 638.

(2) Mr Gordon's preferred interpretation does not apply those principles correctly. The ability of HMRC to enquire into a voluntary return which is treated as a return under s8 TMA by s12D TMA is an inevitable consequence flowing from the treatment of the voluntary return as a valid return under s8 TMA. The purpose of s12D is to treat a return and self-assessment as valid for all purposes.

(3) Even if it is permissible to refer to Parliamentary material in this case, which HMRC challenges, the material on which Mr Gordon relies does not assist Dr Allam; it supports HMRC's argument that the provision was intended to give effect to long-standing practice, which included the making of enquiries into voluntary returns.

(4) Ms Choudhury challenges the alleged absurdities to which Mr Gordon refers.

Discussion

37. The issue before the Tribunal is essentially one of statutory construction. In *Harding v Revenue & Customs Commissioners* [2008] EWCA 1164, [2008] STC 3499, the Court of Appeal summarized (at [51]) the basic principles of interpretation as follows:

> "There is no real dispute on the principles of interpretation. The question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found and the statutory provision should be given a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction answers to the statutory description."

38. Within that basic framework, we have been referred by the parties to various authorities on particular aspects of the process of statutory construction which we should address at this stage.

The relevance of Parliamentary material

39. The first is the question as the extent to which it is permissible to rely on Parliamentary material to inform the process of statutory construction. Mr Gordon referred the Tribunal to two pieces of supporting material in relation to the passage of the Finance (No. 3) Bill 2018 through Parliament. The first was the Explanatory Notes to Clauses for the Bill and in

particular the notes to clause 86 which contained what became s87 FA 2019. Those notes contain the following passage at [23] to [25]:

> 23. Some tax returns are delivered each year "voluntarily" to HMRC by taxpayers, i.e. they are delivered before HMRC has given a statutory notice requiring the return to be delivered. HMRC has historically operated a policy of accepting such voluntary returns and has charged or repaid tax based on them, opened enquiries into them if necessary, and generally has treated them as valid tax returns for all purposes. If HMRC did not accept voluntary returns, it would have to ignore the information sent and formally ask taxpayers to resend the same information, which would cause delays and inconvenience both to taxpayers and HMRC.
> 24. In April 2018, the First-tier Tribunal ruled that this policy was not supported by the law. HMRC has appealed this decision. If this finding were to be upheld by a higher court, it would mean that all voluntary returns, and steps taken by HMRC or taxpayers in reliance of them, were invalid.
> 25. To put the matter beyond doubt and confirm the longstanding policy, this retrospective and prospective legislation makes clear that it is lawful for HMRC to have accepted as statutory returns, the voluntary returns already received and to continue to accept them as such in the future.

40. The second piece of Parliamentary material to which we were referred was the Hansard report of the Finance Bill Committee debates on the relevant provisions of the Finance (No. 3) Bill 2018. In those debates, in response to various proposed amendments, the Minister (Mel Stride) said this (Hansard, Finance (No. 3) Bill 2018, Ninth Sitting, 11 December 2018, columns 346-347):

> "HMRC receives about 600,000 voluntary tax returns each year. They are voluntary because they are made without any requirement or request from HMRC to do so. People in businesses send them in because they want either to pay tax or to make tax repayment claims. HMRC has always accepted those returns and treated them like any other return. This policy is helpful for taxpayers who send in returns because they are concerned that their affairs are not up-to-date. If HMRC did not accept voluntary returns when a taxpayer sent in a return, it would have to formally ask them for a return, and they would need to refile it.
>
> ...
>
> The purpose of the clause is not to change existing practice but to give it legal certainty. Reporting on its impact is therefore unnecessary as there will be no change in either practice or revenue.

41. The circumstances in which Parliamentary material can be admitted on a question of construction are limited. It can usually only be admitted if it can be brought within the principle of *Pepper v Hart* [1993] AC 593. That case imposed narrow conditions for the admissibility of such material. They were summarized by Lord Bingham in *R v Secretary of State for the Environment, Transport and the Regions ex parte Spath Holme Limited* [2001] to AC 349 (at 391D-E) as follows:

> In *Pepper v. Hart*, the House (Lord Mackay of Clashfern L.C. dissenting) relaxed the general rule which had been understood to preclude reference in the courts of this country to statements made in Parliament for the purpose of construing a statutory provision. In his leading speech, with which all in the majority concurred, Lord Browne-Wilkinson made plain that such reference was permissible only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such

> other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear (see pp. 640B, 631D, 634D).

42. In our view, the statements to which our attention has been drawn do not meet those criteria. We doubt that the first condition is met in that the legislation is not, in our view, ambiguous or obscure, nor does it lead to any absurdity. We address this point below (at [63] to [77]). But, in any event, we do not consider that the third condition is met. The effect of the statements in these materials in relation to the point at issue – namely the extent of the deeming provision in s12D(2) – is not clear. The statements to which we have been referred do little more than reiterate the background to the statutory provisions, they do not address the specific point that arises in this appeal.

43. There may be a separate question as to whether the material may be admissible to show the general purpose of the legislation. However, we do not need to address that question in this case. In our view, the purpose is clear from the legislation itself and from the general legislative background; it was to codify the previous policy of accepting voluntary returns and to do so both prospectively and retrospectively. The materials to which we have been referred appear to support that conclusion, but they are not of any significant assistance in resolving the matters in issue in this appeal.

The scope of a deeming provision

44. The second specific issue that we should address is the question of the extent of any deeming provision such as that in s12D TMA.

45. The leading authority is the case of *Marshall v Kerr* [1994] STC 638. In that case, the House of Lords rejected a contention by the appellant, Mrs Kerr, that a deeming provision in s24(7) of the Finance Act 1965 which treated assets bequeathed to her by her husband as acquired by a legatee, a Jersey trust company, applied to treat Mrs Kerr as not having held the assets at all for the purposes of whether or not she should be regarded as a settlor of the relevant trusts. In doing so, Lord Browne-Wilkinson referred (at page 649c-e) with approval to the leading judgement of Peter Gibson J in the Court of Appeal in the same case ([1993] STC 360 at page 366d) where Peter Gibson J said:

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

46. Although the House of Lords reversed the decision of the Court of Appeal in that case, it did so on the basis of different arguments raised before the House of Lords that had not been raised before the Court of Appeal. Lord Browne-Wilkinson expressly endorsed the principles set out by Peter Gibson J. We will therefore follow the same approach.

Application of those principles in this case

47. We must first identify the purpose of the provision. Our starting point is the words of the legislation. From those words, it is clear to us that the purpose of the provision is to give effect to the longstanding practice of HMRC accepting voluntary returns and treating those

returns as having been made pursuant to a notice under s8 TMA and to do so both prospectively and retrospectively.

48. If we assume that a return made in response to an automated notice is not, without reference to s12D, a "return under s8 TMA", then the parties agree that the requirements of s12D(1) are met in relation to each of the relevant returns and that s12D is in point.

49. On that assumption, s12D(2) treats a notice under s8 TMA as having been given to Dr Allam on the day the relevant return was delivered and treats the relevant return as having been made in pursuance of that notice and, accordingly as if it were a return under s8 TMA. This deemed state of affairs is to be treated as existing "For the purposes of the Taxes Acts".

50. Section 12D is treated by s87(3) FA 2019 "as always having been in force". So it applies both retrospectively and prospectively.

51. For example, in relation to Dr Allam's return for the 2011-12 tax year which was made on 13 November 2012, the effect of s12D(2) is to treat a notice under s8 TMA as having been given to Dr Allam on that date, 13 November 2012, and the return as having been made pursuant to that notice so that it is a "return under s8 TMA" for the purposes of the Taxes Acts. There is no dispute between the parties about this conclusion.

52. The dispute arises when one seeks to apply the deeming provision in s12D to s9A TMA. Section 9A permits an officer of HMRC to enquire into a "return under s8 TMA" if he or she gives notice of his or her intention to do so. Ms Choudhury says that it is a natural consequence of treating the return made by Dr Allam on 13 November 2012 as a return under s8 TMA that the enquiry notice issued by HMRC on 5 November 2013 should be treated as an enquiry into a return under s8 TMA for the purposes of s9A so meeting the requirements of that section. Mr Gordon says that the deeming does not go that far; the effect of the deeming provision is more limited and does not extend to treating an enquiry notice retrospectively as meeting the requirements for issue which it did not meet at the time at which it was issued.

53. We agree with Ms Choudhury on this issue. It seems to us that, on a proper construction of s12D TMA and s87(3) FA 2019, the deeming rule in s12D should apply to treat historic returns (i.e. those made before 12 February 2019) which were not made in response to a notice under s8 TMA as returns made in response to a "relevant notice" and so as made under s8 TMA for the purposes of s9A TMA.

54. Our reasons are set out below.

55. First, in our view, this is the ordinary and natural meaning of the words in s12D TMA and s87(3) FA 2019.

56. The deeming rule (in s12D) is expressed (by s87(3) FA 2019) to apply retrospectively and to do so "for the purposes of the Taxes Acts".

57. Mr Gordon accepts that the deeming rule applies to treat an historic return, which was made in response to an automated notice, as a return made under s8 TMA for the purposes of other provisions of the Taxes Acts. For example, Mr Gordon accepts that s12D should apply to treat an historic return which was not made pursuant to a notice under s8 TMA, as a return made under s8 TMA for the purpose of s29(3) TMA, which confers upon a taxpayer certain protections against a "discovery assessment" under s29(1) TMA where the taxpayer "has made and delivered a return under s8 TMA". He also accepts that the deeming rule in s12D should apply to treat a taxpayer as having made a return under s8 TMA for the purpose of paragraph 21 Schedule 36 Finance Act 2008, which confers upon a taxpayer certain protections against the issue of an information notice where the taxpayer has "made a tax return… under s8 TMA".

58. The only distinction that Mr Gordon makes between such provisions and s9A TMA is that these provisions operate to the benefit of the taxpayer. We cannot discern any such distinction in the words of the legislation.

59. Second, in our view, this interpretation is consistent with the policy and purposes of the Act.

60. The FA 2019 provisions are, as we have mentioned, clearly designed to give effect to the longstanding practice of HMRC in accepting voluntary returns and treating such returns as valid for the purposes of the Taxes Acts. The reason for doing so is to provide certainty both to taxpayers and to HMRC that the results of the process of assessment in relation to those historic returns – of which the making and delivery of a return forms part - will be respected. That aim can only be fully achieved in respect of historic returns if it also gives effect to the results of assessments that have been made following the delivery of those returns and so must encompass the enquiry and closure process by which those assessments are made.

61. Third, in our view, this is a natural consequence of the deeming provision.

62. The delivery of a return is part of a process of assessment, which includes the issue of a notice to make a return, the delivery of a return, enquiry into the return and the issue of a closure notice. The retrospective validation of delivery of a return is part of the retrospective validation of the entire process. In accordance with the guidance given by Peter Gibson J in *Marshall v Kerr* as endorsed by Lord Browne-Wilkinson in the same case, we should treat as real the consequences "inevitably flowing from… [the] deemed state of affairs".

Does this interpretation give rise to "injustice or absurdity"?

63. Finally, we do not accept that this interpretation gives rise to injustice or absurdity, which is not within the scope of the fiction.

64. Mr Gordon raised three aspects of the rules which, on his view, would give rise to absurdities if this interpretation were to be adopted.

65. The first was that, on this interpretation, not all enquiries into historic returns would be retrospectively treated as valid. He gave an example of a return received by HMRC on 1 February 2012 in respect of the 2010-11 tax year. If that return had been made in response to a notice under s8 TMA, it would be have been filed after the filing date for that tax year and so HMRC would have until 30 April 2013 to open an enquiry into that return (s9A(2)(b)). If the return was not made in response to a notice within s8 TMA, it would now be treated by s12D as having been made pursuant to a "relevant notice" issued on the same date. As a result, the return would be treated as being made on or before the filing date and so an enquiry notice under s9A would have to be issued on or before 1 February 2012 in order to be valid (s9A(2)(a)). If HMRC had issued an enquiry notice on 30 April 2013, it would be treated as invalid because it was not issued within the 12 month enquiry period. He contrasted that position with a return for the 2010-11 tax year which was delivered on 31 January 2012 (i.e. on the normal filing date), where an enquiry notice would be treated as invalid if the enquiry was not opened on or before 31 January 2013. The effect was therefore to put taxpayers who filed their returns late (i.e. after the normal filing date for the relevant tax year) in a better position than those who filed their returns on or before the normal filing date.

66. Whilst in one sense this might be regarded as an anomaly, we do not regard it as an absurdity which calls into question the scope of the deeming provision. The deeming rule seeks to validate returns that have been made otherwise than in response to a notice under s8 TMA. It does so by treating the return as having been made pursuant to a notice which is treated as having been issued on the same day as the date on which the return was made (referred to as a "relevant notice"). We suspect that it adopts this mechanism because it is designed primarily

to deal with the case of truly "voluntary returns" – namely those which have been made by taxpayers who have not received any form of notice from HMRC (whether valid or defective) – and not cases where a taxpayer has received a notice of some sort from HMRC but it failed to meet the requirements of the relevant section (here, s8 TMA).

67. That having been said, the scope of s12D is clearly not limited to voluntary returns. It applies in any case where "no notice under the relevant section" has been given to the taxpayer. That wording is apt to apply to cases where HMRC has issued some form notice which fails to meet the requirements of the relevant section (in this case, s8 TMA) as well as cases where HMRC has issued no form of notice at all. The parties have accepted – on the assumption that an automated notice is not a notice under s8 TMA – that s12D will apply to returns made in response to automated notices.

68. For taxpayers who file truly voluntary returns, it would clearly have been inappropriate retrospectively to apply the extended period for the issue of an enquiry notice in s9A(2)(b) TMA as they would have received no communication from HMRC which would prompt them to make a return. The fact that some taxpayers who may have filed returns in response to notices which did not meet the requirements of the relevant section may as a result benefit from a delay by HMRC to issue an enquiry notice does not to our minds give rise to an injustice or absurdity sufficient to demonstrate that the statutory fiction should not be extended to s9A. It simply puts those taxpayers in the same position as those who have filed truly voluntary returns. If, on the other hand we were to interpret s12D so as to limit its application to cases where the deeming rule operates to the benefit of the taxpayer – as suggested by Mr Gordon – that would, in our view, undermine the purpose of the provision, which, as we have said, is to give effect to HMRC's longstanding practice of accepting voluntary returns.

69. The issue does not arise in Dr Allam's case. His returns were filed before the normal filing date for the relevant tax years.

70. The second issue raised by Mr Gordon was that the transitional rules in s87(4) FA 2019 would give rise to capricious results.

71. In his skeleton argument, Mr Gordon gave examples of two sets of circumstances in which our preferred interpretation would, in his submission, give rise to such results. At the hearing, however, his submissions focussed on one example.

72. In summary, Mr Gordon says that if the statutory fiction in s12D TMA is extended to s9A TMA there would have been a "perverse incentive" on HMRC to keep enquiries open until after 29 October 2018. This argument assumes that relevant HMRC staff may have been aware in advance of the introduction of s12D TMA and would have taken steps to defer the closure of open enquiries so as to deprive the taxpayer of the opportunity to make an appeal against a decision in a closure notice or an application for judicial review in respect of such a decision (and so prevent taxpayers from relying upon the transitional rule in s87(4) FA 2019).

73. We reject this submission. There is no evidence that relevant HMRC staff were made aware of the possible introduction of s12D TMA. The transitional rule preserves the ability of taxpayers to rely upon an argument that a relevant return was not made under s8 TMA because it was a voluntary return or because it was made in response to a notice which did not meet the requirements of s8 TMA in cases where the argument was made as a ground of appeal or a ground for judicial review on or before the date on which the introduction of s12 TMA was announced in the Budget. That seems to us to be an equitable approach.

74. A third issue to which Mr Gordon refers is that our preferred interpretation of s12D TMA renders s87(5)-(8) FA 2019 nugatory.

75. Sub-sections (5) to (8) of s87 FA 2019 contain powers for the Treasury to make regulations to amend various provisions in tax legislation or s12D TMA itself in connection with the introduction of digital reporting requirements. In our view, the provisions are not relevant to the matters under appeal. We reject this submission.

76. For these reasons, in our view, on a proper construction of s12D TMA and s87(3) FA 2019, even if the returns made by Dr Allam for the 2011-12 tax year and the 2013-14 tax year were not made in response to a notice under s8 TMA, the deeming rule in s12D should apply to treat those returns made in response to a "relevant notice" and so as made under s8 TMA for the purposes of s9A TMA.

77. It follows that, even if the Upper Tribunal had dismissed HMRC's appeal in *Rogers and Shaw*, we would have reached the conclusion that the relevant enquiry notices and the closure notices issued at the completion of those enquiries should be regarded as valid. We would have dismissed this ground of appeal.

THE FIRST AND THIRD APPEALS: COMMON ISSUES

78. The first and the third appeal relate to the same transaction, namely the transfer of shares in ADL by Dr Allam to Allam Marine Limited ("AML") for a consideration paid in cash of £4,950,000. The transfer took place on 26 July 2011.

The relationship between the two appeals

79. The issues before the Tribunal in relation to the first and second appeal whilst rather different, are inter-related. The first appeal concerns a claim by Dr Allam for entrepreneurs' relief from tax on capital gains, the effect of which, if allowed, would be to reduce his liability to capital gains tax on the disposal of the shares in ADL. The third appeal concerns Dr Allam's appeal against the issue of a counteraction notice under s698 ITA. If Dr Allam is unsuccessful in that appeal, he would be charged to additional income tax in an amount equal to the excess of the income tax that would have been payable on an income distribution of the "relevant consideration" and the capital gains tax liability on that amount. So the amount of that charge, if it applies, is dependent upon the result of the first appeal.

80. We have addressed the issues arising in the two appeals separately and set out in relation to each of them our findings of fact which are relevant to that appeal. These include our findings as a result of the witness evidence. In this respect, the evidence of Mr Ehab Allam is relevant to the first appeal. The evidence of Dr Allam and Mr Jackson is primarily relevant to the third appeal.

The background to both appeals

81. It is, however, first helpful to set out some of the common factual background to both appeals, which, for the most part, is not disputed by the parties.

Relevant companies

82. These appeals concern three companies: ADL, AML and a third company, Allamhouse Limited ("Allamhouse"), all of which were controlled by Dr Allam or by Dr Allam and his wife, Mrs Fatima Allam. All three companies – ADL, AML and Allamhouse – were at all material times, "close companies".

83. At all material times, ADL carried on property investment and development activities although there is a dispute, which is relevant to the first appeal, as to the precise characterization of those activities. The business of AML comprised industrial and marine engineering. Allamhouse was a holding company. It acquired its subsidiaries as a result of some of the transactions that we describe below. Its subsidiaries, which included AML, carried on

engineering activities, the operation of a football club, stadium management and property investment and development activities.

The proposed sale of shares in ADL to AML in 2009

84. It is appropriate to begin this narrative in May 2009. At that time:

(1) the issued share capital of ADL comprised 250,000 ordinary shares of £1 each, all of which were registered in the name of and beneficially owned by Dr Allam;

(2) the issued share capital AML comprised 10,000,000 ordinary shares of £1 each, of which 5,714,284 shares were registered in the name of and beneficially owned by Dr Allam and 4,285,716 shares were registered in the name of and beneficially owned by Mrs Allam.

85. On 26 May 2009, Ernst & Young made an application on behalf of AML, ADL and their shareholders for clearance under s701 ITA in respect of a proposed transfer of all the shares in ADL by Dr Allam to AML for consideration in cash equal to the then current market value of the shares in ADL. The application requested confirmation that, on the basis of the information provided in the application, no counteraction notice ought to be given under the transactions in securities legislation in respect of the transfer.

86. In the application, the reasons given by Ernst & Young for the transaction included the following:

(1) AML traded from premises owned by and leased from ADL. It needed bigger premises to develop its business. It was proposed to develop premises owned by ADL for this purpose, but ADL did not have the resources to fund the development, whilst AML did have access to the relevant resources.

(2) The acquisition of shares in ADL would strengthen AML's balance sheet.

(3) The acquisition of ADL by AML would create a single group which would allow both companies to benefit from various tax grouping provisions and simplify the administration of both companies.

(4) ADL's main business was to hold properties, which it leased AML. Following the repurchase by ADL and AML of shares previously owned by Dr Allam's brother, both companies were now under the ownership of Dr Allam or Dr Allam and Mrs Allam and it made commercial sense to group the companies under common ownership.

87. HMRC raised various questions in relation to the application. In response to questions regarding the requirement for cash consideration, Ernst & Young informed HMRC, in a letter dated 2 July 2009, that the consideration was to be used to create a separate fund, invested in real estate in Egypt, which was designed to be available for Dr Allam's retirement.

88. In a letter dated 20 July 2009, HMRC refused clearance for the transaction on the grounds that Dr Allam would retain a controlling interest in ADL while realizing the full market value of the shares and that he would receive that consideration without bearing income tax on it. The letter stated:

> "Mr Allam currently holds all of the shares in [ADL] and 57% of the shares in [AML]. As a consequence of the intended transactions, he will receive consideration representing the market value of ADL. He will thus continue to hold a controlling interest in [ADL], by virtue of his holding in [AML], and will be in a position to obtain a tax advantage within s689 (the D circumstance). He will receive consideration in connection with the distribution, transfer or realisation of assets of a relevant company which represents the value of assets available for distribution by way of dividend but

> he will receive that consideration without bearing income tax on it because it will be in the form of capital."

(The reference to "s689 (the D circumstance)" is a reference to the transactions in securities legislation in force at the time and before the changes made in 2010.)

89. The proposed transaction did not proceed.

The creation of a new holding company, Allamhouse

90. In a letter dated 24 November 2010, Ernst & Young made an application on behalf of the shareholders in AML for clearance under s701 ITA and under s138 TCGA in respect of a proposed transfer by Dr Allam and Mrs Allam of the entire issued share capital of AML to a new holding company, Allamhouse, in connection with the acquisition by Dr Allam and his wife of an interest in companies owning and operating Hull City Football Club.

91. It was proposed that Allamhouse would, in consideration for the transfer, issue new shares to Dr Allam and Mrs Allam such that immediately following the transfer, the share capital of Allamhouse would be held by Dr Allam and Mrs Allam in the same proportions as their previous holdings in AML. Allamhouse would then acquire interests in the companies owning and operating the football club.

92. HMRC granted both clearances. The transfer of shares in AML to Allamhouse took place in late 2010 in the manner described in the clearance applications.

The sale of shares in ADL to AML in 2011

93. Following the transfer of shares in AML by Dr Allam and Mrs Allam to Allamhouse:

(1) the issued share capital of Allamhouse comprised 10,000,000 ordinary shares of £1 each, of which 5,714,284 shares were registered in the name of and beneficially owned by Dr Allam and 4,285,716 shares were registered in the name of and beneficially owned by Mrs Allam;

(2) the entire issued share capital of AML was registered in the name of and beneficially owned by Allamhouse;

(3) Dr Allam continued to own the entire issued share capital of ADL.

This position obtained immediately prior to the transfer of shares in ADL, to which we refer below.

94. On 26 July 2011, Dr Allam sold the entire issued share capital of ADL to AML. The consideration was paid in cash. At the completion of the transfer on 26 July 2011, Dr Allam received a payment of £4,500,000. However, the consideration was subject to adjustment to reflect a valuation of the shares in ADL carried out by AML's accountants. That valuation valued the shares in AML at £4,950,000. On 13 January 2012, Dr Allam and AML entered into a deed of amendment of the share purchase agreement to reflect the adjusted purchase price and AML paid Dr Allam a further £450,000 in cash to reflect the agreed increased consideration. The parties accept that the price paid by AML reflected the market value of the shares at the time of the transfer.

Procedural issues

95. In his return for the tax year 2011/12, Dr Allam reported a capital gain of £4,925,000 on the disposal of the shares. The calculation of the gain took into account allowable expenditure of £25,000. This gain was reduced by allowable carried forward losses. Dr Allam also claimed entrepreneurs' relief in relation to the accrued gain. He accounted for capital gains tax in the amount of £291,130.40 in respect of the resulting gain after taking into account the available losses and giving effect to the claim for entrepreneurs' relief.

96. HMRC opened an enquiry into Dr Allam's tax return for the 2011-12 tax year on 5 November 2013.

97. On 9 October 2015, HMRC issued a preliminary notification under s695 ITA that s684 ITA may apply to the transfer of shares in ADL.

98. On 15 October 2015, Mr Jackson wrote to HMRC. His letter included a statutory declaration dated 14 October 2015 and signed by Dr Allam stating that s684 ITA did not apply.

99. In a letter dated 23 October 2015, HMRC wrote to Jacksons to notify Dr Allam that HMRC proposed to take further action in relation to the preliminary notice. HMRC's letter stated that HMRC would forward the papers to the Tribunal including a certificate to the effect that HMRC saw reason to take further action in relation to the transaction and a copy of the statutory declaration. The Tribunal would be asked to determine whether there was a prima facie case for further action on the basis that s684 ITA applied to the transaction.

100. HMRC made the application to the Tribunal on 16 February 2016.

101. On 7 March 2016, HMRC wrote to Jacksons. The letter noted that the counteraction notice was "in the hands of the Tribunal Service, awaiting a decision". Whilst that was strictly accurate, the inference which the reader was invited to draw from the letter was that the papers had been with the Tribunal for some time. That was, of course, not the case.

102. On 9 March 2016, the Tribunal (Judge Richards) issued his decision confirming that there was a prima facie case under s697 ITA for HMRC to take further action.

103. On 8 April 2016, following their enquiry into Dr Allam's return, HMRC issued a closure notice denying the claim to entrepreneurs' relief. As a result of amendments made to Dr Allam's self-assessment, HMRC assessed Dr Allam to additional tax of £524,034.72 in respect of the disposal of the shares in ADL. There was no reference in the closure notice to the possibility of the issue of a counteraction notice under s698 ITA.

104. Following a statutory review, Dr Allam appealed to the Tribunal against the closure notice.

105. On 19 December 2016, HMRC wrote to Jacksons to confirm that a counteraction notice would be issued in relation to the disposal of shares in ADL to AML. The counteraction notice was finally issued on 24 March 2017. The counteraction notice included an assessment to income tax in the amount of £1,318,298.10 which was expressed as being "the amount of tax which [Dr Allam] would have been liable to pay if [he] had received the consideration [of £4,950,000] as a qualifying distribution".

106. Following a statutory review, Dr Allam gave notice to the Tribunal of his appeal against the issue of the counteraction notice on 21 September 2017.

THE FIRST APPEAL: ENTREPRENEURS' RELIEF

107. The first appeal relates to Dr Allam's claim for entrepreneurs' relief.

Relevant legislation

108. Entrepreneurs' relief applies to produce a lower rate of capital gains tax on "qualifying business disposals" (s169H(1) TCGA).

109. A disposal of shares in a company can qualify as a "qualifying business disposal" provided that it meets the conditions to be treated as "material disposal of business assets" (see s169H(2) TCGA).

110. Those conditions are set out in s169I TCGA. At the time of the disposal of shares in ADL by Dr Allam, s169I was, so far as relevant, in the following form:

169I Material disposal of business assets

(1) There is a material disposal of business assets where–

(a) an individual makes a disposal of business assets (see subsection (2)), and

(b) the disposal of business assets is a material disposal (see subsections (3) to (7)).

(2) For the purposes of this Chapter a disposal of business assets is–

(a) …

(b) …

(c) a disposal of one or more assets consisting of (or of interests in) shares in or securities of a company.

(3) …

(4) …

(5) A disposal within paragraph (c) of subsection (2) is a material disposal if condition A or B is met.

(6) Condition A is that, throughout the period of 1 year ending with the date of the disposal–

(a) the company is the individual's personal company and is either a trading company or the holding company of a trading group, and

(b) the individual is an officer or employee of the company or (if the company is a member of a trading group) of one or more companies which are members of the trading group.

(7) Condition B is that the conditions in paragraphs (a) and (b) of subsection (6) are met throughout the period of 1 year ending with the date on which the company–

(a) ceases to be a trading company without continuing to be or becoming a member of a trading group, or

(b) ceases to be a member of a trading group without continuing to be or becoming a trading company,

and that date is within the period of 3 years ending with the date of the disposal.

111. There is no dispute between the parties that most of the requirements of s169I were met in relation to the disposal of shares in ADL by Dr Allam. In particular, it is agreed that:

(1) Dr Allam made a disposal of shares in a company, ADL (s169I(2)(c) TCGA);

(2) ADL was Dr Allam's "personal company" (s169I(6)(a) TCGA);

(3) Dr Allam was an officer or employee of ADL (s169I(6)(b) TCGA).

112. The only issue between the parties in this case is whether, at the time of the disposal and throughout the period of one year prior to the disposal, ADL was a "trading company" (s169I(6)(a) TCGA).

113. The definition of a "trading company" for these purposes is found in s165A(3) TCGA. It provides:

> (3) "Trading company" means a company carrying on trading activities whose activities do not include to a substantial extent activities other than trading activities.

114. For the purpose of this definition, the meaning of "trading activities" is set out in s165A(4) and (5). These subsections provide:

> (4) For the purposes of subsection (3) above "trading activities" means activities carried on by the company–
>
> (a) in the course of, or for the purposes of, a trade being carried on by it,
>
> (b) for the purposes of a trade that it is preparing to carry on,
>
> (c) with a view to its acquiring or starting to carry on a trade, or
>
> (d) with a view to its acquiring a significant interest in the share capital of another company that–
>
> (i) is a trading company or the holding company of a trading group, and
>
> (ii) if the acquiring company is a member of a group of companies, is not a member of that group.
>
> (5) Activities do not qualify as trading activities under subsection (4)(c) or (d) above unless the acquisition is made, or the company starts to carry on the trade, as soon as is reasonably practicable in the circumstances.

115. The definition of a "trade" is contained in s165A(14) TCGA. It is in the following terms:

> "trade" means (subject to section 241(3)) anything which–
>
> (a) is a trade, profession or vocation, within the meaning of the Income Tax Acts, and
>
> (b) is conducted on a commercial basis and with a view to the realisation of profits.

The reference to s241(3) TCGA is to provisions concerning businesses which consist of letting of furnished holiday accommodation. It is not relevant to this appeal.

HMRC guidance

116. The phrase "to a substantial extent" in 165A(3) TCGA is not further defined in the legislation. HMRC's internal guidance suggests that non-trading activities should be taken to be "substantial" if they amount to twenty per cent. (20%) or more of the activities of the company and that, whilst no single factor is determinative, it is useful to consider the test in the light of some or all of the following factors: income from non-trading activities; the asset base of the company; expenses incurred, or time spent, by officers and employees of the company in undertaking its activities; and the company's history. The relevant passage in HMRC's manuals is set out at CG64090:

> **Entrepreneurs' relief: trading company and holding company of a trading group – the meaning of "substantial".**
>
> Most companies and groups will have some activities that are not trading activities. The legislation provides that such companies and groups still count as trading if their activities "... do not include to a substantial extent activities other than trading activities". The phrase "substantial extent" is used in various parts of [TCGA] to provide some flexibility in interpreting a provision without opening the door to widespread abuse. Substantial in this context means more than twenty per cent. (20%).
>
> The question to ask is how should a company's non-trading company activities be measured to assess whether they are substantial?
> There is no simple formula to this but some, or all of the following are among the measures or indicators that might be taken into account in reviewing a particular company's status. These indicators, adopted for entrepreneurs'

relief, are the same as those used for the old taper relief and in the substantial shareholding exemption for corporation tax.

Income from non-trading activities

For example, a company may have a trade but also let an investment property. If the company's receipts from the letting are substantial in comparison to its combined trading and letting receipts then, on this measure in isolation, the company would probably not be a trading company.

The asset base of the company

If the value of a company's non-trading assets is substantial in comparison with its total assets then again, on this measure, this could point towards it not being a trading company. If a company retains an asset it previously used, but no longer uses, for the purposes of its trade, this may not be a trading activity (but see above regarding surplus trading premises). In some cases it might be appropriate to take account of intangible assets (e.g. goodwill) that are not shown on a balance sheet in considering a company's assets. Current market value and amounts given by way of consideration for assets may both be appropriate measures of the relative extents of a company's trading and other activities. Which measure is appropriate will depend on the facts in each case.

Expenses incurred, or time spent, by officers and employees of the company in undertaking its activities

For example, if a substantial proportion of the expenses of a company were to be incurred on non-trading activities then, on this measure, the company would not be a trading company. Or a company may devote a substantial amount of its staff resources, by time or costs incurred, to non-trading activities.

The company's history

For example, at a particular instant certain receipts may be substantial compared to total receipts but, if looked at on a longer timescale, for instance if a company's trade was seasonal, they may not be substantial compared to other receipts over that longer period. Looked at in this context, therefore, a company might be able to show that it was a trading company over a period, even where that period may have included particular points in time when non-trade receipts amounted to a substantial proportion of total receipts.

Balance of indicators

The indicators discussed should not be regarded as individual tests to which a 20% "limit" applies. They are factors, or indicators, that may be useful in establishing whether there is substantial overall non-trading activity. It may be that some indicators point in one direction and others the opposite way. You should weigh up the relevance of each in the context of the individual case and judge the matter "in the round" (see approach of the Special Commissioner in the IHT case of *Farmer and another (exors of Farmer dec'd) v IRC* SpC 216). If you are unable to agree the status of a particular company for a period then the issue could be established only as a question of fact before the First-tier Tribunal.

Relevant facts

117. The question before us is whether the activities of ADL "to a substantial extent" involved non-trading activities. This question involves an enquiry into the undertaking and business of ADL. Our findings of fact on this issue are set out below. They are taken from the documentary evidence before us and the evidence from the witnesses, primarily Mr Ehab Allam.

The Company

118. ADL is a private limited company incorporated in England and Wales. At all material times, its issued share capital comprised 250,000 ordinary shares of £1 each.

119. At all material times, ADL had two directors: Dr Allam and Mr Ehab Allam. Mr Ehab Allam was also the company secretary of ADL.

ADL's interests in real property.

120. The business of ADL involved holding, developing and leasing properties in and around Hull. The Appendix to this decision notice contains a list of the property interests held by ADL over the period in question, namely the 12 month period prior to the sale of shares in ADL by Dr Allam to AML.

121. We have grouped the properties in the Appendix into five groups, which are explained below.

Melton

122. This is the main factory and offices of AML. The site was acquired by ADL in 2007 and the property leased to AML, subject to a small part of the site which comprised office buildings which were leased to a third party.

Riverside properties

123. These properties include a site at 10-12 Lime Street which is also known as "Mead's Wharf". This site is on the river frontage in Hull. It was acquired by ADL in the 1990's. The site was leased to AML as its main factory and offices for much of the period up to 2007. In 2007, AML relocated its main factory and offices to the site at Melton (see above).

124. There had been some development of this site. However from 2007 onwards, and throughout the relevant period, the site has been leased to AML as additional office and factory space. It was Mr Ehab Allam's evidence that the directors intended the site for residential development into flats and apartments. However, planning permission has not been obtained for this site.

125. We have also included in this category the site at 26 Lime Street, Hull. This site is also a riverside property. It was once a shipyard. It was Mr Ehab Allam's evidence, which we accept, that the site was acquired by ADL with the aim of obtaining planning permission for a residential development. Planning permission has not been obtained. Some of the buildings on the site have been demolished. The site was leased to another business (referred to as "Morgan's") as a site for storage.

Cannon Street

126. In 2008, ADL acquired the freehold of a factory site and related car parking facilities from De Smet Rosedowns Limited ("Rosedowns"), an engineering business in Hull. As part of the transaction for the acquisition of the site, ADL immediately leased the property back to Rosedowns on a full repairing and insuring lease.

127. It was Mr Ehab Allam's evidence that ADL intended to obtain planning permission for the site and to develop the property into low cost housing. In the period in question, the company instructed architects to draw up plans for the development and made several attempts to obtain planning permission for the site, none of which was successful. At the time, the property continued to be leased to Rosedowns as a factory site to maintain income.

Lime Street Car Park

128. The majority of the properties under this heading comprise a collection of sites which the company acquired in 2006 or 2007 and which, for the most part, were developed into a pay and

display car park in 2010 and 2011. This development involved the demolition of existing warehouse buildings on the site, resurfacing, installation of CCTV and pay and display machines amongst other works. We have no evidence of how or by whom the car park was operated after the works had been completed.

129. Within this category we have also included some properties which are adjacent to the car park site. The buildings on these sites have been demolished but the sites have not been let out. In one case, an extension was given to the existing tenant of the site in 2011 to permit further occupation for one more year before demolition work would commence.

Other properties

130. There are a variety of other properties which are currently let to tenants. These are relatively minor and have not affected our decision.

131. The Appendix also sets out the valuation of the various properties as at 31 December 2011. The parties agree that the valuations were applicable to the period in question, subject to one issue. Mr Ehab Allam asserted in his evidence that the valuation of the Cannon Street site would have been significantly higher if planning permission had been obtained for a residential development. We do not doubt his evidence. However, the fact remains that planning permission had not been obtained and, accordingly, we have treated the valuation in the Appendix as the appropriate market value of the relevant property at the time.

132. Most of the properties were let on full repairing leases. Mr Ehab Allam stated that this was standard practice and that when leases expired they were held over on the same terms rather than renegotiated.

133. The Appendix also sets out details of the rental income derived by ADL from the properties in the year ended 31 December 2011. These figures are not disputed by the parties and we have treated them as indicative of the rental income derived by ADL from the properties in the relevant period.

Accounting information

134. We were also provided with copies of the accounts of ADL for the year ended 31 December 2010 and the year ended 31 December 2011.

135. The profit and loss account of ADL for each of those periods is summarized below.

	2011 **£**	**2010** **£**
Turnover	730,218	738,922
Administrative expenses	(50,246)	(12,168)
Operating profit	679,972	726,754
Interest payable	(86,612)	(62,417)
Profit on ordinary activities before taxation	593,360	664,337
Tax on profit	(157,199)	(186,015)
Profit	436,161	478,322

136. As can be seen from the rental income figures in the Appendix to this decision notice, the turnover of ADL in the year ended 31 December 2011 is made up almost entirely of rental income from the properties. The only additional item of income not attributable to rental income was a small amount £17,104, which was attributable to recharging of insurance costs.

We do not have precise figures for the year ended 31 December 2010, but we infer that the position in respect of that period would be very similar.

137. The profit and loss account for the year ended 31 December 2011 shows administrative expenditure of £50,246 and loan interest of £86,612. The profit and loss account for the year ended 31 December 2010 shows administrative expenses of £12,168 and loan interest of £62,417.

138. In the attachments to his witness statement, Mr Ehab Allam presented an allocation of the expenses shown in the accounts between those attributable to "let" properties and those attributable to "other properties". His figures attributed 94% of this expenditure to "other properties" for the year ended 31 December 2011 and 96% for the year ended 31 December 2010. The analysis was based on various assumptions. For example, it treated properties for which there was considered to be a prospect of future development as "other properties" on the basis that they were only being let on a temporary basis until planning permission could be obtained. Some of these properties had, however, been awaiting planning permission for a considerable period of time. It also treated all expenditure which could not be specifically attributed to the "let" properties as attributable to the "other properties" category.

139. We did not find this allocation particularly helpful. We do, however accept, that the significant expenditure on legal and professional costs in the year to 31 December 2011, of £32,469, was likely to be attributable to the development work on the car park site in that period and the various applications for planning permission in relation to other sites.

140. The balance sheets of ADL as at 31 December 2010 and 31 December 2011 (see [184] below) showed fixed assets of £8,644,953 as at 31 December 2010 and £8,871,964 as at 31 December 2011. The figure as at 31 December 2011 is made up entirely of the value of the properties shown in the Appendix together with some additional capitalized expenditure (predominantly planning costs incurred on the Lime Street Car Park Site and the Cannon Street site). As there has been little change in the properties owned by ADL, we infer that fixed asset figure at 31 December 2010 would again be made up almost entirely of the value of the properties.

141. The company's interests in the properties in its accounts are described there as "property investments". The properties are shown as fixed assets and not part of the company's trading stock in the balance sheet of ADL.

142. The main liabilities shown in the balance sheets are for long term mortgages (£3,377,566 at 31 December 2010, and £4,760,866 as at 31 December 2011) and short term liabilities made up principally of payments due under mortgages and amounts due to other group undertakings (£3,062,316 at 31 December 2010 and £1,896,320 as at 31 December 2011).

Directors' time

143. Mr Ehab Allam's evidence was that he spent approximately 20%-30% of his working week dealing with matters for ADL. The bulk of that time (90-95%) was spent on "development" matters. Dr Allam said that he spent very little of his time on ADL matters, perhaps one to two hours on average each week. His focus was on AML. The time that Dr Allam spent working on matters for ADL was largely spent dealing with banks on financing issues. We accept the evidence of both Mr Ehab Allam and Dr Allam on these matters.

The parties' submissions

144. We have summarized the parties' main submissions below.

Dr Allam's submissions

145. Mr Gordon makes the following submissions on behalf of Dr Allam.

(1) The business of ADL was to acquire and develop properties. It incurred significant expense in the course of this business. Mr Ehab Allam spent the vast majority of his time when he was working for ADL in furthering the development activities of the company. Dr Allam only spent one hour every two weeks working on ADL unless he was raising finance. The directors spent little or no time in the collection of rental income. The company's expenditure was devoted predominantly to its trading activities, that is property development.

(2) It is implicit in the "trading company" test for entrepreneurs' relief that the activities of the company do not have to be exclusively trading activities in order for the company to qualify as a trading company. The test requires a holistic approach, not an over-analytical one.

(3) The use of the factors identified by HMRC should be approached with caution. The test itself focuses on the "activities" of the company. The company's asset base, its history and its turnover may provide a misleading impression of the company's activities.

(4) The only factor which the parties both agree is relevant is the use of the company's resources. The vast majority of the company's expenditure in the period was on its development activity. The vast majority of the directors' time working for the company was spent on development activity.

(5) The 20% threshold used by HMRC is not part of the test. But even if it was, on the relevant factors (being the company's expenditure and time spent by its officers and employees), the company would meet the test.

(6) HMRC's test is, in any event, inappropriate and unnecessarily harsh on taxpayers. The statutory test treats every company which carries on some trading activities as a trading company unless it carries on non-trading activities "to a substantial extent". The test should be applied correctly in a manner which reverses HMRC's approach, i.e. if a company is to fail to qualify as a trading company, the non-trading activities must be so substantial as to predominate.

(7) The 20% threshold provides an unnecessary and unjustified cliff edge. If a pure numeric test is appropriate, the threshold should be 50%. In other contexts the Tribunal has given an indication that "substantially" in legislation should be treated as meaning "in excess of 50%" (*Cheltenham College Enterprises Limited v. Revenue and Customs Commissioners* [2010] UKFTT 118 (TC) ("*Cheltenham College*") at [70] and [71]).

HMRC's submissions

146. Dr Schryber's main submissions on behalf of HMRC are as follows.

(1) HMRC accept that ADL was carrying on some trading activities. However, HMRC's view was that ADL's activities did include "to a substantial extent" activities other than trading activities.

(2) The 20% threshold in HMRC's guidance was simply intended as a rule of thumb. It was not a strict limit or threshold. The proper test is the statutory test which should be applied by reference to all the relevant facts and circumstances.

(3) Dr Schryber did, however, defend the use of the four factors in HMRC's guidance. In appropriate circumstances, each of the income and profits of the company, its asset base and its consumption of resources, both in terms of expenses and the time of its offices and employees, could provide useful indicators of the scale of its trading and non-trading activities.

(4) In the present case, the income of the company for the relevant period was predominantly (over 97%) comprised of rental (i.e. non-trading) income and its asset base showed that more than half of its assets were deployed in generating non-trading rental income. These factors alone showed that ADL had substantial non-trading activities.

(5) The consumption of the company's resources had to be viewed in context. Dr Schryber challenged the allocation of expenses presented by Mr Ehab Allan in his evidence. As regards the time of its officers and employees, it was inevitable that, by their very nature, trading activities were likely to require more time to manage than investment activities. Even if a majority of the time of ADL's officers and employees were spent on trading activity, which he did not concede, that did not preclude a substantial extent of the company's overall activities being non-trading.

(6) The company's history was simply an acknowledgment that the trading test was difficult to apply at a single point in time. HMRC had been told on various occasions that the business of ADL was purchasing land and property mainly with a view to developing them for use by AML. Buying and developing property with a view to renting it out was part of a non-trading investment activity.

(7) Viewed in the round, ADL was an investment company with a modest trading activity. Dr Schryber rejected Mr Gordon's arguments that in order to be substantial, the non-trading activities had to predominate or be more than 50% of the overall activities of the company.

Discussion

147. A company is a trading company if it carries on trading activities and its activities "do not include to a substantial extent activities other than trading activities".

148. HMRC accepts that ADL was, at least to some extent, carrying on trading activities. The only question before the Tribunal is whether, in the relevant period, the activities of ADL also included "to a substantial extent" activities other than trading activities. There are two parts to answering this question: the first is to distinguish between those activities of the company that are regarded as "trading activities" and those which are not; and the second is to determine whether the company carried on those other activities "to a substantial extent".

General observations

149. We should begin with some general observations on the structure of the definition of a "trading company".

150. In some respects, the definition of a "trading company" in s165A(3) is relatively broad. The concepts of "trade" and "trading activity" as defined in s165A are not limited to the activities of trading itself. They extend to activities for the purposes of a trade or for the purposes of a trade that the company is preparing to carry on and even to activities involved in acquiring a trade, starting to carry on a trade or acquiring an interest in another company which is itself trading. Against that background, it is clear that an over-analytical approach is not appropriate. The relief is in this respect intended to be relatively broad; it is intended to extend to disposals of shares in companies that are fundamentally trading or preparing to trade and should not be denied simply because the activities of the company extend to activities which are not activities of the trade themselves but are perhaps preparatory to or ancillary to the carrying on of a trade.

151. As Mr Gordon points out, any company that carries on some "trading activities" (as defined) will meet the first part of the definition. It is the second part of the definition (which begins with the words "whose activities do not include…") which provides an important

limitation on the relief. In our view, the clear purpose of that limitation is to ensure that, whilst the relevant company need not be engaged in exclusively trading activities, the relief should not be available for disposals of shares in companies which have non-trading activities which are of real importance when viewed in the context of the company's activities as a whole.

"trading activities"/activities other than "trading activities"

152. As we have mentioned above the first part of our enquiry requires us to distinguish between those activities of the company that are regarded as "trading activities" and those which are not.

153. The definition of a "trading company" refers to the "activities" of the company. This suggests that the focus should be on what the company actually does and a narrow reading of that term might suggest that we should have regard primarily to the active steps that a company takes in furtherance of its business. However, in our view, we should guard against placing too restrictive an interpretation on the term. As we have set out above, in our view, the limitation on the definition of a trading company is designed to ensure that relief is not given for transfers of shares in companies which are not engaged fundamentally in trading activity. That purpose would be defeated if the limitation did not encompass the holding of investments where the holding of investments is substantial in the context of the activities of the company as a whole. If that were not the case it would be possible for relief to be obtained on a sale of shares in a company which has a relatively small but active trading business (or which was perhaps preparing to trade) but which also holds a substantial investment portfolio generating significant income which requires little active management. In our view, that would run contrary to the purpose of the relief.

"to a substantial extent"

154. Both parties pressed upon us various glosses on the words "to a substantial extent" and both referred to the guidance from the HMRC's manuals which we have set out at [116] above.

155. The HMRC guidance suggests that "substantial" in this context means more than twenty per cent. (20%) and that it is helpful to assess that threshold by reference to certain attributes of the business which can be regarded as indicators of the trading or non-trading activities of the company. Those attributes are: the level of income from non-trading activities, such as rental income from investment property; the company's trading and non-trading asset base; the expenses incurred, or time spent, by officers and employees of the company in undertaking its trading and non-trading activities; and the company's history over several years.

156. Dr Schryber, whilst being at pains to state that the twenty per cent. (20%) threshold set out in the HMRC guidance should only be regarded as a "rule of thumb", conducted his analysis by reference to the guidance. Mr Gordon, whilst casting doubt on the guidance and in particular the relevance in this case of some of HMRC's indicative factors, also substituted his own gloss for the statutory words by suggesting that if a company which carried on some trading activities was to be treated as not meeting the test, the non-trading activities should predominate or, if there was to be numerical threshold, it should be at least fifty per cent. (50%).

157. We do not find any of these glosses particularly helpful. The legislation itself does not elaborate further on the meaning of the phrase "to a substantial extent". We must apply those words giving them their ordinary and natural meaning in their statutory context. That context is that of a relief which is intended to apply to shares in companies which are carrying on trading activities (read broadly in the sense required by s165A(14)) but to guard against the use of that relief to reduce the tax on assets which are used for other purposes. Against that background, in our view, "substantial" should be taken to mean of material or real importance in the context of the activities of the company as a whole.

158. This means that we reject Mr Gordon's submission that the non-trading activities must predominate before the limitation can apply. The decision to which Mr Gordon refers in support of that submission, *Cheltenham College*, concerns whether a person was "substantially reconstructing" a protected building within item 1 of Group 6 of Schedule 8 to the Value Added Tax Act 1994 for the purpose of zero rating supplies for the purpose of value added tax. That is a very different context from the present case. The FTT's view that " 'substantially' must mean at the very least 'in the main', or, if percentages must be used, at least over 50%" (*Cheltenham College* [71]), whilst understandable in the context of an exemption from standard rating for value added tax which must itself be read strictly is of little assistance in determining the meaning of "substantial" in the present context.

159. As regards, the HMRC guidance, we can understand that it is useful for HMRC staff to have some practical guidance to assist them in the application of the legislation, but there is no sanction in the legislation for the application of a strict numerical threshold. Furthermore, although the guidance accepts that the factors to which it refers should not be regarded as individual tests and they are just factors which may point one way or another and which need to be weighed up in the context of the individual case, we would counsel against any form of exclusive list. It is not permissible to substitute another test for the test dictated by the legislation. The question for us must be whether or not the activities of ADL include non-trading activities to a substantial extent. We must assess that question in the context of the facts and circumstances of the case as a whole and so by reference to the activities of the company as a whole.

Application to the facts of this case

160. We must then apply these principles to the facts of this case.

161. ADL was carrying on some trading activities. It engaged in some development activity particularly the development of the car park on the Lime Street site.

162. The company has also engaged in some activities in respect of some of the other properties – such as the demolition of properties on various sites and seeking planning permission for other properties albeit that these applications have often been unsuccessful – which we accept were in preparation for development. In accordance with section 165A(13) TCGA, we should treat these preparatory activities as trading activities when we weigh them in the balance.

163. Many of the properties are, however, let to produce rental income. As we have mentioned above, we acknowledge that the activity of holding property and collecting rent is a largely passive activity, but given the purpose of this provision, in our view, we have to take into account those elements as activities in themselves. This is not trading activity and we must take that activity into account.

164. The main tenant of ADL (in terms of its rental income) is AML. We acknowledge that, if ADL was in the same group as AML during the relevant period, then it would be possible to disregard the activities between the companies (see s165A(13) TCGA). However we cannot do so in the present case. We therefore have to take into account the letting of property to AML together with the letting of property to third party tenants as activity other than trading.

165. That having been said, we also take into account that some of the rental income is of a temporary nature. For example, the company re-let the buy-to-let 5 Spyvee Street for one year during the relevant period, but was still considering demolishing the buildings on that site. In a similar way, the company has engaged in several attempts to obtain planning permission for the Cannon Street site. We regard that activity (i.e. seeking planning permission) as trading (or preparing to trade). We also have regard to the fact that the company has sought planning

permission for the site in the weight that we give to the non-trading rental income from it. However, the fact remains that this site has not been developed for many years, that the rental income remains significant and that several of the leases have been renewed on full repairing terms.

166. Furthermore, even though there has been some development activity on the former AML site at 10-12 Lime Street and that development was undertaken in a manner which might assist the future development of the site for apartments and flats, we also take into account the fact that, by the time of the relevant period, the site had been let to AML for four years and had previously been let to AML for many years without any significant development being undertaken. There must come a point at which, it is appropriate to discount the development activity (or the preparation for it) that has been undertaken in the light of the continued use of the property to derive rental income.

167. Having taken all of these factors into account, we have come to the view that ADL was carrying on activities which "to a substantial extent were not trading activities".

168. The company's main source of income over the relevant period is rental income from its properties. The company's most significant income stream is derived from the Melton site, which is let to AML. That site is also by some margin the company's most valuable asset.

169. In our view, although the company was clearly carrying on some trading activity or activity in preparation for trading, the proportion of the income of the company which comprises non-trading rental income and the proportion of its asset base which are devoted to properties which are let simply for their rental income demonstrate that its property investment and rental activities have real importance and cannot be ignored. Those activities are not trading activities and they have to be regarded as "substantial" in the context of the activities of the company as a whole.

Conclusion

170. For these reasons, in our view, entrepreneurs' relief was not available on the disposal of shares in ADL.

171. We dismiss this ground of appeal.

THE THIRD APPEAL: TRANSACTIONS IN SECURITIES

172. The third appeal also relates to the transfer of shares in ADL by Dr Allam to AML in July 2011. It concerns Dr Allam's appeal against the issue of a counteraction notice under s698 ITA.

Relevant legislation

173. Section 698 ITA forms part of the anti-avoidance rules contained in Chapter 1 of Part 13 ITA, which permit HMRC to issue a notice to counteract certain income tax advantages arising from "transactions in securities". These rules are commonly known as the "transactions in securities rules".

174. The transactions in securities rules have been subject to amendment in recent years. At the time of the transactions in question in this case, s684 ITA set out the circumstances in which a person could be liable to the counteraction of an income tax advantage arising from a transactions in securities. It provided:

> **684 Person liable to counteraction of income tax advantage**
>
> (1) This section applies to a person where—
>
> (a) the person is a party to a transaction in securities or two or more transactions in securities (see subsection (2)),

(b) the circumstances are covered by section 685 and not excluded by section 686,

(c) the main purpose, or one of the main purposes, of the person in being a party to the transaction in securities, or any of the transactions in securities, is to obtain an income tax advantage, and

(d) the person obtains an income tax advantage in consequence of the transaction or the combined effect of the transactions.

(2) In this Chapter "transaction in securities" means a transaction, of whatever description, relating to securities, and includes in particular—

(a) the purchase, sale or exchange of securities,

(b) issuing or securing the issue of new securities,

(c) applying or subscribing for new securities, and

(d) altering or securing the alteration of the rights attached to securities.

(3) Section 687 defines "income tax advantage".

(4) This section is subject to—

section 696(3) (disapplication of this section where person receiving preliminary notification that section 684 may apply makes statutory declaration and relevant officer of Revenue and Customs sees no reason to take further action), and

section 697(5) (determination by tribunal that there is no prima facie case that section 684 applies).

175. The circumstances covered by s685 ITA, as mentioned in s684(1)(b) ITA, were described in the following terms:

685 Receipt of consideration in connection with distribution by or assets of close company

(1) The circumstances covered by this section are circumstances where condition A or condition B is met.

(2) Condition A is that, as a result of the transaction in securities or any one or more of the transactions in securities, the person receives relevant consideration in connection with—

(a) the distribution, transfer or realisation of assets of a close company,

(b) the application of assets of a close company in discharge of liabilities, or

(c) the direct or indirect transfer of assets of one close company to another close company,

and does not pay or bear income tax on the consideration (apart from this Chapter).

(3) Condition B is that—

(a) the person receives relevant consideration in connection with the transaction in securities or any one or more of the transactions in securities,

(b) two or more close companies are concerned in the transaction or transactions in securities concerned, and

(c) the person does not pay or bear income tax on the consideration (apart from this Chapter).

(4) In a case within subsection (2)(a) or (b) "relevant consideration" means consideration which—

(a) is or represents the value of—

(i) assets which are available for distribution by way of dividend by the company, or

(ii) assets which would have been so available apart from anything done by the company,

(b) is received in respect of future receipts of the company, or

(c) is or represents the value of trading stock of the company.

(5) In a case within subsection (2)(c) or (3) "relevant consideration" means consideration which consists of any share capital or any security issued by a close company and which is or represents the value of assets which—

(a) are available for distribution by way of dividend by the company,

(b) would have been so available apart from anything done by the company, or

(c) are trading stock of the company.

(6) The references in subsection (2)(a) and (b) to assets do not include assets which are shown to represent a return of sums paid by subscribers on the issue of securities, despite the fact that under the law of the country in which the company is incorporated assets of that description are available for distribution by way of dividend.

(7) So far as subsection (2)(c) or (3) relates to share capital other than redeemable share capital, it applies only so far as the share capital is repaid (on a winding up or otherwise); and for this purpose any distribution made in respect of any shares on a winding up or dissolution of the company is to be treated as a repayment of share capital.

(8) References in this section to the receipt of consideration include references to the receipt of any money or money's worth.

(9) In this section—

"security" includes securities not creating or evidencing a charge on assets;

"share" includes stock and any other interest of a member in a company.

176. The circumstances which are excluded from s685 ITA by s686 ITA (also as mentioned in s684(1)(b) ITA) are circumstances in which the transaction results in a fundamental change of ownership of a close company. The exclusion did not apply on the facts of this case.

177. An "income tax advantage" (as referred to in s684(1)(c) and (d) ITA) was defined in s687 ITA in the following terms:

687 Income tax advantage

(1) For the purposes of this Chapter the person obtains an income tax advantage if—

(a) the amount of any income tax which would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution exceeds the amount of any capital gains tax payable in respect of it, or

(b) income tax would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution and no capital gains tax is payable in respect of it.

(2) So much of the relevant consideration as exceeds the maximum amount that could in any circumstances have been paid to the person by way of a qualifying distribution at the time when the relevant consideration is received is to be left out of account for the purposes of subsection (1).

(3) The amount of the income tax advantage is the amount of the excess or (if no capital gains tax is payable) the amount of the income tax which would be payable.

(4) In this section "relevant consideration" has the same meaning as in section 685.

In summary therefore an individual obtains an income tax advantage where he or she receives consideration on which he or she pays capital gains tax and that amount of tax is less than the income tax which he or she would have paid if he or she had received the consideration as an income distribution.

178. The procedure for the issue of a counteraction notice Part 13 ITA has changed over time. Some of the procedure that applied at the time of the issue of the counteraction notice in this case is evident from the facts that we have described at [95] to [106] above. The details of the procedure are not relevant to the issues in this case, although some issues were raised relating to HMRC's delay in pursuing certain aspects of that procedure. We discuss this issue at [212] to [232] below. For the present purposes, it is sufficient to note that if the conditions for a person to be liable to counteraction were considered to be met and the procedural requirements completed, s698 ITA provided for any income tax advantage to be counteracted by adjustments and for HMRC to issue a notice to the taxpayer setting details of the adjustments required to be made.

179. Section 698 provided, so far as relevant:

698 Counteraction notices

(1) If on an enquiry under section 695 an officer of Revenue and Customs determines that section 684 applies to the taxpayer, the income tax advantage in question is to be counteracted by adjustments, unless the officer is of the opinion that no counteraction is required.

(2) The adjustments required to be made to counteract the income tax advantage and the basis on which they are to be made are to be specified in a notice served on the person by an officer of Revenue and Customs.

(3) In this Chapter such a notice is referred to as a "counteraction notice" ;.

(4) Any of the following adjustments may be specified–

(a) an assessment,

(b) the nullifying of a right to repayment,

(c) the requiring of the return of a repayment already made, or

(d) the calculation or recalculation of profits or gains or liability to income tax.

(5) An assessment may be made in accordance with a counteraction notice at any time (without regard to any time limit on making the assessment that would otherwise apply).

(6) This section is subject to–

section 700 (timing of assessments), and

section 702(2) (effect of clearance notification under section 701).

(7) But no other provision in the Income Tax Acts is to be read as limiting the powers conferred by this section.

180. The adjustments that are to be made by a counteraction notice are those which are required to counteract the income tax advantage. As we have mentioned above, the income tax advantage is defined by reference to the capital gains tax that an individual has paid in relation to the consideration in question.

Relevant facts

181. We have set out some of the background to this appeal above.

182. The further documentary and witness evidence relevant to this particular appeal relates to the accounting information for the companies involved and Dr Allam's evidence relating to the purpose of the relevant transactions.

Accounting information

183. We have summarized the profit and loss account of ADL for the years ended 31 December 2010 and 31 December 2011 at [135] above.

184. The balance sheet of ADL as at 31 December 2010 and 31 December 2011 can be summarized as follows.

	2011	**2010**
	£	**£**
Fixed assets	8,871,964	8,644,953
Net current assets (liabilities)	(1,894,320)	(2,937,314)
Total assets less current liabilities	6,977,100	5,707,639
Creditors falling due after more than one year	(4,760,866)	(3,377,566)
Net assets	2,216,234	2,330,073
Share capital	250,000	250,000
Revaluation reserve	873,352	873,352
Profit and loss account	1,092,882	1,206,721
Shareholders' funds	2,216,234	2,330,073

185. The balance sheet of AML as at 31 December 2010 is summarized below. The balance sheet of AML as at 31 December 2011 was not put in evidence before us.

	2010
	£
Fixed assets	753,915
Net current assets	24,791,106
Total assets less current liabilities	25,545,021
Creditors falling due after more than one year	(100,000)
Deferred tax	(19,634)
Net assets	25,425,387
Share capital	10,000,000
Profit and loss account	15,425,387
Shareholders' funds	25,425,387

186. As can be seen from those figures, if we assume that the profit and loss account of each company represents its distributable reserves, at the relevant time, ADL did not have sufficient reserves to pay a dividend in an amount equal to the consideration paid by AML for the transfer of the shares in ADL (i.e. £4,950,000) at 31 December 2010 or at 31 December 2011. AML, however, had reserves significantly in excess of that amount at 31 December 2010.

187. Although it is not shown in the summary balance sheet above, the detailed accounts show that the amount of cash on the AML balance sheet as at 31 December 2010 was relatively low; £9,102 as at 31 December 2010.

Dr Allam's evidence

188. In his witness statement and his oral evidence, Dr Allam gave the following reasons for the transaction.

(1) Dr Allam had retained the shares in ADL in his own direct ownership because he wanted to have a separate fund for his retirement independent from the engineering business. He regarded the shares in ADL, the value of which substantially reflected its interests in real property, as a safe investment.

(2) Dr Allam had had various offers from third parties to buy the property business of ADL. At the time, he had turned down these offers because he wanted to protect the position of AML as the tenant in relation to the Melton site and not to expose it to third party landlords. These third party offers would, however, have provided a cash fund which Dr Allam wanted to form the basis of funds for his retirement.

(3) It became necessary to redevelop the Melton site to provide new facilities for AML. In the period immediately around and after the financial crisis, the company's bankers were not prepared to lend to ADL for this purpose. However, they were prepared to lend to AML if the property was brought within the AML group. The transfer allowed the property to be brought within the AML group so that the new factory, warehouse and office facilities could be developed with the benefit of finance from the company's bankers.

(4) HMRC had suggested that the transaction could have been undertaken as a share exchange followed by a dividend. However, the sale of shares to AML was the simpler transaction to do. That transaction would have provided him with the cash fund that he required for his retirement. The natural transaction to undertake with the company was to sell the shares in ADL to AML for cash.

(5) Dr Allam took great exception to the suggestion that the transactions had been motivated by his desire to obtain an income tax advantage. He pointed to the significant dividends that he had taken from the companies over the years. In the year in question, Dr Allam received a dividend of £550,000 from ADL alone. UK tax was paid in full on that dividend. He produced figures, which were unchallenged, to show that in the period between 2004 and 2011, the various companies had paid dividends totalling £34 million. In his view, it was simply not sustainable that the transfer of the shares in ADL was structured as a cash sale simply to avoid the payment of tax on a dividend.

189. Dr Allam was questioned by Dr Schryber about the refusal of the clearance for the proposed transaction in 2009. Dr Schryber put it to Dr Allam that the fact that he did not proceed with the transaction when the clearance was refused in 2009, but did proceed with a very similar transaction in 2011 without submitting an application for clearance showed that the primary motive for the transaction was to obtain an income tax advantage. Dr Allam dismissed this assertion. He said that he had understood that the refusal in 2009 was "discretionary" and that he was not able to proceed with the transaction when the application

was refused. His understanding, perhaps mistaken, was that the changes in the legislation in 2010 were designed to ensure that commercial transactions such as the sale of ADL to AML would not be caught by the transactions in securities legislation. He was advised that, in those circumstances, it was not inappropriate to proceed without making a further application.

190. We found Dr Allam to be a credible witness. His explanation of the reasons for the transactions was consistent with the explanations that he had previously given in meetings with HMRC. Although, it was clear that Dr Allam's understanding of the changes in the transactions in securities legislation in 2010 was not entirely accurate, we accept his evidence that this reflected his understanding at the time.

The issues before the Tribunal

191. HMRC say that the conditions set out in section 684 ITA for the issue of a counteraction notice are met.

(1) The sale of shares in ADL by Dr Allam to AML was a transaction in securities (within s684(1)(a)).

(2) The transaction falls within the circumstances covered by Condition A in section 685 and is not excluded by s686 ITA (s684(1)(b)).

(3) Dr Allam's main purpose, or one of his main purposes, in being a party to the transaction was to obtain an income tax advantage (s684(1)(c)).

(4) Dr Allam obtained an income tax advantage because the tax that he would otherwise pay on the receipt of the consideration for the sale of the shares in ADL was less than the amount that he would pay on receipt of an income distribution of that amount (s684(1)(d)).

192. There is no dispute between the parties that the transfer of shares in ADL was a transaction in securities for the purposes of s684(1)(a). Although there were some questions concerning the quantum of any income tax advantage and, of course, the amount of any income tax advantage turned on our answer to the first appeal, there was no dispute, in principle, between the parties that, if the other conditions in section 684 were met, Dr Allam would secure an income tax advantage as a result of the transfer for the purposes of s684(1)(d).

193. There were, however, issues between the parties in relation to the remaining conditions in s684(1).

(1) Mr Gordon challenged whether the transactions could fall within Condition A for the purposes of s684(1)(b) ITA.

(2) He also submitted that it was not the main purpose or one of the main purposes of Dr Allam to obtain an income tax advantage from the transactions for the purposes of s684(1)(c) ITA.

In addition, Mr Gordon raised various procedural challenges to the counteraction notice. Mr Gordon says that HMRC's delay in issuing the counteraction notice was an abuse of process and that the Tribunal should strike out the counteraction notice in such circumstances.

194. We deal with each of these issues in turn.

Condition A

The parties' submissions

195. Dr Schryber, for HMRC, says that Condition A (as set out in section 685(2) ITA) is met.

(1) As a result of a transaction in securities (the transfer of the shares in ADL), Dr Allam received a consideration (the payment of £4,950,000).

(2) That consideration was received in connection with the transfer of assets of a close company. The close company in question was AML. The payment of the consideration of £4,950,000 was itself a transfer of assets of AML.

(3) The payment of £4,950,000 was also "relevant consideration" as defined in section 685(4): it represented "the value of assets which are available for distribution by way of dividend by [AML]". As at 31 December 2010, AML's distributable reserves were £15,425,387 and as at 31 December 2011, AML's distributable reserves were £22,851,099. On those dates, Allamhouse also had distributable reserves of £11,988,637 at 31 December 2010 and £23,296,326 at 31 December 2011. It was therefore clear that the amount of £4,950,000 could have been paid to Dr Allam as a dividend and was available for distribution by AML.

(4) Dr Allam did not pay income tax on the relevant consideration unless the transactions in securities rules applied.

196. Mr Gordon, for Dr Allam, challenges this analysis. He makes the following submissions.

(1) AML is not the correct company. The transaction in securities is the transfer of shares in ADL. Condition A is focussed on the realization of value in that company. The analysis should be performed by reference to ADL.

(2) ADL did not have sufficient distributable reserves to pay a dividend of £4,950,000. As at 31 December 2010, ADL had distributable reserves of approximately £1,206,721 and, of that amount, £550,000, was, in any event, paid to Dr Allam as a dividend. The consideration could not therefore represent the value of assets available for distribution by way of dividend by ADL.

Discussion

197. We can deal with this point briefly.

198. The arguments on this issue come down to a single point, whether the relevant company for the purpose of Condition A is limited to ADL, being the company whose shares are transferred, or whether the analysis can be performed by reference to another company, in this case AML.

199. At first sight, Dr Schryber's analysis seems a little strained.

(1) It assumes that a single payment – the payment of the £4,950,000 by AML – can at the same time be the payment of the "relevant consideration" for the transaction in securities and the transfer of the assets of a close company (AML).

(2) If the payment of the £4,950,000 is to be treated as "relevant consideration" (s685(4)), it also requires that payment to represent "the value of assets that are available for distribution" by AML when, of course, the value of the distributable reserves of AML was unaffected by the payment because the shares in ADL were sold at their market value.

200. That having been said, on its face, the wording of s685(2)(a) and s685(4) is not limited in its application to the company whose shares are transferred. We acknowledge that, on a broad reading, the wording of Condition A can extend to conform to Dr Schryber's approach. Furthermore, that approach is supported by authority albeit not in the context of the version of the transaction in securities legislation that is in issue in this appeal (see *Inland Revenue Commissioners v Cleary* [1968] AC 766 – to which we were not referred by the parties).

Accordingly, we agree with Dr Schryber that the payment of the £4,950,000 can be relevant consideration by virtue of representing the value of assets available for distribution by AML and, at the same time, a transfer of assets of a close company (AML) for the purpose of s685(2)(a) ITA.

201. For these reasons, in our view, the requirements of Condition A were met in this case. Mr Gordon did not dispute that the exception in section 686 ITA could not apply and so the requirements of s684(1)(b) were also met.

The main purpose test

202. Even if the other requirements of s684(1) are met, a person is only liable to counteraction of an income tax advantage if "the main purpose or one of the main purposes of the transaction in securities" is to obtain an income tax advantage.

The parties' submissions

203. HMRC say that this requirement is met. Dr Schryber made the following submissions.

(1) Dr Allam's stated purpose for the transactions as set out in his statutory declaration submitted under s696(1) was that the transaction was:

> "to enable the companies' properties to be amalgamated for the purpose of [AML]'s business and for banking purposes. The bank would not fund the development of [AML]'s new premises unless the properties owned by the two companies were brought under common ownership".

Although the transaction may have a commercial purpose, it did not have to be achieved through a sale of shares for cash. It could have been achieved by a share exchange.

(2) The payment of the cash consideration undermined the commercial rationale for the transaction. It must have reduced the funds available to AML to fund the development of the property.

(3) The reasons given by Dr Allam for the payment of cash – that he needed the cash to fund investments to support his retirement – was not a commercial reason. It was a private reason.

(4) Dr Allam had applied for a clearance for a similar transaction in 2009. The clearance was refused. The changes to the transactions in securities legislation in 2010 did not affect the previous notice refusing clearance. Dr Allam's references to the consultation document which preceded the changes to the transactions in securities legislation 2010 was not relevant. The new version of the transactions in securities rules enacted in 2010 was not intended to relax the provisions in this respect. Dr Allam could have applied for a new clearance following the introduction of the new legislation.

(5) Taking into account all of these factors, the only reasonable inference that could be drawn was that the obtaining of an income tax advantage was one of the main purposes of the transactions.

204. Mr Gordon, for Dr Allam, says that the obtaining of an income tax advantage was not one of the purposes of the transactions.

(1) HMRC accept that there was a commercial objective to the transactions: the acquisition of the interest in the property by AML or a company AML's Group in order to support the raising of finance to acquire and develop the property at the Melton site.

(2) HMRC also accept that Dr Allam wanted to receive cash because he regarded ADL as his pension fund and wanted to raise cash to make investments in Egypt. These were the reasons for the transaction. They did not include a purpose of obtaining a tax

advantage. HMRC had not demonstrated that the obtaining of an income tax advantage was a main purpose of the transaction.

(3) HMRC's argument is, in short, that Dr Allam could have structured the transaction in a way in which he would have received cash and paid income tax on it and so he must be taken to have had as one of his main purposes the obtaining of an income tax advantage. The legislation did not permit HMRC to challenge a commercial transaction simply because it could have been effected in a way that gave rise to a potentially greater tax liability (see *Inland Revenue Commissioners v. Brebner* [1967] 2 AC 18 ("*Brebner*") per Lord Upjohn).

(4) As regards the change in the legislation in 2010, Mr Gordon accepted HMRC's submission that the 2010 changes to the transactions in securities legislation had not changed the effect of the legislation in this respect. However, it was clear that Dr Allam thought that the refusal of the clearance application in 2009 was redundant. Dr Allam did not have to apply for a clearance in 2011. He was entitled to proceed on the assumption that the transactions in securities legislation would not apply.

Discussion

205. As we have mentioned above, if a person is to be liable to counteraction under the transactions in securities rules, it is one of the requirements of s684(1) ITA that a main purpose of the person being a party to the transaction in securities is to obtain an income tax advantage (s684(1)(c) ITA). An income tax advantage is defined by reference to the difference between the capital gains tax payable on the receipt of the relevant consideration and the income tax that would have been payable on a corresponding receipt of dividend income.

206. We agree with Mr Gordon's submission that it is not necessary for Dr Allam to show that he had a commercial purpose for the transaction. The legislation is clear. It can only apply if the obtaining of an income tax advantage was the main purpose or one of the main purposes of the transaction. It does not matter if the purposes of the transaction were "commercial" or "personal". The only question is whether or not a main purpose of the transaction was to obtain an income tax advantage.

207. We also agree with Mr Gordon that the mere fact that the result of the transactions might have been achieved in a different manner which would have given rise to an income tax receipt – in this case by a share exchange or two share exchanges, and the payment of a dividend by AML to Allamhouse and by Allamhouse to Dr Allam – does not automatically give rise to the inference that a main purpose of the transaction that was undertaken was to obtain an income tax advantage. In support of that submission, we need only refer to the well-known statement of Lord Upjohn in *Brebner* to which we referred by both parties.

> "My Lords, I would only conclude my speech by saying, when the question of carrying out a genuine commercial transaction, as this was, is reviewed, the fact that there are two ways of carrying it out - one by paying the maximum amount of tax, the other by paying no, or much less, tax - it would be quite wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the section, avoidance of tax. No commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence."

208. That does not of course mean that the availability of an alternative transaction is not relevant to the analysis. There must be an alternative transaction which would incur an income tax cost if a person is to have a purpose of avoiding income tax. But the question remains whether the obtaining of that advantage was a purpose of the relevant person, in this case, Dr Allam, in being a party to the transaction.

209. Dr Schryber invited us to draw the inference from the surrounding facts that a main purpose of Dr Allam in being a party to the transaction was to obtain an income tax advantage. We have considered the arguments made by the parties and the evidence regarding the surrounding facts and, in our view, the evidence does not support the inference which HMRC invite us to draw.

210. Our reasons are as follows.

(1) As we have stated above, we found Dr Allam to be a credible witness. He gave clear reasons for the transfer: the need to unite ADL and AML under common corporate ownership to support the bank financing of the development at the Melton site and the desire to create a cash fund for his retirement. Dr Allam was consistent in the reasons that he gave for the transaction at all stages. Those reasons are either "commercial" or "personal" reasons, to adopt the terminology used by HMRC, but the crucial point is that they are not the purpose of obtaining an income tax advantage.

(2) The main reasons put forward by HMRC that we should infer that the obtaining of an income tax advantage was one of the main purposes of the transactions are twofold.

(a) The first reason was that Dr Allam applied for a clearance in 2009 under a previous form of the transactions in securities legislation for a transaction which was in very similar form to the transfer of the shares which took place in 2011. Dr Allam did not proceed with that transaction when the clearance was refused.

(b) The second reason that HMRC gave was that the transaction could have been undertaken in an alternative manner which would have incurred an income tax cost.

As regards the first of these arguments, Dr Allam's explanation was that his understanding was that, following the refusal, he was not able to proceed with the transaction, but that position altered when changes were made to the transactions in securities legislation in 2010. Although Dr Allam's understanding of the effect of the transactions in securities legislation and the changes to it may not be accurate, we accept that this was his understanding at the time.

As regards the second argument, for the reasons that we have given above, the mere fact that there exists an alternative means of undertaking a transaction which has a different tax result is not conclusive of the question as to whether an inference can be drawn that the obtaining of an income tax advantage was a main purpose of the transaction.

We accept that, in a particular case, the fact that an alternative transaction existed and was perhaps considered but rejected, may be a factor in deciding whether or not an inference can be drawn that the obtaining of an income tax advantage was a main purpose of a transaction. However, we do not draw that inference on the facts of the present case. Dr Allam did not consider an alternative transaction. Dr Allam had a clear purpose for the transfer (to unite the companies under common ownership) and a clear purpose for his desire to receive the proceeds in cash (to fund his retirement). The latter was not a commercial reason. It was a personal reason, but it was not a tax reason.

(3) The effect of the transaction was to realize the value of ADL and to use that value to support Dr Allam's desire for a fund for his retirement. The sale of the shares to AML was the simplest transaction to undertake to achieve that purpose and the purpose of uniting the companies under common ownership.

(4) The other surrounding circumstances do not support the inference that Dr Allam was seeking to obtain an income tax advantage: he received significant dividends from the companies in the tax year in question including the dividend of £550,000 from ADL representing almost 50% of the retained profits in that company.

211. For these reasons, in our view, the requirement of section 684(1)(c) ITA was not satisfied: the obtaining of an income tax advantage was not a main purpose of Dr Allam in being party to the transaction. The income tax advantage was merely an incidental benefit that was obtained as a result of the transaction.

Procedural issues

212. Our decision on the previous ground decides the third appeal in the favour of Dr Allam. We do not strictly need to address the other ground which was raised by Mr Gordon to resist the counteraction notice. However, we have heard argument from the parties on this issue and so we address it briefly.

213. This ground relates to the procedure for the issue of a closure notice under the form of the legislation that was in place at the time. The relevant facts are set out at [95] to [106] above.

The parties' submissions

214. We have summarized the parties' submissions below.

215. Mr Gordon, for Dr Allam, makes the following submissions.

(1) There were inordinate delays in HMRC's dealing with the process. He refers, in particular, to the delay of over four months between the initial exchange of correspondence in October 2015 and HMRC's referral of the matter to the Tribunal in February 2016; and also to the delay of over 12 months following the receipt of the decision of Judge Richards on 9 March 2016 and the final issue of the counteraction notices on 26 March 2017. In the interim, HMRC had issued a closure notice for the relevant period in April 2016. There was no mention at that time that HMRC was still considering the issue of a counteraction notice. Dr Allam was entitled to assume that the closure notice represented his final tax liability and that the possibility of the issue of a counteraction notice under the transactions in securities legislation had been dropped.

(2) Section 696(3) ITA states that when a person sends a declaration within s696(1) to the relevant HMRC officer and "the officer sees no reason to take further action" the person is not liable to counteraction under s684 and "no counteraction notice may be served on the person under s698". The letter sent by HMRC to Jacksons on 23 October 2015 notifying Dr Allam that HMRC had reason to believe that a counteraction notice ought to be served and the letters from HMRC to the Tribunal in February 2016 submitting the matter to the Tribunal for a decision were signed by different officers of HMRC. No explanation has been given as to the decision-making process and the reason for the delay. If the officer who had received the statutory declaration had come to the view that there was no reason for further action, HMRC could not restart the process and issue a counteraction notice.

(3) The delay between HMRC confirming to Jacksons that they would submit the papers to the Tribunal in October 2015 and the final issue of the counteraction notice was inordinate and an abuse of process. No indication was given to Dr Allam at the time of

the issue of the closure notice in March 2016 that the amount set out in the closure notice was not the full amount of tax for which he was regarded as being liable for the period. Mr Gordon relied on the line of cases relating to the concept of "staleness" in the context of discovery assessments under s29 TMA (for example, *Beagles v Revenue and Customs Commissioners* [2018] UKUT 380 (TCC) ("*Beagles*") and *Revenue and Customs Commissioners v Tooth* [2018] UKUT 38 (TCC) ("*Tooth*")) and the Upper Tribunal decision in *FMX Food Merchants Imports Export Company Limited v Revenue and Customs Commissioners* [2015] UKUT 669 (TCC) ("*FMX*") in support of a submission that there were circumstances where, even if HMRC were acting within the statutory time limits set out in the legislation, a Tribunal should strike out a counteraction notice on the grounds of abuse of process for an inordinate delay.

216. For HMRC, Dr Schryber rejects any suggestion that there was any abuse of process on the facts of this case.

(1) It was clear at all times after the time at which HMRC sent its letter to Jacksons on 23 October 2015 that HMRC was considering the possibility of issuing a counteraction notice. The delays in progressing the case were regrettable, but they were not sufficient to amount to an abuse.

(2) The concept of "staleness", which was an issue in the line of cases concerning discovery assessments (including *Beagles* and *Tooth*) to which Mr Gordon referred was not relevant to the present case. The concept of staleness, if it existed, was based on the specific wording of s29 TMA. There was no basis for such a concept in the context of the transactions in securities legislation.

(3) The Tribunal had no jurisdiction to strike out a counteraction notice on these grounds. The only questions within the jurisdiction of the Tribunal in relation to this appeal were whether s684 ITA applied to Dr Allam in relation to the transaction and whether the adjustments directed to be made by the counteraction notice were appropriate (s705 ITA).

Discussion

217. We will deal with these points briefly, turning first to the question of the jurisdiction of the Tribunal.

Jurisdiction

218. The Tribunal is a creature of statute (s3 TCEA 2007), it can only decide matters prescribed by statute. The Tribunal does not have general or inherent powers to supervise the conduct of HMRC or any other public body by way of judicial review.

219. It follows that any question regarding the scope of the Tribunal's jurisdiction to hear any particular matter is a question of construction of the statute which gives rights of appeal to the Tribunal or defines the powers of the Tribunal in the particular case in question. It does not follow that the Tribunal can never consider public law matters. It can and must do so if it is necessary in relation to matters that fall within its jurisdiction as prescribed by statute. (There is authority for this proposition in, for example, *Revenue and Customs Commissioners v Noor* [2013] UKUT 71 (TCC) at [31] and [56], to which we were referred by Dr Schryber.)

220. In the present case, the rights of the taxpayer to appeal to the Tribunal against a counteraction notice and the powers of the Tribunal on such an appeal are found in s705 ITA. It provides, so far as relevant:

705 Appeals against counteraction notices

(1) A person on whom a counteraction notice has been served may appeal on the grounds that–

(a) section 684 (person liable to counteraction of income tax advantage) does not apply to the person in respect of the transaction or transactions in question, or

(b) the adjustments directed to be made are inappropriate.

(2) …

(3) On an appeal under this section that is notified to the tribunal, the tribunal may–

(a) affirm, vary or cancel the counteraction notice, or

(b) affirm, vary or quash an assessment made in accordance with the notice.

…

221. Mr Gordon's submissions raise two main arguments. The first is that, given the delays in the process, an officer of HMRC must have decided that there was "no reason to take further action" (s696(3) ITA) and so s684 cannot apply. This is clearly a matter that is within the jurisdiction of the Tribunal. It goes directly to whether or not s684 can apply to Dr Allam and so falls within s705(1)(a) ITA.

222. The second argument is broader. Mr Gordon argues that, in appropriate circumstances, HMRC may be precluded from exercising their powers to issue a counteraction notice if HMRC delays unduly in doing so. Mr Gordon suggested that HMRC may be precluded from exercising its power in two circumstances: the first was where the delay amounted to an abuse of process; and the second was where HMRC's actions breached a general principle that HMRC must act expeditiously in the exercise of their powers. Whilst these arguments go to the validity of the counteraction notice itself, they do not relate to whether or not s684 can apply to the transaction and so can only fall within the matters in respect of which a person can appeal to the Tribunal against the issue of a counteraction jurisdiction, if they concern whether the adjustments directed to be made by the counteraction notice are "inappropriate" (within s705(1)(b) ITA).

223. One reading of s705(1) may be that paragraph (a) sets out the circumstances in which the validity of the notice itself can be challenged – that is, only in circumstances in which s684 does not apply – and that paragraph (b) sets out the circumstances in which the quantum or the nature of an adjustment contained within a counteraction notice can be challenged. This might suggest a challenge to the validity of the notice itself is not within paragraph (b).

224. We would have rejected that narrow reading of s705(1) ITA. In our view, an adjustment might be regarded as equally "inappropriate" where there is an error in the computation of the adjustment, where the proposed counteraction does not meet any of the other requirements of Chapter 1 Part 13 ITA, or where a counteraction notice might be regarded as invalid for any other reason. In support of this broader reading of s705(1), we note that the powers of the Tribunal on an appeal (in s705(3)) are not limited by reference to ground on which the appeal is made. For example, the power to cancel the counteraction notice (in s705(3)(a)) is not expressly restricted to circumstances where the grounds of appeal are directed at whether s684 does not apply (s705(1)(a)) and so may be available where an appeal is made on the grounds that the adjustments made by a counteraction notice which otherwise meets the requirements of s684 are "inappropriate" (s705(1)(b)).

225. As we have mentioned above, our decision that the requirements of s684(1)(c) ITA are not met decides the third appeal in favour of Dr Allam. However, if we wrong on that point, we would have taken the view that s705(1)(b) ITA does extend to permit the Tribunal to hear a challenge to the validity of a counteraction notice on public law grounds.

Section 696(3) ITA

226. As regards Mr Gordon's argument that HMRC must be regarded as having reached a view that there was no reason to take further action (within s696(3)) so that Dr Allam would not be liable to counteraction under s684 and no counteraction notice could be served upon him, we reject that submission.

227. At no stage in the process did HMRC intimate to Dr Allam that it had reached a view that there was no reason to take further action. Whilst there may have been significant gaps in the correspondence, which are regrettable, in its communication with Dr Allam and his advisers, HMRC was consistent in its view that there was a possibility that a counteraction notice may be served. There is no basis for the application of s696(3) in this case.

Abuse of process/failure to exercise powers expeditiously

228. As regards, Mr Gordon's broader proposition, if we were required to express a view, we would have rejected Mr Gordon's submissions.

229. In our view, the cases to which Mr Gordon referred which consider the effect of a delay in the issue of an assessment under s29 TMA (such as *Beagles* and *Tooth*) are not authority for a general proposition that HMRC is required to act expeditiously in the exercise of its powers even when it is acting within the statutory time limits. We agree with Dr Schryber that the concept of "staleness" of a discovery assessment which is referred to in those cases is derived from the particular wording of the relevant statutory provisions.

230. The other authority to which Mr Gordon referred, *FMX*, concerns the application to specific provisions of the EU Customs Code and, in particular, whether the general common law as to abuse of process and/or the equitable doctrine of laches and/or article 47 of the Charter of Fundamental Rights or Article 6 of the European Convention on Human Rights might apply in the absence of a specific limitation on the collection of customs debts. We did not find it to be of great assistance in this case.

231. In any event, we would not have regarded the delays in the issue of a counteraction notice in this case as sufficient to amount to an abuse of process. Dr Allam was on notice that HMRC were considering the issue of a counteraction notice. The procedure for the issue of such a notice operates outside the normal self-assessment procedure. The closure notice did not affect the procedure for the issue of the counteraction notice. Although HMRC did not give any indication at the time at which the closure notice was issued in April 2016 that they were still considering the issue of a counteraction notice, equally they did not give any indication that the point had been dropped. Dr Allam and his advisers should have been aware that there remained a possibility that a counteraction notice might be issued.

Conclusion

232. For all of these reasons, if we were wrong in our view that the requirements of s684(1)(c) ITA are not met, we would have rejected Dr Allam's arguments on the procedural issues.

THE SECOND APPEAL: BUSINESS INVESTMENT RELIEF

233. The final issue before the Tribunal relates to the appeal against a closure notice issued by HMRC on 8 April 2016 which concluded an enquiry into Dr Allam's tax return for the tax year 2013-14. That closure notice, in effect, withdrew business investment relief from income tax

previously given in respect of certain remittances made to the UK. The resulting adjustments to Dr Allam's tax return charged Dr Allam to additional income tax of £1,305,000.

Background

234. This appeal concerns the application of the remittance basis of taxation to individuals who are not domiciled in the UK. Where the remittance basis applies, an individual who is resident but not domiciled in the UK for tax purposes is not taxed on overseas income and gains unless and until they are remitted to the UK.

235. Significant changes were made to the remittance basis of taxation in the Finance Act 2008. The effect of those changes was, in broad terms, to restrict the availability of the remittance basis. The provisions relating to business investment relief were introduced in the Finance Act 2012 as a relaxation to that revised regime.

Relevant legislation

236. The provisions governing business investment relief are now contained in s809VA to s809VQ ITA.

237. Section 809VA sets out the circumstances in which an individual may make a claim for business investment relief. In summary, relief is available if funds are used to make a "qualifying investment" or are remitted to the UK and used to make a "qualifying investment" within a 45-day period. Where funds are used to make a "qualifying investment", they are treated as not having been remitted to the UK.

238. Section 809VA provides:

> **809VA Money or other property used to make investments**
>
> (1) Subsection (2) applies if—
>
> (a) a relevant event occurs,
>
> (b) but for subsection (2), income or chargeable gains of an individual would be regarded as remitted to the United Kingdom by virtue of that event, and
>
> (c) the individual makes a claim for relief under this section.
>
> (2) The income or gains are to be treated as not remitted to the United Kingdom.
>
> (3) A "relevant event" occurs if money or other property—
>
> (a) is used by a relevant person to make a qualifying investment, or
>
> (b) is brought to or received in the United Kingdom in order to be used by a relevant person to make a qualifying investment.
>
> (4) Subsection (1)(b) includes a case where income or gains would be treated under section 809Y as remitted to the United Kingdom by virtue of the relevant event.
>
> (5) Subsection (2) applies by virtue of subsection (3)(b) to the extent only that the investment is made within the period of 45 days beginning with the day on which the money or other property is brought to or received in the United Kingdom.
>
> (6) Where some but not all of the money or other property is used to make the investment within that 45-day period, the part of the income or gains to which subsection (2) applies is to be determined on a just and reasonable basis.

(7) Subsection (2) does not apply if the relevant event occurs, or the investment is made, as part of or as a result of a scheme or arrangement the main purpose or one of the main purposes of which is the avoidance of tax.

(8) A claim for relief under this section must be made on or before the first anniversary of the 31 January following the tax year in which the income or gains would, but for subsection (2), be regarded as remitted to the United Kingdom by virtue of the relevant event.

239. The definition of a "qualifying investment" is found in s809VC ITA. At all material times for the purpose of this appeal, it provided, so far as relevant:

809VC Qualifying investments

(1) For the purposes of section 809VA, a person makes an investment if—

(a) shares in a company are issued to the person, or

(b) the person makes a loan (secured or unsecured) to a company.

(2) The company is referred to as "the target company" .

(3) The shares or the person's rights under the loan (or both) forming the subject of the investment are referred to as "the holding" .

(4) The investment counts as a "qualifying investment" if conditions A and B are met when the investment is made.

(5) Conditions A and B are defined in sections 809VD and 809VF.

(6) A reference in this section to "shares" includes any securities.

(7) …

Condition A and Condition B referred to in s809VC(4) and (5) contain further conditions which have to be met before an investment can be treated as "qualifying". They are not in issue in this appeal.

240. Where a claim for business investment relief has been made (and income or gains have been treated as not having been remitted to the UK), that relief can be withdrawn (and those income and gains treated as remitted and so taxable) in the circumstances set out in s809VG. Those circumstances are where a "potentially chargeable event" occurs and appropriate mitigation steps are not taken within a "grace period". In such cases, the funds are treated as having been remitted at the end of the grace period.

241. Section 809VG provides so far as relevant:

809VG Income or gains treated as remitted following certain events

(1) Subsection (2) applies if—

(a) income or chargeable gains are treated under section 809VA(2) as not remitted to the United Kingdom as a result of a qualifying investment,

(b) a potentially chargeable event occurs after the investment is made, and

(c) the appropriate mitigation steps are not taken within the grace period allowed for each step.

(2) The affected income or gains are to be treated as having been remitted to the United Kingdom immediately after the end of the relevant grace period.

…

(7) Sections 809VN (order of disposals etc) and 809VO (investments made from mixed funds) make further provision for the purposes of this section.

…

242. Section 809VH contains the meaning of a "potentially chargeable event". There are various events that may be "potentially chargeable events" but HMRC have stated their case on the basis that the relevant event in this case is found in s809VH(1)(b). At all material times for the purposes of this appeal, s809VH(1)(b) was in the following form:

> **809VH Meaning of "potentially chargeable event"**
>
> (1) For the purposes of section 809VG, a "potentially chargeable event" occurs if—
>
> (a) …
>
> (b) the relevant person who made the investment ("P") disposes of all or part of the holding,
>
> …

243. The appropriate mitigation steps are set out in s809VI. It provided:

> **809VI The appropriate mitigation steps**
>
> (1) If the potentially chargeable event is a disposal of all or part of the holding, the appropriate mitigation steps are regarded as taken if the whole of the disposal proceeds have been taken offshore or reinvested.
>
> (2) For any other case, the appropriate mitigation steps are regarded as taken if—
>
> (a) P has disposed of the entire holding (or so much of it as P retains when the potentially chargeable event occurs), and
>
> (b) the whole of the disposal proceeds have been taken offshore or re-invested.
>
> (3) But if the disposal proceeds exceed X, subsections (1) and (2)(b) apply only to so much of the proceeds as is equal to X.
>
> (4) "X" is—
>
> (a) the sum originally invested, less
>
> (b) so much of that sum as has, on previous occasions involving the same investment—
>
> (i) been taken into account in determining the affected income or gains under section 809VG(2),
>
> (ii) been taken offshore or re-invested in order to avoid the application of that section, or
>
> (iii) been used to make a tax deposit without which the amount actually taken offshore or re-invested would not have been enough to satisfy subsection (1) or (2)(b) (see section 809VK).
>
> (5) "The sum originally invested" means the amount of the money, or the market value of the other property, used to make the investment.
>
> (6) Market value is to be assessed for these purposes as at the date of the relevant event (see section 809VA).
>
> (7) Proceeds are "re-invested" if a relevant person uses them to make another qualifying investment (or the proceeds are themselves a qualifying investment) whether in the same or a different company.

(8) In cases where a breach of the extraction of value rule occurs in connection with the winding-up or dissolution of the target company—

(a) subsection (2)(a) does not apply,

(b) the reference in subsection (2)(b) to the disposal proceeds is to the value received, and

(c) references in this section and in succeeding provisions of the business investment provisions to the disposal proceeds are to be read as references to the value received.

244. If the "potentially chargeable event" is disposal of all or part of the holding within s809VH(1)(b), the "appropriate mitigation steps" are therefore those within s809VI(1). In such a case, the relevant "grace period" is 45 days unless it is extended by agreement with HMRC (s809VJ(2)).

245. There are some special ordering rules in s809VN which apply to assist the interpretation of s809VG in cases where more than one qualifying investment has been made in the same company or in companies in same the group or where an individual has made both qualifying and non-qualifying investments in the same company or in companies in same the group.

246. At all material times for the purpose of this appeal, s809VN provided:

809VN Order of disposals etc

(1) Subsection (2) applies if at any time income or chargeable gains of an individual are treated under section 809VA as not remitted to the United Kingdom as a result of—

(a) more than one qualifying investment made in the same target company,

(b) more than one qualifying investment made in companies in the same eligible trading group, or

(c) qualifying investments made in an eligible trading company and in an eligible stakeholder company that holds investments in that trading company.

(2) In the application of section 809VG at that time—

(a) treat the investments and holdings as if they were a single qualifying investment and a single holding, and

(b) assume that a disposal of all or part of that deemed single holding affects the deemed single investment in the order in which the qualifying investments were made (that is to say, on a first in, first out basis).

(3) Subsection (4) applies if at any time—

(a) income or chargeable gains of an individual are treated under section 809VA as not remitted to the United Kingdom as a result of one or more qualifying investments,

(b) in addition to that investment or those investments, a relevant person holds at least one other investment in the same target company, the same eligible trading group or a related eligible company, and

(c) that other investment is not a qualifying investment.

(4) In the application of section 809VG at that time—

(a) treat the investments and holdings as if they were a single investment and a single holding, and

(b) assume that a disposal of all or part of that deemed single holding is a disposal of a holding from a qualifying investment until the holdings from all the qualifying investments have been disposed of.

(5) The reference to a "related eligible company" —

(a) in relation to an eligible trading company, is to an eligible stakeholder company that holds investments in that company, and

(b) in relation to an eligible stakeholder company, is to an eligible trading company in which that company holds investments.

(6) Subsections (2) and (4) apply whether the investments in question are held by the same relevant person or different ones.

Relevant facts

247. As we have mentioned above, we were provided by the parties with a bundle of documents relating to this appeal. These documents included witness statements of Dr Allam and Mr Jackson. Dr Allam and Mr Jackson were cross-examined on their statements.

248. Our findings of fact are set out in the following paragraphs.

249. In all relevant tax years, Dr Allam was resident but not domiciled in the UK for tax purposes. He was entitled to use the remittance basis of assessment.

250. The transactions that are relevant to this appeal relate to Allamhouse. Allamhouse was at all material times resident in the UK for tax purposes and was controlled by Dr Allam and Mrs Allam (see [93] above).

251. Allamhouse was established in connection with the acquisition of Hull City Football Club in 2010. As part of the structure for the acquisition, a dividend was declared by AML to its shareholders (Dr Allam and Mrs Allam) in the aggregate amount of £2,500,000 (£1,428,571 being attributable to the shares held by Dr Allam and £1,071,429 being attributable to the shares held by Mrs Allam). Dr Allam and Mrs Allam paid income tax on the dividend.

252. The funds representing the dividend were not paid to Dr Allam and Mrs Allam, but were transferred into a solicitor's account and then used by Allamhouse to fund the acquisition of the football club. The amount was reflected in the accounts of Allamhouse in a loan account showing amounts due to Dr Allam. Interest was charged on the balance. However, other documentary evidence shows that the amount continued to be treated as an amount due from Allamhouse to Dr Allam and Mrs Allam in the relevant proportions. We infer that, to the extent of her share of the dividend (i.e. £1,071,429), the amount remained due to Mrs Allam.

253. Allamhouse then acquired the entire issued share capital of AML from Dr Allam and Mrs Allam (see [92] above). AML declared a further dividend of £12,500,000 in favour of Allamhouse. Allamhouse also used these funds to fund the acquisition of the football club.

254. In the 2012-13 tax year, Dr Allam made loans to Allamhouse out of his previously unremitted and untaxed overseas income or gains totalling £6,945,746. Dr Allam's unchallenged evidence was that these loans were funded from rental income from property investments in Egypt, the sale of interests in some Nile cruisers (also in Egypt) and certain inheritances which had not previously been remitted to the UK. Dr Allam provided evidence to show that he had paid Egyptian tax on the rental income in the amount of approximately £229,998 in the period between 2004 and 2015. Once again, this evidence was not challenged.

255. The loans were not otherwise documented, but were recognized in the accounts of Allamhouse as an increase in the balance of the same loan account as that showing amounts due to Dr Allam and Mrs Allam. Interest was charged on the combined balance. Dr Allam claimed business investment relief on the remittance of the funds in his tax return for the 2012-

13 tax year. HMRC accepted that claim. The result was that the foreign income or gains, which would otherwise have been regarded as remitted to the UK and therefore taxable, were treated as not having been remitted to the UK and so not taxable.

256. It was common practice for the companies controlled by Dr Allam to declare dividends out of their profits when the accounts were prepared for each accounting period. Dr Allam and Mrs Allam paid income tax on these amounts. However, these dividends were often not paid immediately in cash, but left outstanding as amounts due to Dr Allam and Mrs Allam. The amounts would then be paid as and when cashflow permitted.

257. Any amount of unpaid dividend was also treated in the accounts of Allamhouse as an amount due to Dr Allam or Mrs Allam, as the case may be, and reflected as an increase in the balance of the same account.

258. In 2013, Allamhouse made payments to Dr Allam personally totalling £2,900,000. The details are set out below:

(1) a payment of £400,000 on 14 March 2013;

(2) a payment of £1,500,000 on 19 August 2013;

(3) a payment of £1,000,000 on 23 September 2013.

259. The documentation which was provided to us was inconsistent in its treatment of these payments as, at times, it did not differentiate between the interests of Dr Allam and Mrs Allam. In addition, we were not provided with the corporate documentation relating to the declaration of dividends by Allamhouse. From the evidence available to us, our conclusions are:

(1) the payment of £400,000 on 14 March 2013 was intended to represent the payment of a dividend declared on 19 December 2012 in favour of Dr Allam;

(2) the payments of £1,500,000 on 19 August 2013 and £1,000,000 on 23 September 2013 were intended to represent the repayment of the amounts contributed to Allamhouse by Dr Allam and Mrs Allam and derived from the dividend declared by AML in 2010.

260. On 14 November 2014, HMRC issued an enquiry notice under section 9A TMA enquiring into Dr Allam's return for the tax year 2013-14.

261. On completion of its enquiry, on 8 April 2016, HMRC issued a closure notice under s28A TMA. The effect of the closure notice was to assess Dr Allam to income tax on the £2,900,000 withdrawn from the loan account in 2013. The additional income tax charged was £1,305,000.

262. Dr Allam appealed against the closure notice.

The issues before the Tribunal

263. It is common ground that Dr Allam was entitled to the remittance basis for the tax years 2012-13 and 2013-14; that the loans of £6,945,746 made by Dr Allam to Allamhouse in the tax year 2012-13 (the "overseas loans") were "qualifying investments" within s809VC(1)(b) ITA; and that the funds advanced in making the overseas loans should be treated as not being remitted to the United Kingdom under section 809VA(2) ITA in the 2012-13 tax year.

264. The only issue before the Tribunal is whether the payments to Dr Allam personally to which we refer at [258] above were "potentially chargeable events" within s809VG ITA on the grounds that the payments represent the disposal of "all of part of [Dr Allam's] holding" within s809VH(1)(b).

265. If the payments were potentially chargeable events, Dr Allam has not taken any "appropriate mitigation steps" (s809VI) and so those amounts will be treated as remitted to the UK at the end of the grace period for each payment. The grace period for all of the payments

is 45 days. The end of the grace period for each payment falls within the 2013-14 tax year. So any amount which is treated as remitted will be included in the taxable income of Dr Allam for that tax year.

The parties' submissions

266. Mr Gordon, for Dr Allam, makes the following submissions.

(1) On HMRC's argument, the payments can only be potentially chargeable events if they are made to repay "investments" which are not qualifying investments but which form part of a single holding with the qualifying investments (i.e. the overseas loans) as a result of the ordering rules in s809VN ITA.

(2) The legislation does not define "investment" for the purposes of section 809VN. It should take its ordinary meaning, which would require some injection of funds or value into the company. It cannot extend to leaving funds, representing declared dividends, in the company pending their subsequent withdrawal. If this were not the case, a variety of other creditors to whom payment was deferred would become "investors" for the purposes of these rules.

(3) The entire context of these provisions concerns the making of investments into the company (see s809VA(3), s809VC, s809VN, s809VO). If Parliament had intended to include every situation in which a person stood as a creditor to the company within the meaning of an "investment", it would have said so (see, for example, s302(1) Corporation Tax Act 2009).

(4) HMRC have relied upon s809VC(1)(b), which refers to the making of loans in support of their arguments. But s809VC(1)(b) is not relevant for present purposes: it requires the making of a loan, i.e. an advance, rather than simply leaving funds in a company; and, in any event, it only applies for the purposes of s 809VA and is not of any wider significance.

(5) In the alternative, Dr Allam is entitled to relief to the extent that the funds were previously taxed in Egypt (£229,998).

267. Dr Schryber, for HMRC, makes the following submissions.

(1) The dividends credited to the loan account were also "investments", albeit non-qualifying investments, in Allamhouse. This was an ongoing long-term arrangement. under which dividends were routinely credited to Dr Allam's loan account rather than paid to him. It involved a positive decision to provide funds for Allamhouse. The arrangement was, in effect, a loan by Dr Allam to Allamhouse; it was analogous to a situation where the dividends were paid out and immediately loaned back to Allamhouse. HMRC's approach was consistent with accounting treatment of the dividends in the accounts of Allamhouse.

(2) A "potentially chargeable event" includes circumstances where a person who made a qualifying investment disposes of all or part of the holding (s809VH(1)(b)).

(3) For the purpose of determining whether Dr Allam has made a disposal of all or part of his holding, the overseas loans and the dividends left on loan account should be treated as a single holding (s809VN(4)(a)).

(4) The withdrawals of £2,900,000 from the loan account in 2013 represented part disposals of that single holding.

(5) The effect of the ordering rules in s809VN is that any disposal of part of the single holding is treated as a disposal of the qualifying investments (the overseas loans) in

priority to the non-qualifying investments (the dividends credited to the loan account) comprised in that holding (s809VN(4)(b)).

(6) The question of double taxation relief was not before the Tribunal.

Discussion

Observations on the relevant facts

268. We should begin our discussion of this issue with some observations on the relevant facts.

The declaration of the dividend by AML

269. As we have mentioned above, one of the sources of the financing for the acquisition of the football club by Allamhouse in 2010 was a dividend paid by AML. Dr Allam's evidence, which we have accepted, was that a dividend of £2,500,000 was declared on the shares in AML held by Dr Allam and Mrs Allam. (A dividend in an aggregate amount of £2,500,000 declared by AML on all of its ordinary shares would have been payable as to £1,428,571 to Dr Allam and as to £1,071,429 to Mrs Allam as its shareholders at the time.) Dr Allam and Mrs Allam paid tax on the dividend. However, the funds were not paid to them directly. Instead, they were held in a solicitor's account and then made available to Allamhouse to finance the acquisition.

270. These funds are reflected in the loan account of Allamhouse and the analysis of transactions between Allamhouse and its shareholders which appears in the documents with which we were provided as amounts due to Dr Allam and Mrs Allam (in the amount of £1,428,571 to Dr Allam and in the amount of £1,071,429 to Mrs Allam). In the absence of other evidence, the inferences that we draw are that, although the funds were not paid directly to Dr Allam and Mrs Allam, they were held by the solicitor on their behalf and in their respective proportions and then provided to Allamhouse by way of loans at the direction of Dr Allam and Mrs Allam.

The payments made to Dr Allam in 2013

271. Allamhouse made payments to Dr Allam during 2013 in a total amount of £2,900,000. The payments are shown in the loan account of Allamhouse and the analysis of transactions between Allamhouse and its shareholders which appears in the documents with which we were provided as: (i) the payment on14 March 2013 of a dividend to Dr Allam of £400,000, which had been declared on 19 December 2012 and (ii) payments of £1,500,000 on 19 August 2013 and £1,000,000 on 23 September 2013 being a repayment of the funds initially provided by Dr Allam and Mrs Allam to finance the purchase of the football club.

272. The records which were provided to us are not consistent in their treatment of the latter payments and their division as between Dr Allam and Mrs Allam. However, the inferences that we draw are that the latter payments were repayments of loans treated as made by Dr Allam and Mrs Allam to Allamhouse to which we refer at [270] above and that, although the payments appear to have been made to Dr Allam, they were held by Dr Allam as to £1,428,571 for himself and as to £1,071,429 on behalf of Mrs Allam.

Were the payments potentially chargeable events?

The meaning of "investment" in s809VN

273. HMRC say that potentially chargeable events occurred when the payments were made to Dr Allam's account in 2013 because those payments represented a disposal of part of Dr Allam's holding in Allamhouse for the purpose of s809VH(1)(b) ITA. As we have described above, this submission relies on the rule in s809VN(4) ITA which treats qualifying investments (such as the overseas loans in this case) together with other "investments" (which are not qualifying) made by the same person in the same company as part of a single investment and

a single holding. It also requires the unpaid amounts to be treated as "investments" made by Dr Allam and the repayment of those amounts to be treated as a disposal of those investments.

274. Mr Gordon, for Dr Allam, says that there is no definition of "investment" in s809VN. The term "investment" in s809VN must be given its ordinary meaning. The payments made to Dr Allam are payments of outstanding dividends; they do not represent the proceeds of disposal of the shares on which the dividend was paid or a disposal of a separate "investment". He describes an "investment" as requiring some form of contribution of value to the investee company.

275. To an extent, we agree with Mr Gordon. There is no definition of "investment" in or for the purpose of s809VN. We therefore agree with him that "investment" in s809VN (and in the other provisions of relating to business investment relief) must be given its ordinary meaning informed by the context in which it is being used.

276. In this respect, we note that s809VC(1) sets out the circumstances in which a person "makes an investment" for the purposes of s809VA. Those circumstances are limited to cases in which shares or securities are issued to a person or a person makes a loan to the company (s809VC(1) and (3)). That definition applies only for the purposes of s809VA. There are clearly good reasons for a relatively restrictive definition in the context of a focussed relief from taxation under the remittance basis. Furthermore, given that the relief from taxation under the remittance basis is being targeted at encouraging new funds being invested in UK businesses, it is understandable that the relief is restricted to newly issued shares or securities or new loans.

277. The same rationale does not apply to the use of the word "investment" in other parts of the business investment relief rules. For example, there is no reason why the concept of "investment" in those provisions should not encompass any interest in the share or loan capital of a company that a person acquires from a third person. That having been said, in our view, the meaning of "investment" in s809VN (and in other part of the business investment relief rules) must at the very least be informed by s809VC given that the provisions form part of the same code: for example, a (non-qualifying) investment is treated by s809VN(4)(a) as part of the same "holding" as a qualifying investment (for the purposes of s809VC(2)) and the same concepts of "disposal" (in s809VG(1)(b)) should apply to them.

278. Against this background, in our view, a normal dividend which is declared (and so becomes due and payable) does not, simply because it is not paid immediately, become an "investment" for the purposes of s809VN. In those circumstances, the dividend is a return on the investment (the shares). It is not a disposal of the investment. In the period before the dividend is actually paid, the obligation to pay the dividend does not (without more) become an "investment" for the purpose of the business investment relief rules so that when it is discharged the payment is treated as a disposal. This interpretation accords with the natural meaning of the words. It also avoids the risk of a dividend on shares becoming both taxable income and, at the same time, a potentially chargeable event under the business investment relief rules, which would run contrary to the purpose of those rules, which is to encourage investment in UK trading companies.

279. By a "normal" dividend in the previous paragraph, we mean a regular dividend paid out of the commercial profits of the company. We can envisage circumstances in which the same conclusion might not be reached – for example, if a dividend is paid out of profits created on a reduction in capital of the company. However, every case will have to be judged on its own facts in the context of all of the circumstances.

280. In our view, before an outstanding normal dividend can be treated as a further investment, there needs to be some further step which indicates that the shareholder is intending to reinvest

the proceeds and put them at the disposal of the company. That may occur in a number of ways, for example, the shareholder and the company may take steps after a dividend has been declared to formalize the debt which is then outstanding between the shareholder and the company by entering into documentation to govern its terms or the shareholder may agree to accept further shares in lieu of the unpaid dividend. We also accept that that, in appropriate circumstances, it may be possible to infer that position has been reached between the company and its shareholders, for example, if a dividend has been left outstanding for a material period of time and/or if interest is charged on the amount due. Whether such an inference can be justified will depend on the circumstances of the case.

Application to the facts of this case

The dividend of £400,000

281. If we turn to the facts of this case, in our view, the unpaid dividend declared on 19 December 2012 became an investment before it was paid on 14 March 2013. Steps were taken which indicate that Dr Allam was reinvesting the proceeds (albeit for a relatively short time) and putting them at the disposal of the company. The obligation to pay the dividend was added to the loan account of Dr Allam with the company and taken into account in the balance due to Dr Allam on that account. There was no differentiation made between the dividend and other amounts due to Dr Allam (which were clearly "investments" for these purposes) shown in that account in the respect. Interest was charged on the balance.

282. The outstanding dividend should therefore be treated as a loan made by Dr Allam and so as part of the same single investment and single holding in Allamhouse as his other qualifying investments (the overseas loans) and any other investments in Allamhouse that he may have had (s809VN(4)(a)).

The funds used to finance the acquisition of the football club

283. As we mentioned above, the funds used by Allamhouse to finance the acquisition of the football club which derived from dividends paid by AML to Dr Allam and Mrs Allam should be regarded as provided to Allamhouse in the form of loans made by Dr Allam and Mrs Allam. In our view, those loans should also be treated as "investments" for the purpose of s809VN. The loans would fall within the definition of "investment" in s809VC(1) which applies for the purpose of determining whether an investment is a "qualifying investment". Given that the concept of "investments" which are not qualifying investments in s809VN is potentially broader than the more limited definition in s809VC(1), the loans should also be treated as "investments for that purpose.

284. The loan treated as made by Dr Allam should therefore also be treated as part of the same single investment and single holding in Allamhouse as his other qualifying investments (the overseas loans) and any other investments in Allamhouse that he may have had (s809VN(4)(a)).

285. On our analysis, Mrs Allam will also be treated as having made a loan to Allamhouse to finance the acquisition of the football club. However, this appeal relates only to the assessment made on Dr Allam. The "potentially chargeable event" on which HMRC have raised the assessment in this case is that the payments fall within s809VH(1)(b) which provides that a "potentially chargeable event" occurs if "the relevant person who made the investment ("P") disposes of all or part of the holding". The investment referred to in this provision is the qualifying investment. In the present case, the qualifying investment was made by Dr Allam. He is the "relevant person" and it is his holding to which s809VH(1)(b) refers, not the holding of Mrs Allam.

Potentially chargeable events

286. The payment of the outstanding dividend of £400,000 on 14 March 2013 and the proportion of the payments of £1,500,000 on 19 August 2013 and £1,000,000 on 23 September 2013 which are attributable to Dr Allam's loan should be treated as repayments of the loans treated as made by Dr Allam to the company. Those repayments will be part disposals of Dr Allam's single investment and single holding in Allamhouse.

287. In accordance with s809VN(4)(b), the repayments should be treated for the purposes of s809VG as a disposal of a holding from a qualifying investment (the overseas loans) unless and until the holdings from all the qualifying investments have been disposed of. Dr Allam had not made a previous disposal of any part of the investment comprising the overseas loans and so all of the repayments (to the extent that they are attributable to Dr Allam) will be treated as disposals of a holding from a qualifying investment and accordingly as a "potentially chargeable events" within s809VH(1)(b) ITA.

288. As Dr Allam has not taken any "appropriate mitigation steps" (s809VI), the aggregate amount of the repayments (£1,828,571) will be treated as remitted to the UK immediately after the end of the grace periods for the repayments. The repayments were made on 14 March 2013, 19 August 2013 and 23 September 2013 and so the 45-day grace periods all ended in the 2013-14 tax year. The aggregate amount should be included in the taxable income of Dr Allam for that year.

Double taxation relief

289. Mr Gordon raised the prospect that, if Dr Allam was liable to income tax under s809VG, he should be entitled to double taxation relief for Egyptian tax incurred on the rental income from which the funds remitted to make the loans to Allamhouse were at least in part derived. Mr Schryber did not respond to this point and simply asserted that the question of double taxation relief was not in issue before the Tribunal.

290. The matter at issue in this appeal is the assessment made in the closure notice. It seems to us appropriate that that assessment should reflect double taxation relief that is available to Dr Allam.

Conclusion

291. It follows that we allow the second appeal in part: the aggregate amount of £1,828,571 received by Dr Allam in part on 14 March 2013, in part on 19 August 2013 and in part on 23 September 2013 should be treated as remitted to the UK and included in his taxable income for the tax year 2013-14. Dr Allam should be entitled to relief from double taxation in respect of Egyptian tax paid on the amounts treated as having been remitted.

DECISION

292. In summary, our decisions on the various matters before the Tribunal are as follows:

(1) we dismiss Dr Allam's appeals on the grounds of the Section 12D issue (which was relevant to the first and second appeals);

(2) we dismiss Dr Allam's appeal in relation to the first appeal (entrepreneurs' relief);

(3) we allow Dr Allam's appeal in relation to the second appeal (business investment relief) in part;

(4) we allow Dr Allam's appeal in relation to the third appeal (transactions in securities).

293. We have assumed that the parties will, in the light of our conclusions be able to reach agreement on the revised amounts of the assessments. If not, the parties should reapply to the Tribunal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

294. 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.

ASHLEY GREENBANK
TRIBUNAL JUDGE

Release date: 15 January 2020

APPENDIX

Details of properties owned by ADL

Property	**Tenant**	**Annual rent**	**Valuation**
		£	£
Melton factory			
Factory Gibson Lane	AML	325,000	4,430,427
Melton Offices	AML	54,000	
Melton Offices	JC Services	3,500	
Riverside properties			
10/12 Lime Street	AML	72,000	550,000
26 Lime Street	Morgans	17,000	500,000
1 Witham	None	n/a	150,000
Cannon Street			
Cannon Street,	Rosedowns	127,500	1,570,432
Lime Street Car Park			
1 Lime Street 2 Lime Street 17/19 Lime Street 3 New Cleveland St	[unknown]	106,000	775,100
5 Spyvee Street	Fairbotham	4,044	60,000
6 Spyvee Street	None	n/a	80,000
4 New Cleveland	None	n/a	325,000
Others			
Maplewood Ave,	P Thorpe	1,526	
Maplewood Ave,	AML	2,544	155,000