Neutral Citation: [2022] UKFTT 222 (TC)

Case Number: TC08544

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, 88 Rosebery Avenue, London EC1R 4QU and, in part, by remote video hearing

Appeal reference: TC/2019/00977

TAX AVOIDANCE – income tax – whether or not a loss arose under paragraph 2 of Schedule 13 to the Finance Act 1996 on the acquisition and disposal of relevant discounted securities – held that, on the basis of a purposive construction of the relevant legislation and a realistic view of the facts, no loss arose – for the purposes of the relevant legislation, the Appellant did not in fact acquire the securities and, even if he had, the amount which he had paid in respect of the issue of the securities was the same as the amount deemed to be received for them on disposal – appeal dismissed – penalty for failure to take the necessary corrective action after a follower notice – held that Audley v HMRC was a prior relevant judicial ruling in relation to the follower notice and it was not reasonable in all the circumstances for the Appellant to have failed to take the necessary corrective action following his receipt of the follower notice so that the conditions for a penalty to be assessed had been met – in addition, the quantum of the penalty was appropriate - the Respondents' decision to limit the mitigation for the Appellant's co-operation because of the Appellant's failure to take the necessary corrective action was appropriate – appeal dismissed

Heard on: 20, 21, 22 AND 23 JUNE 2022
Judgment date: 19 JULY 2022

Before

TRIBUNAL JUDGE TONY BEARE
MS REBECCA NEWNS

Between

MR KEVIN JOHN PITT

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Michael Avient of counsel, instructed by Price Bailey LLP

For the Respondents: Mr Nicholas Macklam of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This decision relates to an appeal by the Appellant against a closure notice dated 3 October 2018 (the "Closure Notice") in respect of the Appellant's tax return for the tax year ending 5 April 1999 (the "Tax Year"), along with an appeal by the Appellant against a penalty assessment dated 2 July 2018 (the "Penalty Assessment") for failing to take the necessary corrective action following the issue of a follower notice (the "Follower Notice") to him under Section 204 of the Finance Act 2014 (the "FA 2014") in relation to the transactions to which the Closure Notice relates. In this decision, we will refer to the appeal against the Closure Notice as the "substantive appeal" and the appeal against the Penalty Assessment as the "penalty appeal". The two appeals have been heard together because they both have their origins in the same transactions which were implemented by the Appellant in the Tax Year.

THE FACTS

Introduction

2. The facts which are relevant to the two appeals are straightforward.

3. Many of them were the subject of formal agreement between the parties prior to the hearing, whilst others emerged, and were not the subject of dispute between the parties, at the hearing.

4. We set out in the section headed "FINDINGS OF FACT" below our conclusions in relation to the few facts which were the subject of dispute.

The agreed facts

5. The facts which the parties formally agreed prior to the hearing are set out in paragraphs 6 to 36 below.

The companies

6. K.P. Hastingwood Limited ("KPPD Ltd") is a private limited company with the number 02867074 which was originally incorporated on 29 October 1993 and was named K.P. Property Developments Limited from 9 November 1993 until its change of name on 4 January 2012. The Appellant has at all material times been its sole director. During the Tax Year, the Appellant was the sole shareholder of the company.

7. Columnstyle Limited ("Columnstyle Ltd") is a private limited company with the number 01907528 which was incorporated on 23 April 1985. The Appellant has been its sole director since 26 February 1993. During the Tax Year, the Appellant owned 84% of its shares and KPPD Ltd owned the remainder.

Sums transferred to the Appellant by the companies

8. On 4 March 1999, the following sums were transferred to the Appellant's personal NatWest bank account:

(1) £622,492.07 from KPPD Ltd; and

(2) £388,640.36 from Columnstyle Ltd.

9. These payments were made as a withdrawal of funds from the balance of the Appellant's director's loan accounts with KPPD Ltd and Columnstyle Ltd.

Sums transferred by the Appellant to the companies and creation of loan note instruments

10. On the same day, the following amounts were transferred from the Appellant's personal NatWest bank account:

(1) £6,000,000 to KPPD Ltd. The correct amount should have been £600,000 and the banking error was corrected the following day on 5 March 1999. (In the rest of this decision, we propose to ignore the banking error which was made as it has no relevance to the matters in issue and we will assume that £600,000 was transferred by the Appellant to KPPD Ltd on 4 March 1999); and

(2) £400,000 to Columnstyle Ltd.

11. On 5 March 1999 KPPD Ltd and Columnstyle Ltd each resolved to create loan notes to be constituted by a loan note instrument (the "Loan Notes"). The amount of the Loan Notes were:

(1) £600,000 as regards KPPD Ltd; and

(2) £400,000 as regards Columnstyle Ltd.

12. Both loan note instruments were dated 5 March 1999 and the terms, other than the parties and the amounts, were materially the same.

13. Taking the Loan Notes in respect of KPPD Ltd as an example, the terms of the Loan Notes included the following:

(1) the Company was defined as KPPD Ltd and Certificate was defined as "a certificate for the Loan Notes issued in accordance with clause 6.1 or any replacement thereof from time to time issued under clause 6.3";

(2) Interest Payment Date was defined as "the seventh day following the date of issue of a Loan Note and each subsequent anniversary of that day";

(3) Loan Notes were defined as "the £10 Loan Notes of the Company constituted by this Instrument or as the case may be the amount thereof for the time being issued and outstanding and "Loan Note" means each such £10 Loan Note";

(4) Noteholder was defined as "a person for the time being entered in the Register as a holder of a Loan Note or Loan Notes";

(5) Redemption Date was defined as "the thirtieth anniversary of the date of issue of a Loan Note or, if such date falls on a day which is not a Business Day, the date of the next succeeding Business Day" and Business Day was defined as "a day (other than a Saturday or a Sunday) on which banks are generally open for business in London";

(6) Redemption Price was defined as "an amount equal to £1.20 per £1 par value";

(7) clause 2.1 provided that the principal amount was limited to £600,000 (for Columnstyle Ltd the principal amount was £400,000);

(8) clause 2.4 provided that the Loan Notes were to rank pari passu as unsecured obligations of the Company;

(9) clause 3.1 provided that the Loan Notes were to carry interest at the rate of 0.5% per annum;

(10) clause 3.2 provided that the interest, less any tax, was to be payable annually in advance on the Interest Payment Date;

(11) clause 4.1 provided that, subject to the provisions of clause 5, the Loan Notes were to be redeemed by the Company on the Redemption Date by payment of the Redemption Price;

(12) clause 4.3 provided that, once redeemed in full by the Company, the Loan Notes were to be cancelled and not re-issued;

(13) clause 5.1 provided that the Loan Notes were to become immediately repayable at the Redemption Price at the option of the Noteholder upon the occurrence of various events of default or insolvency;

(14) clause 6.1 provided that the Loan Notes were to be issued in integral multiples of £10 and a duly executed Certificate was to be issued by the Company to each and every Noteholder for the total amount of Loan Notes registered in his name;

(15) clause 7.1 provided that a register (the "Register") was to be kept by the Company which was to include:

(a) the name and address of each of the holder or holders for the time being of the Loan Notes;

(b) the amount of the Loan Notes held by each Noteholder; and

(c) the date at which the name of each Noteholder was entered in the Register in respect of the Loan Notes standing in the name of the Noteholder; and

(16) clause 11.1 provided that the Loan Notes were transferrable in nominal amounts and integral multiples of £10.

14. Certificates dated 5 March 1999 were issued to the Appellant stating he was the registered holder of:

(1) £600,000 of Loan Notes in KPPD Ltd; and

(2) £400,000 of Loan Notes in Columnstyle Ltd.

15. The Register of each company was updated to reflect that the Appellant was the Noteholder in respect of the Loan Notes as detailed in the Certificates issued on 5 March 1999.

Creation of trusts and transfer of the Loan Notes into the trusts

16. On 29 March 1999, the Appellant created two trusts by two deeds.

17. The first was the Kevin John Pitt Settlement 1999 (the "KJP Settlement") and the Appellant settled the sum of £100 on the KJP Settlement.

18. The second was the Kevin John Pitt Children's Settlement 1999 (the "Children's Settlement", and, together with the KJP Settlement, the "Settlements" and, each, a "Settlement") and the Appellant settled the sum of £100 on the Children's Settlement.

19. At the time of the Settlements' creation, the following individuals were the trustees of each Settlement:

(1) the Appellant;

(2) Mr Charles William Olley; and

(3) Mr Richard James Downing

(together, the "Trustees").

20. Mr Olley is an accountant and is a partner in the accountancy firm Price Bailey LLP ("PB").

21. The terms of the KJP Settlement included the following:

(1) the Trust Fund was defined at clause 1(2) as £100 and any other property transferred to the Trustees to hold on the terms of the KJP Settlement and all property from time to time representing the above;

(2) the Trust Property was defined in clause 1(3) as any property comprised in the Trust Fund;

(3) the Trust Period was defined in clause 1(4) as the period of 80 years beginning with the date of the KJP Settlement, being 29 March 1999;

(4) the Beneficiaries were defined in clause 1(5) as:

(a) the Appellant and his children and descendants;

(b) the spouses and former spouses of the people in (a); and

(c) any person or class of person nominated to the Trustees by the Appellant or, after the Appellant's death, by two Beneficiaries and whose nomination was accepted in writing by the Trustees;

(5) clause 2(1) provided that, subject to the overriding powers in clause 3, the Trustees were to pay the income of the Trust Fund to the Appellant during his life;

(6) clause 2(2) provided that, subject to clause 2(1), during the Trust Period, the Trustees were to pay and apply the income of the Trust Fund to or for the benefit of any Beneficiaries as the Trustees thought fit;

(7) under clause 3, the Trustees were given various overriding powers, including a power of appointment, a power to transfer Trust Property to new settlements and a power of advancement to any Beneficiary;

(8) clause 4 provided that, subject to the foregoing clauses, the Trust Fund was to be held on trust for all grandchildren of the Appellant living at his death and, if more than one, in equal shares absolutely; and

(9) clause 5 gave the Appellant the power to appoint trustees during his life.

22. On the day that the KJP Settlement was created (i.e. 29 March 1999):

(1) the Appellant executed a deed of gift assigning £600,000 in principal amount of the Loan Notes issued by KPPD Ltd to the Trustees of the KJP Settlement; and

(2) KPPD Ltd issued a Certificate certifying that the Trustees of the KJP Settlement were the registered holders of £600,000 in principal amount of the Loan Notes issued by KPPD Ltd.

23. The Register in relation to the loan note instrument in respect of KPPD Ltd also recorded the transfer of £600,000 in principal amount of the Loan Notes issued by KPPD Ltd from the Appellant to the Trustees of the KJP Settlement on 29 March 1999.

24. The terms of the Children's Settlement included the following:

(1) the Trust Fund was defined at clause 1(2) as £100, and any other property transferred to the Trustees to hold on the terms of the Children's Settlement and all property from time to time representing the above;

(2) the Trust Property was defined in clause 1(3) as any property comprised in the Trust Fund;

(3) the Trust Period was defined in clause 1(4) as the period of 80 years beginning with the date of the Children's Settlement, being 29 March 1999;

(4) the Accumulation Period was defined in clause 1(5) as the period of 21 years beginning from the date of the Children's Settlement, being 29 March 1999;

(5) the Beneficiaries were defined in clause 1(6) as:

(a) the children and descendants of the Appellant;

(b) the spouses and former spouses of the people in (a); and

(c) any person or class of persons nominated to the Trustees by the Appellant or, after the Appellant's death, by two Beneficiaries and whose nomination was accepted in writing by the Trustees;

(6) Interest in Possession was defined in clause 7 as having the same meaning as in the Inheritance Tax Act 1984;

(7) the Principal Beneficiaries were defined in clause 1(9) as Leeanna and Robin Pitt and any other child of the Appellant born:

(a) at a time when a Principal Beneficiary was under the age of 25; and

(b) during the Trust Period.

(8) clause 2(1) provided that, subject to the overriding powers in clause 3, the Trust Fund was to be divided into equal shares (the "Shares") so that there would be one Share for each Principal Beneficiary;

(9) clause 2(2) provided that, while a Principal Beneficiary was living and under the age of 25, the Trustees were able to apply the income of his or her Share for the maintenance, education or benefit of any of the Principal Beneficiaries who were under the age of 25. Subject to that, the Trustees were to accumulate the income of the Share during the Accumulation Period and add it to the Trust Fund. Subject to that, section 31 of the Trustee Act 1925 was to apply to the Share (with certain modifications);

(10) clause 2(3) provided that the Trustees were to pay the income of the Share to the Principal Beneficiary during his or her life if he or she attained the age of 25;

(11) clause 2(4) provided that, subject to the foregoing, during the Trust Period, the Trustees were to pay or apply the income of the Share to or for the benefit of any Beneficiaries as the Trustees thought fit;

(12) under clause 3, the Trustees were given various overriding powers, including a power of appointment, a power to transfer Trust Property to a new settlement, and a power of advancement;

(13) clause 4 provided that the overriding powers in clause 3 were to be exercised over Trust Property only in specified circumstances;

(14) clause 5 was a default clause and provided that, subject to the foregoing, the Trust Fund was to be held on trust for Leeanna and Robin Pitt in equal shares absolutely;

(15) clause 6 gave the Appellant the power to appoint trustees during his life; and

(16) under clause 8, the Appellant and his spouse were excluded from the Settlement and no power conferred by the Settlement was exercisable, and no provision was able to operate, so as to allow Trust Property or its income to become payable to or applicable for the benefit of the Appellant or the spouse of the Appellant in any circumstances.

25. On the day that the Children's Settlement was created (i.e. 29 March 1999):

(1) the Appellant executed a deed of gift assigning £150,000 in principal amount of the Loan Notes issued by Columnstyle Ltd to the Trustees of the Children's Settlement; and

(2) Columnstyle Ltd issued a Certificate certifying that the Trustees of the Children's Settlement were the registered holders of £150,000 in principal amount of the Loan Notes issued by Columnstyle Ltd.

26. The Register in relation to the loan note instrument in respect of Columnstyle Ltd also recorded the transfer of £150,000 in principal amount of the Loan Notes issued by Columnstyle Ltd from the Appellant to the Trustees of the Children's Settlement on 29 March 1999.

The Appellant's tax return for the Tax Year

27. The Appellant claimed a loss of £694,684 as a result of the foregoing transactions and claimed tax relief of £278,557.60 in respect of the loss claimed. The Appellant's self-assessment return for the Tax Year (the "Return") included the following entries:

(1) under the rubric "Post-cessation expenses and losses on relevant discounted securities etc" in box 15.11, an amount of £694,684 was entered;

(2) the tax return software, based upon the entries in the Return, calculated the tax repayment due to the Appellant to be £81,873.20 and this amount was shown in box 18.3; and

(3) accompanying the Return were two explanatory notes providing additional information relating to the entry in box 15.11 and the calculation of market value of the Loan Notes assigned.

Subsequent transfer of Loan Notes into trust

28. On 29 October 1999 (i.e. in the tax year of assessment following the Tax Year), the Appellant transferred the remaining £250,000 in principal amount of the Loan Notes in Columnstyle Ltd to the Trustees of the Children's Settlement by way of gift. The Register in relation to the loan note instrument in respect of Columnstyle Ltd also recorded the transfer of the £250,000 in principal amount of the Loan Notes in Columnstyle Ltd from the Appellant to the Trustees of the Children's Settlement on 29 October 1999. The transfer of the £250,000 in principal amount of the Loan Notes in Columnstyle Ltd on 29 October 1999 is not part of the subject of these appeals and, in the rest of this decision, unless expressly indicated to the contrary by the phrase "the Aggregate Loan Notes", references to the "Loan Notes" are solely to the £600,000 in principal amount of the Loan Notes in KPPD Ltd and the £150,000 in principal amount of the Loan Notes in Columnstyle Ltd which were transferred to the Settlements on 29 March 1999 and do not encompass the remaining £250,000 in principal amount of the Loan Notes in Columnstyle Ltd which were transferred to the Trustees of the Children's Settlement on 29 October 1999.

Follower Notice and Penalty Assessment

29. On 16 June 2016, the Respondents issued the Follower Notice to the Appellant, requiring him to take corrective action in respect of the relief of £278,557.60 claimed in respect of the loss of £694,684 claimed in the Return. The corrective action was to amend the Return so as to remove the relief claimed of £278,577.60 in its entirety.

30. The Appellant made representations against the Follower Notice on 18 August 2016, but the conclusions of the Follower Notice were upheld by the Respondents in a letter of 24 May 2017.

31. On 18 April 2018, the Respondents notified the Appellant of the penalty it intended to charge, inviting the provision of any relevant information that had not been taken into account, and the Appellant responded in a letter dated 31 May 2018.

32. On 2 July 2018, the Respondents explained that the information provided in the letter of 31 May 2018 did not affect their view of the amount of the penalty and issued the Penalty

Assessment to the Appellant, in the absence of the Appellant's having taken the corrective action required by the Follower Notice.

The Respondents' enquiry into the Return and the Closure Notice

33. On 16 January 2001, the Respondents issued an enquiry notice under Section 9A of the Taxes Management Act 1970 into the Return.

34. By the Closure Notice, the Respondents amended the Return to reduce the Appellant's claim to relief of £278,577.60 in respect of the loss of £694,684 to £nil.

Appellant's appeals

35. Following a statutory review requested by the Appellant, by a notice of appeal generated on 14 February 2019, the Appellant appealed against the review conclusions in respect of the Penalty Assessment.

36. Following a statutory review requested by the Appellant, by a notice of appeal generated on 20 March 2019, the Appellant appealed against the review conclusions in respect of the Closure Notice.

Facts which emerged and were not disputed at the hearing

37. The following facts emerged at the hearing and are not the subject of any dispute between the parties:

(1) the Appellant was in the habit of consulting his accountants, PB, on a quarterly basis to discuss his and the companies' financial positions. Those discussions generally included a review of his and the companies' tax affairs;

(2) PB were not themselves tax specialists and were accustomed to receiving approaches from other advisers with tax-efficient products and ideas which PB might wish to suggest to their clients. One such advisor was the accounting firm Haines Watts ("HW");

(3) On 15 December 1998, at the suggestion of Mr Olley of PB, the Appellant met with a Mr Javed Siddiqui of HW. In the course of that meeting, Mr Siddiqui became aware that the Appellant was owed significant sums by the companies by way of balances on his director's loan accounts with the companies;

(4) following that meeting, on 6 January 1999, Mr Olley sent Mr Siddiqui some further financial information in relation to the companies and the Appellant's director's loan accounts with the companies;

(5) on 13 January 1999, Mr Siddiqui, the Appellant and Mr Olley attended a conference with Mr Michael Sherry, a tax counsel, which had been arranged by Mr Siddiqui to discuss the proposal to enter into the transactions which are the subject of these proceedings;

(6) following that conference, the Appellant decided to proceed with the transactions and accordingly there was a second meeting between the Appellant, Mr Olley and Mr Siddiqui at some point prior to the end of February 1999, whereupon HW prepared the documentation required to enable the Appellant to replace part of the balances on his director's loan accounts with the companies with the Aggregate Loan Notes;

(7) on 18 March 1999, following the issue of the Aggregate Loan Notes on 5 March 1999, the Appellant and Mr Olley attended a meeting at the Appellant's solicitors, Nockolds, to discuss the creation of trusts to be settled by the Appellant for the benefit of himself and his family. Nockolds advised that the Appellant should settle two trusts

– an interest in possession trust (which is the KJP Settlement) and an accumulation and maintenance trust (which is the Children’s Settlement); and

(8) as already noted in paragraphs 16 to 18 above, on 29 March 1999, the Settlements were established and the Loan Notes, comprising £750,000 in principal amount of the Aggregate Loan Notes and with an aggregate market value of £55,316, were transferred to the Settlements.

THE RELEVANT LEGISLATION

The substantive appeal

38. The legislative provisions which are relevant to the substantive appeal have been repealed and re-enacted in the period since the Tax Year but, in the Tax Year, the relevant legislative provisions were contained in Schedule 13 to the Finance Act 1996 (“Schedule 13”) and Section 839 of the Income and Corporation Taxes Act 1988 (“Section 839”). The relevant provisions are set out in Appendix 1 to this decision.

39. It can be seen from the relevant legislation that, as long as:

(1) the Loan Notes were “relevant discounted securities” for the purposes of Schedule 13;

(2) for the purposes of Schedule 13:

(a) the Appellant acquired the Loan Notes;

(b) the Appellant paid the aggregate amount of £750,000 in respect of his acquisition of the Loan Notes;

(c) each Settlement was connected with the Appellant for the purposes of Section 839 and paragraph 8(3) of Schedule 13; and

(d) the market value of the Loan Notes on the date when the gifts were made – i.e. 29 March 1999 - was £55,316, as the Appellant claimed in the Return,

then the Appellant was entitled to claim the loss of £694,684 which appeared in the Return and to succeed in the substantive appeal.

40. In that regard, it is common ground that:

(1) the Loan Notes were “relevant discounted securities” for the purposes of Schedule 13;

(2) each Settlement was connected with the Appellant for the purposes of Section 839 and paragraph 8(3) of Schedule 13; and

(3) the market value of the Loan Notes on 29 March 1999 was £55,316.

41. In addition, since it is relevant to the discussion which is set out below, we should record that the parties have agreed that, for the purposes of determining this appeal, we should proceed on the assumption that the Loan Notes also had an aggregate market value of £55,316 on 5 March 1999, when they were issued.

42. However, the parties are in dispute over whether, for the purposes of Schedule 13:

(1) the Appellant did acquire the Loan Notes; and

(2) the Appellant paid the aggregate amount of £750,000 in respect of his acquisition of the Loan Notes.

The penalty appeal

43. The legislative provisions which are relevant to the penalty appeal are contained in the Finance Act 2014 (the "FA 2014") and are set out in Appendix 2 to this decision.

44. It can be seen from the relevant legislation that:

(1) the Respondents were entitled to give the Follower Notice to the Appellant only if:

(a) a tax enquiry into the Return was still in progress;

(b) the Return included a claim that a particular tax advantage resulted from particular tax arrangements;

(c) there was a "relevant judicial ruling" in relation to those tax arrangements;

(d) no previous follower notice had been given to the Appellant and not withdrawn by reference to the same tax advantage, tax arrangements, judicial ruling and tax period; and

(e) the Follower Notice was given within the time limit required by the legislation;

(2) the Respondents were entitled to issue the Penalty Assessment only if:

(a) the Respondents were entitled to give the Follower Notice to the Appellant;

(b) the Appellant failed to take the necessary corrective action in respect of the tax advantage sought to be denied by the Follower Notice within the time allowed by the legislation; and

(c) it was not reasonable in all the circumstances for the Appellant not to have taken that necessary corrective action; and

(3) if the Respondents were entitled to issue the Penalty Assessment, they were entitled to reduce the penalty imposed on the Appellant to a figure of no less than 10% to reflect the Appellant's co-operation with them in one or more of five specified ways.

45. It is common ground in this case that:

(1) each of the requirements set out in paragraph 44(1) above apart from the one set out in paragraph 44(1)(c) above is satisfied; and

(2) if the Respondents were entitled to give the Follower Notice to the Appellant, the Appellant did fail to take the necessary corrective action in respect of the tax advantage sought to be denied by the Follower Notice within the time allowed by the legislation.

46. However, the parties are in dispute over whether:

(1) the decision cited by the Respondents in the Follower Notice as the "relevant judicial ruling" meets the conditions to qualify as such, which goes to the question of whether the Respondents were entitled to give the Follower Notice to the Appellant at all; and

(2) if the Respondents were entitled to give the Follower Notice to the Appellant:

(a) it was reasonable in all the circumstances for the Appellant not to have taken the necessary corrective action; and

(b) if it was not reasonable in all the circumstances for the Appellant not to have taken that necessary corrective action, whether the Respondents applied appropriately the provisions in the legislation which allow for a reduction in the penalty as a result of the Appellant's co-operation.

THE AGREED ISSUES

47. The parties have agreed that the following are the agreed issues to be determined in these proceedings:

(1) whether the Appellant acquired the Loan Notes;

(2) if the Appellant did acquire the Loan Notes, whether the Appellant sustained a loss on the transfer of the Loan Notes to the Trustees of each of the Settlements;

(3) whether the conditions for issuing the Follower Notice and the Penalty Assessment to the Appellant were satisfied; and

(4) if so, the quantum of the penalty due.

48. There was some discussion at the hearing in relation to the precise relationship between:

(1) the question of whether or not, if the Appellant did acquire the Loan Notes, he had paid £750,000 in respect of that acquisition, which we have recorded in paragraph 42(2) above as being a point of dispute between the parties; and

(2) the agreed issue of whether or not, if the Appellant did acquire the Loan Notes, he had sustained a loss on the transfer of the Loan Notes, as set out in paragraph 47(2) above.

49. Mr Avient accepted that the Respondents' position to the effect that the Appellant had not paid £750,000 in respect of the acquisition of the Loan Notes and had not sustained a commercial loss had been pleaded in the Respondents' statement of case and fleshed out in the Respondents' skeleton argument which had been provided to the Appellant before the hearing. However, he suggested that, whereas:

(1) the way in which the agreed issue in paragraph 47(2) had been framed suggested that:

(a) the agreed issue was whether or not the Appellant had sustained a real commercial loss on the transfer of the Loan Notes; and

(b) the question of whether or not the Appellant had paid £750,000 in respect of the acquisition of the Loan Notes was a matter which fed into that agreed issue;

(2) the Respondents' position at the hearing suggested that:

(a) the agreed issue was whether or not the Appellant had paid £750,000 in respect of the acquisition of the Loan Notes; and

(b) the question of whether or not the Appellant had sustained a real commercial loss on the transfer of the Loan Notes was a matter which fed into that agreed issue.

50. In other words, Mr Avient suggested that the thrust of the Respondents' submissions at the hearing was not entirely consistent with the way in which the agreed issue in paragraph 47(2) above had been framed.

51. Mr Macklam responded by pointing out that:

(1) the agreed issue in paragraph 47(2) above was whether the Appellant had sustained a loss for the purposes of paragraph 2 of Schedule 13;

(2) the question of whether the Appellant had paid £750,000 in respect of the acquisition of the Loan Notes went directly to the agreed issue; and

(3) a fundamental plank of the Respondents' argument in relation to the question described in paragraph 51(2) above was that the Appellant had not sustained a real commercial loss on the transfer of the Loan Notes,

and that the Respondents' position in relation to each of the above had not changed at any stage in the process.

52. We think that the reason for the disagreement between the parties on this point may lie in a slight misunderstanding between them in relation to the precise nature of the agreed issue in question. We think that Mr Avient was reading the agreed issue as referring to the question of whether or not the Appellant had sustained a real commercial loss on the transfer of the Loan Notes whereas Mr Macklam was reading the agreed issue as referring to whether or not the Appellant had sustained a loss for the purposes of paragraph 2 of Schedule 13 on the transfer of the Loan Notes.

53. In our view, the latter interpretation of the agreed issue is the right one. Our reading of the agreed issue, referring as it does to the "sustaining" of a "loss" and thus explicitly tracking the language used in paragraph 2 of Schedule 13, is that it is referring to sustaining a loss for the purposes of paragraph 2 of Schedule 13 and not referring to sustaining a real commercial loss. As such, we agree with the reasoning of Mr Macklam set out in paragraph 51 above. A key plank in the Respondents' position in relation to the acquisition price paid in respect of the Loan Notes (and, hence, whether or not the Appellant sustained a loss for the purposes of paragraph 2 of Schedule 13) is that the Appellant did not sustain a real commercial loss in respect of his acquisition and transfer of the Loan Notes. This position was clearly flagged in the statement of case and the Respondents' skeleton argument. As such, we do not perceive there to be any change of position on the part of the Respondents as between, on the one hand, the statement of case and the Respondents' skeleton argument and, on the other hand, the submissions of Mr Macklam at the hearing or any gap between, on the one hand, the Respondents' position in the statement of case, the Respondents' skeleton argument and Mr Macklam's submissions and, on the other hand, the agreed issue in paragraph 47(2) above.

54. We therefore consider that:

(1) the Appellant was aware of how the Respondents intended to argue their position in relation to the agreed issue in paragraph 47(2) above well before the hearing, by virtue of the terms of the statement of case and the Respondents' skeleton argument; and

(2) the Appellant could have been in no doubt before the hearing that the fact that he had not sustained a real commercial loss from the transactions was a matter which needed to be addressed in the context of that agreed issue.

55. We therefore see no valid basis for complaint in that regard.

THE EVIDENCE

Introduction

56. The evidence in the proceedings took the form of:

(1) various documents contained in the documents bundle; and

(2) witness evidence from the Appellant and Mr Olley on behalf of the Appellant and Ms Sara McCrorie on behalf of the Respondents.

The documentary evidence

57. The documents bundle for the hearing included the following:

(1) a file note prepared by Mr Olley of a meeting with Nockolds on 18 March 1999, attended by the Appellant, Mr Olley and two representatives of Nockolds. The file note made no mention of the Loan Notes or the tax benefits which might accrue to the Appellant from transferring the Loan Notes to trusts but referred merely to the fact that

transferring the assets to trusts would protect some of the Appellant's assets for the long-term benefit of the Appellant's family;

(2) the Return, which showed that the Appellant had taxable income in the Tax Year of £728,242 in aggregate. This meant that, after deducting the loss of £694,684 claimed in respect of the transactions making up the arrangements, the Appellant's taxable income for the Tax Year was £33,558 in aggregate;

(3) a letter from the Respondents to the Appellant of 10 May 2001, in which the Respondents asked for:

(a) various documents in relation to the arrangements (including memos, emails, notes of meetings and notes of telephone calls relating to the issue of the Loan Notes and their subsequent transfer to the Settlements); and

(b) an explanation of the commercial rationale behind the Appellant's decision to invest in the Loan Notes "when their value was substantially lower than the amount to be paid";

(4) a letter from Mr Olley to the Respondents on 11 June 2001 in which:

(a) Mr Olley responded to the request for documents as follows:

"2….There are also engagement letters with BKR Haines Watts, tax advisers and correspondence, fee notes etc, in relation thereto, together with instructions to counsel and notes of the conference. We assume this information is not required, relating as it does to adviser client matters. If however this is required, please let us know as soon as possible….Having said that, we assume the information is required by you to identify motive in establishing the loan notes. If this is correct, it will not be needed because, as stated at (7) below, it is acknowledged that in establishing the loan notes our client was seeking to provide the possibility of obtaining a tax advantage"; and

(b) Mr Olley responded to the request for the commercial rationale as follows:

"7 Mr Pitt has traditionally assisted his companies by provision of substantial personal finance and it was recognised that this could be achieved in a manner that also provided possible tax advantages if he chose to take advantage of them";

(5) a letter from the Respondents to Mr Olley of 8 November 2001 in which the Respondents refused to accept that the loss claimed by the Appellant had arisen and set out the basis for that refusal;

(6) a letter from Mr Olley to the Respondents of 13 March 2002 which:

(a) referred to Mr Olley's understanding that the Respondents were "at a more advanced stage of discussions with Mr Stephen Edwards of [HW] in Farnborough in connection with similar discounted securities to [the Appellant's]" and that the Respondents were imminently going to release their refined thinking on the technical analysis to Mr Edwards for his comments; and

(b) suggested that it would be more efficient for all concerned if, rather than responding to the Respondents' letter of 8 November 2001, he awaited Mr Edwards's explanation of that refined thinking and then responded to that letter;

(7) a letter from the Respondents to Mr Olley of 12 September 2002 in which the Respondents confirmed that no further information was required but stated that discussions with other companies in relation to similar transactions in relevant discounted

securities were ongoing and that therefore proposing that the enquiry into the Return be kept open;

(8) a letter from Mr Olley to the Respondents of 9 October 2002 in which Mr Olley referred to the fact that he was uncertain at that point whether the Respondents might still require further information from the Appellant in relation to the transactions;

(9) a letter from the Respondents to Mr Olley of 23 October 2002 in which the Respondents agreed that the enquiry into the transactions was ongoing and stated that "discussions with other persons is ingoing in this regard and I regret that it may be sometime before the matter is finalised";

(10) a letter from the Respondents to Mr Olley of 29 April 2004 in which the Respondents confirmed that correspondence had been continuing with Mr Edwards and that there had been a recent case which might shed light on the issues which were in dispute between the parties and said that, on receipt of the decision in that case, its application to the facts in the Appellant's case could be considered;

(11) a letter from Mr Olley to the Respondents of 26 August 2004 in which Mr Olley suggested that the case to which the Respondents had been referring in their letter of 29 April 2004 was *Campbell v Inland Revenue Commissioners* [2004] STC (SCD) 396 ("*Campbell*"), and that, on the basis of the decision in *Campbell*, the loss made by the Appellant from the transactions should be allowed;

(12) a letter from the Respondents to Mr Olley of 18 October 2006 in which the Respondents:

(a) explained why the decision in *Campbell* did not apply to the facts in the Appellant's case;

(b) explained why, on the basis of the anti-avoidance case law, the Appellant was not entitled to claim a loss under Schedule 13 in respect of the transactions; and

(c) requested further information and documents in relation to the transactions;

(13) a letter from Mr Olley to the Respondents of 10 January 2007 in which Mr Olley:

(a) informed the Respondents that the Appellant was advised by Mr Edwards of HW in the relevant matter;

(b) said that Mr Edwards had several similar cases in hand and that Mr Edwards was due to meet with the Respondents soon "to narrow the technical arguments"; and

(c) asked the Respondents to hold the matter open until the outcome of those discussions was clear;

(14) a letter from the Respondents to Mr Olley of 26 March 2007 in which the Respondents agreed to hold the enquiry into the transactions in abeyance pending the outcome of their discussions with Mr Edwards, as requested by Mr Olley;

(15) a letter of 16 September 2010 from Mr Edwards to the Respondents attaching a letter of authority from the Appellant for HW to act on his behalf in relation to the claim for the loss from the transactions and an acknowledgement of receipt of that authority by the Respondents to Mr Edwards of 22 September 2010;

(16) a letter from the Respondents to Mr Olley of 10 February 2012 in which the Respondents referred to the fact that, after a number of discussions with HW in relation to, inter alia, the transactions, HW were "considering the position";

(17) a letter from the Respondents to the Appellant of 11 May 2016 informing the Appellant that he was about to receive the Follower Notice and an accelerated payment notice in respect of the transactions - which were referred to in the letter as the "Haines Watts RDS Scheme" - and providing the Appellant with information in relation to both notices;

(18) the Follower Notice from the Respondents to the Appellant of 16 June 2016 in which, inter alia:

(a) the transactions into which the Appellant had entered were identified by the Respondents as the "Haines Watts RDS Scheme";

(b) the decision of the First-tier Tribunal in *Robert Audley v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 219 (TC) ("*Audley*") was identified as a final judicial ruling which was relevant to those transactions for the purposes of Section 205(3) of the FA 2014;

(c) the Respondents set out the facts in *Audley* and the facts in the Appellant's case and explained why the principles laid down in, or the reasoning given in, *Audley* would, if applied to the Appellant's case, deny the loss claimed by the Appellant in the Return;

(d) informed the Appellant that, if he did not take the necessary corrective action by 19 September 2019, he would become liable to a penalty under Section 208 of the FA 2014;

(e) explained the steps which the Appellant needed to take which would amount to the necessary corrective action;

(f) invited the Appellant to make representations to the Respondents objecting to the Follower Notice prior to 19 September 2016 if he believed that, inter alia, *Audley* was not a relevant judicial ruling in relation to his case; and

(g) informed the Appellant that, if representations were made and the Respondents did not withdraw the Follower Notice, then he would become liable to a penalty if he did not take the necessary corrective action by the later of 19 September 2016 and the date falling 30 days after the date on which the Respondents informed the Appellant of their decision in relation to the representations;

(19) an accelerated payment notice of 16 June 2016 in which the transactions into which the Appellant had entered were identified by the Respondents as the "Haines Watts RDS Scheme";

(20) a letter from Mr Olley to the Respondents of 18 August 2016 containing representations on behalf of the Appellant to the effect that, inter alia, *Audley* was not a relevant judicial decision in relation to the Appellant's facts;

(21) a letter from the Respondents to the Appellant of 24 May 2017 in which the Respondents notified the Appellant that:

(a) they had considered the representations and were confirming the Follower Notice; and

(b) the deadline for the necessary corrective action to be taken was 29 June 2017;

(22) a letter from Mr Olley to the Respondents of 29 June 2017 in which the transactions into which the Appellant had entered were identified by Mr Olley as the "Haines Watts RDS Scheme" and in which Mr Olley asked the Respondents to give the Appellant

additional time before issuing a penalty for his failing to take the necessary corrective action because the Appellant was taking advice in relation to whether or not *Audley* was a relevant judicial decision from Mr Edwards and Mr Edwards was on long-term sick leave and was not expected to be back until early August 2017;

(23) a letter from the Respondents to PB of 5 July 2017 setting out the terms of the payment arrangements which the Appellant had made in order to comply with the accelerated payment notice;

(24) a letter from the Respondents to PB of 17 July 2017 refusing to extend the deadline for the necessary corrective action to be taken following the rejection of the Appellant's representations in relation to the Follower Notice;

(25) a letter from the Respondents to PB of 18 July 2017 in which the Respondents noted that the deadline for the necessary corrective action had expired on 29 June 2017 and reminding the Appellant that, if he did not take the necessary corrective action by 8 August 2017, a penalty would be assessed in respect of that failure;

(26) a letter from the Respondents to PB of 7 November 2017 in which the Respondents:

(a) noted that the Appellant had used the relevant discounted securities scheme sold by HW;

(b) said that most users of that scheme had now settled; and

(c) invited the Appellant to do so as well and, in that regard, offered the Appellant the same instalment basis as the one which the Appellant was using to discharge the accelerated payment notice; and

(27) a letter from the Respondents to the Appellant of 18 April 2018 in which the Respondents explained that they were about to issue the Penalty Assessment and enclosing a schedule explaining how the penalty had been calculated and inviting the Appellant to send to the Respondents any other information which he considered to be relevant to the mitigation of the penalty which had not yet been taken into account.

The witness evidence

58. The testimony of the Appellant was as follows:

(1) he could not recollect the specific contents of the meetings with PB or HW but he did recall that, as a result of those meetings, HW had become aware of:

(a) the significant balances on his director's loan accounts with the companies;

(b) the fact that the companies were highly profitable; and

(c) his long-term aims of making provision for his children and for his retirement;

(2) he had in the past invested in enterprise zones and film partnerships;

(3) one of the reasons for his meeting with HW on 15 December 1998 was to discuss how he might mitigate his tax liability for the Tax Year through investing in a film partnership but that wasn't the only reason. He also wished to take advice on how he might achieve the long-term commercial aims mentioned in paragraph 58(1)(c) above;

(4) the main reason for his entering into the arrangements was to achieve the commercial aims described in paragraph 58(1)(c) above. He had understood that, by replacing the balances on his director's loan accounts with the companies with the Loan Notes, the funds in question would be ring-fenced until his retirement. In other words,

unlike the balances on his director's loan accounts, which could be withdrawn at will and on demand, he would be precluded from extracting the monies outstanding under the Loan Notes until they matured 30 years after their issue date. As this date coincided with his expected retirement date, the funds would then be available when he needed them;

(5) to his way of thinking, the balances on his director's loan accounts were his money and could freely be used by him to meet his personal expenditure but, once he had subscribed for the Loan Notes, the subscription monies belonged to the companies and he could no longer access those monies to meet his personal expenditure. Instead, the monies remained available to the companies to be used in their respective businesses;

(6) another commercial reason for the arrangements was that it offered him the ability to protect his assets from potential creditors. He had understood that placing assets into the Settlements would protect those assets from potential creditors. It was a little unclear as to precisely what the Appellant meant by this. In his witness statement, the suggestion was that the protection would be from the claims of business creditors but, at the hearing, he said that the protection he was seeking was not from business creditors but rather from potential claims by his wife as he anticipated at the relevant time that he would soon be getting divorced. He said at the hearing that:

> (a) he had not mentioned that reason in his witness statement because he hadn't thought that it was relevant to the proceedings; and
>
> (b) he had not thought that it needed to be mentioned in Mr Olley's letter to the Respondents of 11 June 2001 as one of the reasons for the transactions because he considered that his marital affairs were a private matter;

(7) given the commercial reasons for the transactions set out above, he saw the tax advantage arising out of the arrangements as being simply a collateral benefit and not the main purpose for his entering into the arrangements. He added that he had always viewed the arrangements as giving rise to a tax deferral as opposed to a permanent tax saving. This was because the Settlements would be subject to tax when the Loan Notes matured on the difference between the amount paid on redemption and the market value of the Loan Notes on the date of the transfers into the Settlements. The benefit that he derived in the Tax Year from the loss to which the arrangements gave rise would therefore ultimately be reversed. He accepted that:

> (a) this assumed that the Loan Notes would be redeemed in full on their maturity date; and
>
> (b) neither of the companies was currently trading or had sufficient assets to discharge the Loan Notes on maturity.

However, he explained that, as a result of a group reorganisation which had taken place approximately 10 years ago, the companies were now grouped with a third company which was carrying on a trade and had substantial assets and that the intention and expectation was that that company would see to it that the companies were able to discharge the Loan Notes;

(8) the Settlements had been established on the advice of Nockolds and HW had had nothing to do with them. They were established after the Loan Notes had been issued and HW's role was over. Thus, he saw the issue of the Loan Notes and the subsequent gifts of the Loan Notes to the Trustees of the Settlements as two distinct transactions. HW advised him on the first of those, which involved replacing the on-demand director's loans to the companies with 30-year Loan Notes whose maturity date would coincide with his retirement and then Nockolds advised him on the second of those, which was

that, once the Loan Notes were issued, the best way of holding the Loan Notes would be to put them into two trusts, one for the benefit of his children and the other for the benefit of himself on his retirement;

(9) however, in cross-examination by Mr Macklam, the Appellant conceded that:

(a) the advice from HW in relation to the proposal had included the fact that, in order for the arrangements to give rise to a loss which would shelter his income for the Tax Year, he needed to transfer the Loan Notes to a connected person such as the trustees of a settlement which he had settled;

(b) HW had also advised him that putting the Loan Notes into a trust would protect the Loan Notes from his creditors;

(c) thus, the formation of the Settlements and the subsequent gifts to the Trustees of the Settlements were in accordance with HW's initial advice and the meeting with Nockolds was simply to obtain advice on the precise form which the Settlements should take;

(d) he had been required by HW to sign a confidentiality agreement in relation to the arrangements;

(e) he had been warned by PB and HW that "some elements of the proposed financing might not be agreeable to [the Respondents]" and that was why he had sought the advice of Mr Sherry;

(f) although he could not recollect the specific contents of the conference with Mr Sherry, he had said in his witness statement that "it must have been positive, otherwise I would not have gone ahead"; and

(g) the reason why £250,000 in principal amount of the Aggregate Loan Notes had been retained at the end of the Tax Year and then transferred by way of gift to the Children's Settlement in the following tax year of assessment was that he wanted to use that part of the principal amount of the Aggregate Loan Notes to give rise to a loss which could shelter his income in that following tax year of assessment;

(10) he made various contradictory statements in relation to the market value of the Loan Notes on issue relative to the monies paid to the companies at the time of issue. At one point in his testimony, he agreed that the market value of the Loan Notes when they were issued was only a small fraction of the amount which had been paid to the companies at the time of issue but said that he didn't care that there was such a large discrepancy because the monies were going back into his companies. At another, he that he had had no idea what the market value of the Loan Notes on issue actually was but that he didn't care because the monies were going back into his companies. However, he was consistently clear that, whatever the market value of the Loan Notes was on issue, he would not have paid the amount which he had paid to the companies at the time of issue had the companies been owned by an unrelated party;

(11) although he had been responsible for ensuring that the funding movements which took place on 4 March 1999 occurred and for signing the various transaction documents, he had not read the documents in any detail and had relied entirely on PB, HW and Nockolds to ensure that the transactions were properly implemented. He was aware that, by entering into the transactions comprising the arrangements, he would be able to shelter some of his taxable income in the Tax Year from a charge to tax by reason of a loss but he was not entirely sure whether that loss arose out of the first stage of the arrangements

– i.e. replacing part of the balances on the director's loan accounts with the Loan Notes - or the second stage of the arrangements – i.e transferring the Loan Notes to the Trustees of the Settlements by way of gift; and

(12) he had not taken any corrective action following receipt of the Follower Notice (or the letter from the Respondents of 24 May 2017 confirming the Follower Notice following their consideration of the representations made on his behalf by Mr Olley) because he had taken advice from PB at the time and been "advised by PB that one or more of the conditions required to issue a follower notice had not been met". That advice had been given orally and not in writing and he had not sought advice from any other professional adviser in connection with the Follower Notice.

59. The testimony of Mr Olley was as follows:

(1) he confirmed that:

(a) the context in which the initial meeting with HW had taken place was that PB were looking for ways to mitigate the tax liabilities of the Appellant and Mr Siddiqui had given a presentation to PB in relation to a film partnership in which the Appellant might invest;

(b) at that initial meeting, Mr Siddiqui had become aware of the large sums which were due to the Appellant on his director's loan accounts with the companies and had introduced to the Appellant the proposal to enter into the transactions;

(c) the proposal as outlined by Mr Siddiqui and put to Mr Sherry necessarily involved a subscription for relevant discounted securities at an amount which was considerably in excess of their market value on issue and a transfer of those securities by the Appellant to a person connected with the Appellant and the trustees of a trust settled by the Appellant had been cited as an example of such a connected person;

(d) as such, by the time that the Loan Notes were issued, the Appellant was aware that he would be transferring the Loan Notes to a connected person such as the trustees of a trust although the precise nature of the connected person to which the Loan Notes were to be transferred had not yet been determined;

(e) Mr Sherry's advice in relation to the proposal had been positive, albeit subject to caveats "as [was] always the case";

(f) the additional information for Box 15.11 of the Return describing the transactions and setting out the calculation of the market value of the Loan Notes at the date of the gifts had been drafted for the Appellant by HW; and

(g) the plan was that the Appellant would transfer sufficient of the Aggregate Loan Notes to the Trustees of the Settlements in the Tax Year for the loss on that proportion of the Aggregate Loan Notes to cover the Appellant's taxable income in the Tax Year and that the balance of the Aggregate Loan Notes, to the extent that there was a balance, would then be transferred to the Trustees of the Settlements in the next tax year of assessment;

(2) he conceded that:

(a) it was curious that the note of the meeting at Nockolds on 18 March 1999 had made no reference to the fact that the assets to be contributed to the trustees of the two new trusts were going to be the Loan Notes given that the context in which that meeting was held was to establish the terms of the trusts which were to be the connected persons to which the Loan Notes were to be transferred in accordance with HW's advice; and

(b) the terms of the Loan Notes had been determined by HW and that the redemption premium of 20% had been included in those terms purely to obtain the tax advantage which was perceived to arise on the transfer of the Loan Notes. However, he added that, although the sole purpose for including that term was to obtain the tax advantage, that wasn't the sole purpose for the issue of the Loan Notes because the issue of the Loan Notes also had commercial purposes. Having said that, he conceded that those commercial purposes could have been achieved without including the redemption premium in the terms of the Loan Notes;

(3) as regards the accounting for the Loan Notes in the companies, he said that:

(a) under the accounting standards applicable at the time of the transactions, each company was required to record the Loan Notes which it issued in its balance sheet for the financial year in which they were issued at the amount subscribed for the relevant Loan Notes; and

(b) however, had the accounting standards which were applicable at the time of the hearing been in place at the time of issue, the companies would have been required to record the Loan Notes at their market value on issue and to show the difference between the subscription price for the Loan Notes and the notes' market value in their reserves;

(4) he said that he agreed with the Appellant that, subject to any differences between the tax rate applicable to the Appellant in the Tax Year and the tax rate applicable to the Settlements in the tax year of assessment in which the Loan Notes were redeemed, the transactions merely gave rise to a tax deferral and not a permanent tax saving because:

(a) when the Loan Notes were redeemed, the Settlements would be required to account for tax in respect of the difference between the amount paid on redemption and the market value of the Loan Notes on the date of the transfers into the Settlements; and

(b) although the two companies themselves did not have sufficient assets to be able to redeem the Loan Notes in full on the notes' maturity date, the company with which they were now grouped following the group reorganisation did have sufficient assets to be able to do so and could put the companies in funds in order that no default occurred. It was certainly the expectation that the Loan Notes would be redeemed in full on maturity; and

(5) he said that, once the Loan Notes were issued, the amounts subscribed for the Loan Notes were available to the companies for the full term of the Loan Notes but he conceded that the companies were under the control of the Appellant at all times and that it had always been open to the Appellant and the companies to negotiate an early redemption of the Loan Notes at their market value at any time before the specified maturity date.

60. Ms McCrorie was the sole witness for the Respondents. Although Ms McCrorie was a perfectly credible witness, it was not clear to us why the Respondents had asked her to appear on their behalf. Despite the fact that her background was in compliance, she had had no experience of the relevant discounted securities legislation in general and had had no involvement with the enquiry into the transactions which were relevant to the proceedings or with the issue of the Follower Notice, the Closure Notice or the Penalty Assessment. This meant that, beyond producing some of the documents to which we have alluded in paragraph

57 above, she had nothing of any relevance to add to the matters which we have to decide and we therefore propose to say nothing about her evidence.

FINDINGS OF FACT

Introduction

61. Before setting out our conclusions of fact in relation to these appeals, we should make a few general observations about the two witnesses on behalf of the Appellant.

62. We did not find the Appellant to be a credible witness. This was not simply because of the passage of time since the arrangements had been implemented. In large part, it was due to his inadequate understanding of the legal and tax world, a fact that Mr Olley, in giving his evidence, frankly acknowledged. This meant that the Appellant's understanding of the transactions into which he had entered could, at best, be described as hazy. It was perfectly apparent to us that the Appellant had relied entirely on his professional advisers to propose, and then to draft the documents for implementing, the relevant transactions and had had no real understanding of what he was doing. He accepted that he had not read the transaction documents or the submissions in the Return in any detail and had instead relied entirely on PB, HW and Nockolds.

63. However, if that basis for his lack of credibility might be understood, if not entirely excused, given his background, we considered that there was another, slightly more insidious, reason for the inaccuracies in the evidence which he gave and that was his clear desire to convince us that, despite the overwhelming evidence to the contrary, the reasons for the transactions were primarily commercial in nature and the tax advantage which was expected to arise from the transactions was merely a collateral benefit. For the reasons set out in paragraph 65(8) below, we consider it to be clear beyond any doubt that the transactions which are the subject of these appeals were motivated by the desire to obtain a loss for tax purposes in order to shelter a substantial part of the Appellant's income for the Tax Year. Indeed, the Appellant admitted as much in his witness statement when he said that he would not have gone ahead with the transactions had he not received a favourable opinion from Mr Sherry. The Appellant's insistence to the contrary at the hearing was totally implausible. Putting the case which the Appellant sought to make at its strongest, the transactions did have enduring commercial consequences which were not inconsistent with the Appellant's plans for the future but we do not accept that those commercial consequences were ever significant enough to amount to reasons for the implementation of the transactions.

64. In contrast to the Appellant, we considered Mr Olley to be a credible witness whose evidence was very helpful to our determination of the facts in these proceedings.

Findings of fact

65. We now set out our findings of fact, together in each case with the reasons for those findings:

(1) Fact: the only reason why the Appellant attended the meeting with HW on 15 December 1998 was to discuss a possible way of reducing his tax liability in respect of the Tax Year by investing in a film partnership and there was no other purpose to that meeting.

Reason: that was the testimony of Mr Olley (see paragraph 59(1)(a) above). Although the Appellant suggested in giving his oral evidence at the hearing that he also had commercial purposes in consulting HW (see paragraph 58(3) above), that was at odds with the evidence of Mr Olley and we do not accept that that was the case;

(2) Fact: in the course of that meeting, when Mr Siddiqui ascertained more about the Appellant's commercial profile, he proposed that another way of reducing the

Appellant's tax liability in respect of the Tax Year was a structure involving the subscription of relevant discounted securities at an over-value and the subsequent transfer of those securities to a connected person such as a trust settled by the holder of securities.

Reason: this was also the evidence of Mr Olley (see paragraph 59(1)(b) above);

(3) Fact: the structure described above was an integrated whole – a single composite transaction – so that, once the Aggregate Loan Notes had been issued, there was no realistic possibility that they would not be transferred to a person connected with the Appellant such as the trustees of a trust settled by the Appellant. It follows that, by the time that the Aggregate Loan Notes were issued, it was already certain that the Aggregate Loan Notes would be transferred by way of gift to a person connected with the Appellant such as the Trustees of the Settlements. The only issues which were outstanding were:

> (a) the profile of the Aggregate Loan Note transfers – i.e. the proportion of the Aggregate Loan Notes which would be transferred in the Tax Year and the proportion of the Aggregate Loan Notes which would be transferred in the following tax year of assessment; and
>
> (b) the precise identity of the connected person in question.

Reason: that was also the evidence of Mr Olley – see paragraphs 59(1)(d) and 59(1)(g) above. It is, in any event, a natural inference to draw from the agreed facts;

(4) Fact: at the time when the Aggregate Loan Notes were issued, the amount of the Aggregate Loan Notes to be transferred to the connected person in the Tax Year was dependent on the market value of the Aggregate Loan Notes and the taxable income of the Appellant, the aim being that sufficient of the Aggregate Loan Notes would be transferred for the loss on that proportion of the Aggregate Loan Notes to shelter almost all of the Appellant's taxable income in the Tax Year and that the balance of the Aggregate Loan Notes would be transferred to the connected person in the tax year of assessment following the Tax Year. This was to be determined in discussion with HW.

Reason: that was also the evidence of Mr Olley – see paragraph 59(1)(g) above). It is also, in any event, a natural inference to draw from the agreed facts;

(5) Fact: at the time when the Aggregate Loan Notes were issued, the precise form which the trusts whose trustees would be the connected person transferee would take was to be determined in discussion with Nockolds.

Reason: that was also the evidence of Mr Olley – see paragraphs 59(1)(d) and 59(2)(a) above). It is also, in any event, a natural inference to draw from the agreed facts;

(6) Fact: the flow of funds which occurred on 4 March 1999 was almost entirely circular, the only difference being that, although the amounts paid by the companies in aggregate were exactly the same as the amounts paid to the companies in aggregate, there were some small rounding differences at the individual company level.

Reason: this is apparent from the agreed facts – see paragraphs 8 to 10 above;

(7) all of the parties to the transactions – the Appellant, the companies and the Trustees of the Settlements – were connected.

Reason: this is apparent from the agreed facts – see paragraphs 6,7 and 16 to 18 above;

(8) Fact: the sole purpose of the Appellant in entering into the transactions was to secure a loss under Schedule 13 in order to reduce his income tax liability in respect of the Tax Year. That tax advantage was the only reason why the transactions were implemented when they were and in the way they were. That is not to say that the

transactions did not have enduring commercial effects or that those enduring commercial effects were not acceptable to the Appellant. However, those enduring commercial effects were merely consequences of the transactions and not part of the purposes of the transactions. They were, to borrow a phrase which has been used in a different context, no more than "icing on the cake" – convenient window-dressing by which the real only purpose of the transactions – the securing of the loss for tax purposes – could be secured in a manner which suited the Appellant.

A related conclusion of fact is that the issue of the Loan Notes to the Appellant followed by the transfer of the Loan Notes to the Trustees of the Settlements had no commercial or business purpose apart from the tax advantage which the Appellant hoped to obtain by taking those steps.

Reason: our first reason for reaching the conclusions set out above is the provenance of the transactions. The possibility of implementing the transactions was first mooted at the meeting which the Appellant had with HW and PB on 15 December 1998 to discuss how he might reduce his tax liability in respect of the Tax Year. That was the sole purpose of the meeting. The meeting was not to discuss any aim other than that (see paragraph 65(1) above).

A second reason for that conclusion is the Appellant's admission in his witness statement to the effect that, had Mr Sherry not provided a favourable opinion in relation to the transactions, he would not have gone ahead. That showed in stark terms that the only reason for the transactions was the tax benefits to which they were expected to give rise. Tellingly, the Appellant did not say that, had Mr Sherry's opinion been negative, he would have looked to achieve the same commercial purposes in another way.

The third reason for that conclusion is the total artificiality of the transactions when viewed in the light of both the actual commercial position at the time when it took place and the Appellant's stated commercial purposes.

We should expand on that statement as follows.

The companies were at all times wholly-owned by the Appellant. This meant that, just before the transactions were implemented:

(a) all that the Appellant needed to do if he wanted to ensure that money was left in the companies for his retirement was to leave the balances on his director's loan accounts outstanding as they already were and simply resolve not to demand repayment by the companies; and

(b) the entire value in the debt and equity in the companies was held by the Appellant and accessible to his potential creditors, including his wife.

In the light of those realities, replacing £750,000 of the amounts outstanding on his director's loan accounts with relevant discounted securities with a market value of £55,316 made no commercial sense. The monies paid to the companies by the Appellant at the time of issue remained accessible to the Appellant in their entirety because the Appellant controlled the companies. As such, the Appellant could easily have agreed with the companies to an early repayment of the securities at any stage at their then current market value. More significantly, the securities had a market value of only £55,316 and the difference between the monies paid into the companies at the time of issue and that amount continued to be reflected in the value of the Appellant's equity holdings in the companies. In effect, by implementing the transaction which was the first step in the arrangements, the Appellant simply converted £694,684 of the balance on his director's loan accounts in the companies into equity in the companies and £55,316 of the balance on his director's loan accounts in the companies into the Loan Notes.

In the light of those facts, it is not surprising that:

(i) the Appellant conceded in giving his evidence that:

(A) he did not care what the market value of the Loan Notes was on issue; and

(B) he would not have paid to the companies the amount he did when the Loan Notes were issued if he had not wholly-owned the companies; and

(ii) Mr Olley testified that, in his view, had current accounting standards been applicable at the time when the Loan Notes were issued, the Loan Notes would have been shown in the companies' accounts in the financial year in which they were issued at only £55,316 and the balance would have been taken to reserves. Mr Olley was not giving expert evidence but he is an experienced qualified accountant and his answer reflected our expectation of the likely accounting treatment, which reveals that the commercial substance of the transaction was to convert £694,684 of indebtedness owed by the companies to the Appellant into enhanced equity value in the companies.

This in turn demonstrates that, if the Appellant had wished to convert £55,316 of value in his director's loan accounts into debt with a maturity of 30 years, he could easily have achieved that purpose by replacing £55,316 of value in his director's loan accounts with 30-year securities with a par value of £55,316 carrying interest at a market rate which rolled up over the term of the securities and was paid on maturity. That would have produced exactly the same repayment profile as the Loan Notes but without any of the artificiality which actually occurred or the conversion of £694,684 of debt owed by the companies to the Appellant into equity in the companies.

The features described above mean that, when the Appellant took the step of transferring the Loan Notes to the Trustees of the two Settlements, he was in fact transferring to the Settlements assets to the value of only £55,316 and not £750,000. The balance of the amount paid by the Appellant when the Loan Notes were issued (£694,684) remained outside the Settlements, was reflected in the value of his equity in the companies and remained accessible to him and his potential creditors, including his wife. If the Appellant had wished to settle £55,316 into the Settlements, the obvious way of doing so would have been to transfer to the Settlements either cash of £55,316 (which the Settlements could have used to subscribe for 30 year securities with a par value of £55,316) or to convert £55,316 of value on his director's loan accounts into 30 year securities with a par value of £55,316 and to transfer those securities to the Trustees of the Settlements.

In short, we find that the assertion made on behalf of the Appellant that he had a commercial purposes as his main purposes in implementing the transactions lacks any credibility. We think that the alleged commercial purposes were not purposes at all. Instead, the commercial effects of the transactions on which the Appellant seeks to rely to establish that he had commercial purposes were no more than commercial results which were acceptable to the Appellant and provided a convenient backdrop against which the sole real purpose of the transactions –the loss for tax purposes – could be secured.

We would add that, even if are wrong in saying that the commercial effects stemming from the Loan Notes' becoming assets of the Settlements did not amount to a purpose, those commercial effects could have been achieved in a much more straightforward manner by the Appellant's procuring that the Loan Notes were issued directly to the Settlements. Thus, on any analysis, the issue of the Loan Notes to the Appellant followed by the transfer of the Loan Notes to the Trustees of the Settlements were steps which had no commercial or business purpose whatsoever.

The terms of Mr Olley's letter to the Respondents of 11 June 2001, shortly after the transactions were implemented, is indicative of that (see paragraph 57(4) above). In paragraph 2 of that letter, Mr Olley frankly acknowledged that "in establishing the loan notes our client was seeking to provide the possibility of obtaining a tax advantage". Mr Olley did not in that paragraph of the letter mention that there might be any other purposes for the transactions. We think that that omission is telling. Although Mr Olley did mention in paragraph 7 of the letter that there was a commercial rationale to the issue of the Loan Notes, in that they enabled the Appellant to provide finance to the companies, there was no explanation of why the provision of that finance in the form of the Loan Notes served any commercial purposes. Moreover, entirely absent from that letter are references to any of the commercial purposes on which the Appellant sought to rely at the hearing – the provision for his children and his retirement and the protection of his assets from his potential creditors, including his wife;

(9) Fact: the terms of the Loan Notes were determined by HW and were chosen solely in order to ensure that the Loan Notes qualified as relevant discounted securities and gave rise to the loss under paragraph 2 of Schedule 13.

Reason: that was also the evidence of Mr Olley – see paragraph 59(2)(b). It is also, in any event, a natural inference to draw from the agreed facts;

(10) Fact: the terms on which the Loan Notes were issued were highly artificial and not commercial. There was a huge discrepancy between the amount which was paid on the issue of the Loan Notes - £750,000 – and the amount which would have been paid in respect of the issue of the Loan Notes in a transaction taking place at arm's length - £55,316.

Reason: Mr Macklam produced a calculation at the hearing which showed that, based on the discount rate used by HW in preparing the additional information for box 15.11 of the Return, for the Loan Notes to have had a market value on issue of £750,000, the amount payable on maturity of the Loan Notes would have needed to be approximately £12,200,000. Although Mr Avient did not accept the accuracy of that calculation, we do not think that anything turns on the precision of the calculation. Even Mr Avient accepted that there was a significant mismatch between the amount paid on the issue of the Loan Notes and the market value of the Loan Notes when they were issued. It follows that, in order for the Loan Notes to have had a market value on issue of £750,000, the amount payable on maturity of the Loan Notes would have needed to be significantly in excess of the £900,000 which is in fact payable on their maturity. Thus, the stated terms on which the Loan Notes were issued had no commercial reality;

(11) Fact: the only commercial loss to which the arrangements clearly gave rise was the value which was settled by the Appellant into the Children's Trust. That amount was £11,063.20 (being 20% of the aggregate value of £55,316 which was given by the Appellants to the two Settlements when he transferred the Loan Notes to the Trustees of the Settlements on 29 March 1999). One can debate whether the remaining £44,252.80 which was given to the two Settlements on that date also amounted to a loss. The reason

why that is unclear is that that value went into the KJP Settlement of which the Appellant was a beneficiary and under which the Appellant held a life interest. However, even if the Appellant were to be seen as having divested himself of the whole of the £55,316 of value which went into the Settlements on 29 March 1999, what is absolutely clear is that that is the only commercial loss to which the arrangements conceivably gave rise. The £694,684 which the Appellant claimed as a loss in respect of the implementation of the arrangements was not a loss at all. It was merely the amount which was converted from debt in the companies into equity in the companies.

Reason: this finding of fact stems inexorably from the reasoning underlying the findings of fact in paragraph 65(8) above;

(12) Fact: the transactions into which the Appellant entered were part of a mass-marketed scheme adopted by many others.

Reason: our reasons for saying this are that:

(a) there is compelling evidence in the case law – which we consider below – that the idea of subscribing at an over-value for relevant discounted securities issued by a connected party and then transferring the securities to another connected party was a proposal which had been put to, and adopted by, many other taxpayers. Indeed, in *Audley*, the structure was described at paragraph [7] of the decision as a "marketed tax avoidance scheme";

(b) the fact that this was the case is also demonstrated by the enactment in 2002 of a new paragraph 9A of Schedule 13, which effectively put an end to the proposal by providing expressly that the over-value in such cases could not give rise to a loss for the purposes of the regime;

(c) in the correspondence which we have described in paragraph 57 above, there are repeated references – and not just by the Respondents - to the transactions' having been implemented pursuant to the "Haines Watts RDS Scheme" and to the fact that there were other users of that scheme (see paragraphs 57(17), 57(18), 57(19), 57(22) and 57(26) above), thereby indicating that HW had introduced the proposal to many other taxpayers;

(d) the very fact that the Respondents considered it worthwhile to serve a follower notice on the Appellant in relation to the proposal is indicative of the fact that the proposal had been adopted by many other taxpayers because the follower notice regime was introduced for that very purpose;

(e) the Appellant was required to sign a confidentiality letter when HW introduced the proposal to him, thereby indicating that HW were keen to preserve the technology underlying the arrangements confidential so that it could be monetised; and

(f) finally, it is clear from the correspondence which passed between Mr Olley and the Respondents in relation to the transactions described in paragraph 57 above that:

(i) HW were acting for a number of people in relation to relevant discounted securities transactions which were similar to the transactions; and

(ii) HW were authorised by the Appellant to act on the Appellant's behalf in relation to the transactions.

This again is indicative of the fact that the Appellant was simply one of many people who had availed themselves of this particular product and that HW was providing after-sales care in dealing with the Respondents in relation to such transactions; and

(13) Fact: there are no grounds for concluding that the Respondents were solely responsible for the delay which has occurred between the Tax Year in which the transactions were implemented and the proceedings which led to this decision or that any criticism should be levelled at the Respondents in respect of their conduct in relation to the transactions in question.

Reason: a theme to which Mr Avient returned repeatedly during the hearing was that the Appellant was aggrieved at the fact that transactions which he had implemented more than 20 years previously were only now the subject of a hearing before the First-tier Tribunal. The Appellant had three grievances in relation to the Respondents' conduct, as follows:

(a) first, he complained about the delay in resolving the matter, saying that the delay in completing the enquiry into the Return was attributable entirely to the Respondents;

(b) secondly, he was unhappy at the fact that it was only by reason of the delay that the arrangements had potentially become exposed to the follower notice regime, which had been introduced only in 2014, and thus to the penalty for failing to take the necessary corrective action in response to the Follower Notice; and

(c) finally, he suggested that, instead of issuing the Follower Notice to the Appellant on 16 June 2016, the Respondents could instead have issued the Closure Notice at that stage or indeed at any point following the publication of *Audley* in 2011 and that, had the Respondents taken that course of action, he would not have been exposed to the penalty.

The Respondents' conduct is not one of the issues before us and is not within our jurisdiction, as such. If the Appellant wished to pursue a remedy in that regard, he would have needed to proceed by way of an action for judicial review in the High Court. The Respondents' conduct is therefore not something which we consider to be relevant to our decision in this case but, in case it might be said that the Respondents' conduct is a matter which we ought to be taking into account in relation to:

(i) the question of whether or not the Appellant's failure to take the necessary corrective action following receipt of the Follower Notice and the rejection of his submissions in respect of that notice was reasonable in all the circumstances; or

(ii) the quantum of the penalty in respect of that failure,

we should say that, on the basis of the evidence provided to us at the hearing, we are not at all convinced that responsibility for the extensive delay which has occurred in this case should be laid exclusively at the Respondents' door or that the Respondents should be criticised for their conduct in this matter.

In the first place, there is no shortage of evidence to suggest that the Appellant and his advisers may have been just as responsible for the delay as the Respondents.

The correspondence listed in paragraph 57 above contains repeated reference to the fact that HW were in discussions with the Respondents in relation to other relevant discounted securities transactions for a considerable length of time and that it was Mr Olley on behalf of the Appellant who suggested that the enquiry into the Appellant's transactions should await the outcome of those discussions.

Moreover, the Appellant authorised HW to act on his behalf in relation to the transactions in September 2010 – which suggests that the discussions with HW were still ongoing at that stage - and we have not been provided with any of the correspondence which passed between HW and the Respondents either before or after that date. This was no doubt because that correspondence contained references to the other transactions and therefore had to remain confidential but it does mean that we are unsighted in relation to much of the conduct of the dispute.

Finally, if the Appellant was as aggrieved about the delays as he now claims to be, it was always open for him to apply for the enquiry into the Return to be brought to an end long before the FA 2014 was enacted or the Follower Notice was issued, and there is no evidence that he sought to do that at any stage. In the absence of any such application, we do not see it as being incumbent on the Respondents to have issued the Closure Notice before they issued the Follower Notice.

We therefore decline to make any criticism of the Respondents' conduct in this matter.

DISCUSSION

The substantive appeal

The submissions of the parties

Introduction

66. Mr Avient submitted that the position in this case was perfectly straightforward. The Appellant had acquired the Loan Notes and had paid the full face value of the Loan Notes – i.e. £750,000 - in respect of that acquisition. Consequently, as the Loan Notes had a market value of only £55,316 on 29 March 1999 when he had transferred the Loan Notes to the Settlements, the Appellant had become entitled to claim a loss under paragraph 2 of Schedule 13 as a result of the transfers.

67. In response, Mr Macklam submitted that, when one construed the relevant provision purposively and applied the relevant provision to the facts viewed realistically, the Appellant had not acquired the Loan Notes or, if he did, he had paid no more than £55,316 (which was the market value of the Loan Notes when they were issued) in respect of his acquisition.

68. Both parties agreed that the starting point in relation to determining this question was the general principle of legislative construction which had first been articulated by the House of Lords in *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 ("*Ramsay*"), as that had been developed in subsequent cases. The conclusions to be drawn from those cases had been summarised by Lewison J in the Upper Tribunal in *Berry v The Commissioners for Her Majesty's Revenue and Customs* [2011] STC 1057 ("*Berry*") at paragraph [31], as follows:

(1) the principle outlined in *Ramsay* is a general principle of statutory construction;

(2) the principle is two-fold in that it is first necessary to decide on a purposive construction exactly what transaction will answer to the statutory description and then to decide whether the transaction in question does so;

(3) it does not matter in which order these steps are taken and the whole process can be iterative;

(4) although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so;

(5) in seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words but must have regard to the context and scheme of the relevant Act as a whole;

(6) however, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words;

(7) in looking at particular words that Parliament has used, what the interpreter is looking for is the relevant fiscal concept;

(8) although one cannot classify all concepts a priori as "commercial" or "legal", it is not an unreasonable generalisation to say that, if Parliament refers to some commercial concept such as a gain or loss, it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction;

(9) a provision granting relief from tax is generally (though not universally) to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief. However, even if a transaction is carried out in order to avoid tax it may still be one that answers the statutory description;

(10) in approaching the factual question of whether the transaction in question answers the statutory description, the facts must be viewed realistically;

(11) a realistic view of the facts includes looking at the overall effect of a composite transaction, rather than considering each step individually;

(12) a series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so, or because there is an expectation that they will be carried through as a whole and no likelihood in practice that they will not;

(13) in considering the facts, the fact-finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate; and

(14) in considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intention and expectation of the parties, it might not work as planned. Even if the contingency is a real commercial possibility, it may be disregarded if the parties proceeded on the basis that it should be disregarded.

69. The above principles can helpfully be grouped into general concepts as follows:

(1) the *Ramsay* principle apply to all statutes (paragraphs 67(1) to 67(3));

(2) the purpose of the legislation is to be found in its wording, having regard to the context and scheme of the relevant Act as a whole (paragraphs 67(4) to 67(7));

(3) where a statute refers to a commercial concept such as gain or loss, it generally means a real gain or loss rather than one that does not change the economic position of the parties to the transaction (paragraph 67(8));

(4) a provision granting relief from tax is generally to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements for obtaining the relief (paragraph 67(9)); and

(5) in approaching the question of whether specific facts fall within the particular provision, the facts must be viewed realistically and this includes looking at the overall effect of a transaction or series of transaction, in the way it was expected to be carried out, rather than considering each step individually (paragraphs 67(10) to 67(14)).

Each party's position

The Appellant's position

70. Mr Avient said that, when one examined the transactions which had been implemented by the Appellant in the light of the *Ramsay* principle of statutory construction and the applicable case law, the Appellant was entitled to a loss under paragraph 2 of Schedule 13. Under the law as it stood in 1999, when the transactions occurred, as long as:

(1) the amount paid by a taxpayer in respect of the acquisition of relevant discounted securities exceeded the amount received by the taxpayer on the disposal of those securities;

(2) the taxpayer had some commercial purpose in implementing the transactions in question; and

(3) the transactions in question involved a change in the taxpayer's economic position,

then paragraph 2 of Schedule 13 operated to give rise to a loss. This was the case even if:

(a) in addition to his or her commercial purpose, the taxpayer also had a tax avoidance purpose;

(b) the transactions did not give rise to a genuine commercial loss; and/or

(c) the difference between the acquisition consideration and the transfer consideration was pre-planned.

71. He submitted that the transactions undertaken by the Appellant in this case met the conditions described in paragraph 70 above because:

(1) they involved the acquisition by the Appellant of the Loan Notes, which had been issued by two companies of long-standing and substance;

(2) the Appellant had actually paid £750,000 in respect of that acquisition to the companies;

(3) the Appellant had subsequently transferred the Loan Notes to the Trustees of the Settlements, which were trusts set up for commercial reasons - namely, the desire to provide long-term funding to the companies, to provide for the Appellant's retirement and the Appellant's children and to provide protection for the Appellant from potential creditors, including his wife – for a deemed consideration (market value at the time of the transfer) which was less than the amount paid by the Appellant in respect of the acquisition of the Loan Notes by the amount of £694,684;

(4) those steps did not have the tax loss as their primary purpose but had instead been effected primarily for commercial reasons; and

(5) critically, following their implementation, they had given rise to a change in the economic positions of each of the parties.

72. In particular, there was clear documentary evidence, supported by the evidence of the Appellant and Mr Olley, to the effect that:

(1) the Appellant had paid £750,000 to the companies in respect of the issue of the Loan Notes;

(2) the companies had issued the Loan Notes to the Appellant; and

(3) the Appellant had subsequently transferred the Loan Notes to the Trustees of the Settlements,

and the Respondents had not put forward any evidence to show that the Appellant had not acquired the Loan Notes or that the £750,000 which had clearly been paid by the Appellant to the companies had not been paid in respect of the issue of the Loan Notes.

73. In addition, the transactions;

(1) had not been implemented pursuant to a mass-marketed scheme;

(2) were not artificial or contrived and were not circular and self-cancelling; and

(3) were simple and transparent.

74. In support of his position, Mr Avient relied primarily on the decisions in *Campbell* and *Berry*.

The Respondents' position

75. In response, Mr Macklam said that it was central to the legislation in Schedule 13 that there needed to be a real commercial loss from the discount on a relevant discounted security in order for there to be a loss for the purposes of paragraph 2 of Schedule 13 and that the Appellant had realised no such commercial loss in this case.

76. The first stage in the application of the *Ramsay* principle was to decide, on a purposive construction, exactly what transaction would answer to the statutory description. In that regard, paragraph 2(1) of Schedule 13 referred to a person's "sustaining" a "loss" in respect of the discount on a relevant discounted security. The word "sustain" connoted undergoing, suffering or having to submit to, something unpleasant or harmful, whilst the word "loss" was a recognised commercial concept which also connoted something unpleasant or undesirable. There was no reason to think that, in referring to a person's "sustaining" a "loss", Parliament meant something different from that in this context. The language in paragraphs 2(2) and 2(3) of Schedule 13, which explained what was meant by a person's "sustaining" a "loss" for the purposes of the schedule, needed to be read in the light of the language used in paragraph 2(1). That was the context in which the calculations in paragraphs 2(2) and 2(3) of Schedule 13 were set. Given that paragraphs 2(1), 2(2) and 2(3) of Schedule 13 were complementary, the fact that a taxpayer had not sustained a genuine commercial loss in respect of the discount on a relevant discounted security needed to be recognised when it came to determining the amount which had been paid by the taxpayer "in respect of his acquisition of the security" for the purposes of paragraphs 2(2) and 2(3) of Schedule 13.

77. Mr Macklam said that the starting point in the examination of the case law which was relevant to the appeal was the Court of Appeal decision in *Astall and another v The Commissioners for Her Majesty's Revenue and Customs* [2009] EWCA Civ 1010 ("*Astall*"). In that case, the Court of Appeal had addressed the question of whether securities which had been issued on particular terms qualified as relevant discounted securities. In doing so, the Court of Appeal:

(1) had proceeded on the basis that paragraphs 1, 2 and 3 in Schedule 13 were to be given a purposive construction – see *Astall* at paragraph [41];

(2) had expressly rejected the contentions of the taxpayers in that case to the effect that the concept of a deep gain was simply an amount resulting from a calculation, saying that, instead, there had to be the realistic possibility of a real gain – see *Astall* at paragraphs [61] et seq.; and

(3) made it clear that the relevant question was not whether the legislation contained a restriction on the nature of the funds which could be used to redeem the securities but rather whether, on the facts, the terms of redemption resulted in a redemption at a deep gain for the purposes of the legislation – see *Astall* at paragraphs [61] et seq..

78. The Court of Appeal decision in *Astall* was indicative of the fact that it was not possible to apply paragraph 2 of Schedule 13 without considering the question of whether or not the transactions in question had given rise to a real commercial loss.

79. Mr Macklam said that the same approach had been followed in numerous decisions following *Astall* - *Berry*, *Audley*, *Pike v The Commissioners for Her Majesty's Revenue and Customs* [2011] SFTD 830 ("*Pike*"), *Bretten v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 189 (TC) ("*Bretten*") and *Andrew v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 177 (TC) ("*Andrew*).

80. As regards the application of the law to the facts, Mr Macklam submitted that:

(1) the Appellant had made no commercial loss from the transactions, given that the Settlements were for the benefit of himself and his family;

(2) even if one could see the gifts to the Settlements as involving a real commercial loss, that loss was only £55,316 at most – i.e. the value of the Loan Notes when they were transferred to the Trustees of the Settlements – and the loss in question was the loss of £55,316 arising from giving away assets of that value to the Settlements and not a loss of the kind at which paragraph 2 of Schedule 13 was aimed – i.e. a loss arising from the difference between the amount paid in respect of the acquisition of relevant discounted securities and the amount received for those securities on disposal;

(3) the Appellant had not paid £750,000 in respect of the acquisition of the Loan Notes because, when one examined the facts realistically:

(a) assuming that the Appellant had ever acquired the Loan Notes, the only amount which could reasonably be said to have been paid by the Appellant in respect of that acquisition was the £55,316 which was equal to the market value of the Loan Notes when they were issued. The balance of the amount which the Appellant had paid to the companies when the Loan Notes were issued was, in reality, capital contributions to the companies issuing the Loan Notes – see *Berry* at paragraph [58] and *Audley* at paragraph [89]; and

(b) in any event, the Appellant had in fact never acquired the Loan Notes at all because he had not taken on any of the risks or rewards of ownership. Instead, his acquisition and disposal of the Loan Notes could be disregarded as inserted steps in a single composite transaction in which the Loan Notes were always going to be acquired by the Trustees of the Settlement – see *Bretten* at paragraphs [136] to [148]. As such, the £55,316 paid by the Appellant to the companies in respect of the issue of the Loan Notes should simply be seen as an amount paid to procure the issue of the Loan Notes directly to the Settlements; and

(4) as such, when one came to conduct the calculations required by paragraphs 2(2) and 2(3) of Schedule 13, the amount paid by the Appellant in respect of the acquisition of the Loan Notes was either nil or £55,316. In either case, no loss had arisen under paragraph 2 of Schedule 13 when that provision was construed purposively and the facts were viewed realistically.

81. Both parties relied substantially on past case law to support their positions.

Campbell

The Appellant’s position

82. Mr Avient said that, given the facts described in paragraphs 71to 73 above, the facts in this case were much closer to those in *Campbell* than to those in *Audley*.

83. In *Campbell*, the Special Commissioners had found that the taxpayer had a commercial purpose in implementing the transaction in addition to his main purpose of producing a tax loss and that, because the issuer of the loan notes was wholly owned by the taxpayer, there was nothing uncommercial in the taxpayer's having subscribed for loan notes which had a value to unconnected third parties of an amount which was much lower than the amount that the taxpayer had paid for them.

84. As such, in *Campbell*, as in this case:

(1) the transaction could not be said to have been implemented solely for tax purposes;

(2) the transaction gave rise to enduring commercial consequences. In *Campbell*, the taxpayer's economic position had changed for the worse in that he still owed money to the bank from which he had borrowed to subscribe for the loan notes but he no longer held the loan notes and, in this case, the Appellant had given up his right to be repaid £750,000 of the balance on his director’s loan accounts with the companies, the Settlements held the Loan Notes with a maturity of 30 years and the companies had the use of the subscription proceeds for 30 years; and

(3) the relevant loan notes had a greater value to the owner of the company which had issued the loan notes than they did to an unconnected third party.

85. Indeed, the facts in this case were even stronger than in *Campbell* because:

(1) in *Campbell*, the Special Commissioners had held that there was a tax main purpose whereas, in this case, the Appellant's main purpose was commercial and the tax purpose was subsidiary to that purpose; and

(2) in *Campbell*, the issuer of the loan notes was newly-formed whereas, in this case, the issuers of the loan notes were companies of long-standing.

86. In *Campbell*, the Special Commissioners had held that:

(1) the language in paragraph 2 of Schedule 13 was mechanistic in nature and was apt to apply to transactions such as gifts "which would not either in ordinary parlance or in a commercial sense be regarded as giving rise to a loss"; and

(2) the language in the paragraph did not support the implication of an additional condition to the effect that, in order for a transaction to give rise to a loss under the paragraph, the transaction had to have been implemented solely for commercial purposes. Although, in *Campbell*, such commercial purposes did in fact exist, that was not a necessary condition to the claiming of the loss – see *Campbell* at paragraphs [90] to [94], as analysed in *Berry* at paragraph [43].

The Respondents’ position

87. Mr Macklam said that Mr Avient’s reliance on *Campbell* in this case was misconceived. He pointed out that the crucial point in *Campbell* was that, in that case, the Respondents:

(1) had accepted that the taxpayer had acquired the loan notes and that the entirety of the subscription monies had been paid in respect of that acquisition; and

(2) had sought to rely exclusively on the argument that the entire arrangements had a tax avoidance purpose so that they should all be disregarded.

88. The statement by the Special Commissioners in *Campbell* at paragraph [65] to the effect that, because the issuer of the loan notes was wholly-owned by the taxpayer, the loan notes had a value to the taxpayer which was much greater than their value to third parties should be read in the light of the Respondents' concession described in paragraph 87(1) above.

89. Mr Macklam said that there were two ways of interpreting the statement in paragraph [86] of *Campbell* to the effect that paragraph 2 of Schedule 13 was an entirely mechanistic provision. One way was to read it as saying that, in the particular factual context – i.e. taking into account the Respondents' concession described in paragraph 87(1) above - the operation of paragraph 2 of Schedule 13 could have only one outcome. The second way was to read it as saying that paragraph 2 of Schedule 13 could not be the subject of a purposive construction. If the first way of interpreting paragraph [86] in *Campbell* was correct, then the case had no relevance in the present context because the Respondents did not accept in this case that the Appellant had acquired the Loan Notes or that, if he did, the Appellant had paid the full £750,000 in respect of that acquisition. If the second way of interpreting paragraph [86] in *Campbell* was correct, then the case again had no relevance in the present context because, as Lewison J had noted in *Berry* at paragraph [36], that was not consistent with *Astall* and was therefore not good law.

90. Mr Macklam added that, insofar as the Special Commissioners in *Campbell*:

(1) were seeking to draw a parallel between paragraph 2 of Schedule 13 and the legislative provision which was relevant in the case of *Scottish Provident Institution v Inland Revenue Commissioners* [2004] 1 WLR 3172 ("*SPI*"), that was an error because it was clear from *Berry* at paragraph [40] that it was always necessary in each case to focus on the language used in the specific provision which was under consideration and the legislative provision which was relevant in *SPI* was different from the legislative provision which was relevant in *Campbell*;

(2) were seeking to rely on the dichotomy described in *MacNiven v Westmoreland Investments Limited* [2001] STC 237 ("*Westmoreland*") between "commercial" concepts (which were susceptible to the *Ramsay* doctrine) and "legal" concepts (which were not), the decision in *Westmoreland* was no longer good law; and

(3) were saying that the loss referred to in paragraph 2 of Schedule 13 was not a loss in the commercial sense but instead had an artificial meaning, that was incorrect and it was not the reason for the decision in *Campbell*. Instead, the basis for that decision was that, following the concession made by the Respondents to the effect that the entire subscription amount had been paid in respect of the acquisition of the securities and the uncontested evidence to the effect that the transfer of the securities was not certain to occur when the securities were issued, the taxpayer had made a real commercial loss.

Audley

The Appellant's position

91. Mr Avient said that, in contrast to *Campbell*, the facts in *Audley* were very different from the facts in this case in the following respects:

(1) in this case, the issuers of the Loan Notes were companies which were of long standing whereas, in *Audley*, the loan note in question had been issued by a newly-formed trust;

(2) in this case, there was a commercial rationale for the issue of the Loan Notes – namely, the Appellant's desire to make provision for his children and his retirement and to provide protection to the Appellant from his potential creditors, including his wife – whereas, in *Audley*, there was no commercial rationale for the issue of the loan note in question;

(3) in this case, there were two separate transactions – first, the issue of the Loan Notes and then the transfer of the Loan Notes to the Trustees of the Settlements – whereas, in *Audley*, the First-tier Tribunal had found that there was a single composite transaction and the sole purpose of the single composite transaction was to provide the taxpayer with access to the tax benefit;

(4) in this case, the Loan Notes had been issued for cash which had actually been paid whereas, in *Audley*, the taxpayer could not explain why the cash element of the issue price had been paid and most of the issue price was in the form of a property the transfer of which had not been completed. Moreover:

(a) the same solicitor had acted for both parties in relation to the transfer of the property;

(b) the taxpayer did not have the means to give away the property and purchase another; and

(c) the property was the taxpayer's principal residence.

These were further indications that there had not been a genuine sale of the property by the taxpayer to the issuer of the loan note; and

(5) in this case, the transactions gave rise to enduring commercial outcomes for the Appellant, the companies and the Settlements whereas, in *Audley*, viewed realistically, nothing had changed. The taxpayer still lived in the property and could deal with it as he wished and therefore no payment had been made for the loan note.

92. Mr Avient said that, in *Audley*, the First-tier Tribunal had looked at the label attached to the transactions and then, after determining the facts, concluded that, viewed realistically, the property and the cash were gifts and not consideration for the acquisition of the loan note. However, recognising that the loan note existed and had some market value, the First-tier Tribunal sought to attribute such part of the value of the property and the cash as was equal to the market value of the loan note on issue to the acquisition price for the loan note. In contrast, in this case, the Respondents were simply seeking to argue that, as the amount purportedly paid for the acquisition of the Loan Notes was greater than the market value of the Loan Notes on issue, only such part of the amount purportedly paid for the acquisition of the Loan Notes as did not exceed that market value had been paid for the acquisition.

93. He added that, whereas, in *Campbell*, and in this case, the issuers of the loan notes were companies which were wholly-owned by the taxpayer, the acquisition of the loan notes was for real cash and the funding provided to the issuers had a real commercial purpose, none of those was a feature in *Audley*.

The Respondents' position

94. Mr Macklam said that, on the contrary, there were substantial parallels between the facts in *Audley* and the facts in this case. Both involved:

(1) a claim for relief under paragraph 2 of Schedule 13;

(2) relevant discounted securities issued to the taxpayer by a connected entity;

(3) a transfer of assets by the taxpayer to the connected entity which was the issuer;

(4) as a result of a lack of commerciality in the terms of the relevant discounted securities, a significant disparity between the value of the relevant discounted securities on issue and the value of the assets transferred by the taxpayer to the issuer on issue;

(5) a total lack of concern on the part of the taxpayer as to the disparity mentioned in paragraph 94(4) above because of the connection between the taxpayer and the issuer;

(6) a gift of the relevant discounted securities to a connected entity other than the issuer a few days after issue;

(7) origins in a meeting between the taxpayer and his advisers on ways in which the taxpayer might mitigate his tax liabilities; and

(8) a lack of any meaningful technical understanding of the arrangements by the taxpayer who was simply following the steps set out for him by his advisers.

95. The fact that:

(1) the issuer of the loan notes in *Audley* was a trust rather than a company;

(2) the assets transferred to the issuer by the taxpayer in *Audley* were property and cash rather than just cash; and

(3) the same advisers acted for both the taxpayer and the issuer in relation to the property transfer

were not relevant distinguishing features. In relation to the first two points, the key issues were that the taxpayer and the issuer were connected and that the transfer of the assets to the issuer involved uncommercial features and that was true in this case. In relation to the third point, it was not a point of difference at all as, in this case, the same advisers had acted for the Appellant and the companies.

96. In addition, even if one were to accept the Appellant's evidence that he had had commercial purposes as well as a tax avoidance purpose in implementing the transactions, that was not a point of distinction from *Audley* as the First-tier Tribunal in *Audley* had accepted that the taxpayer in that case had had the commercial purpose of wealth planning by financing trusts in addition to his tax avoidance purpose in entering into the transactions – see *Audley* at paragraph [8].

97. In short, all of the facts mentioned in *Audley* at paragraphs [83] to [90] could easily be read across into this case.

98. Mr Macklam added that *Berry* had not been mentioned in *Audley* even though the decision in *Berry* had been published very shortly before the decision in *Audley* was published, but the conclusions in *Audley* were entirely consistent with the decision in *Berry*.

Berry

The Appellant's position

99. Mr Avient said that, in *Berry*, the view of the Upper Tribunal was that, as long as a transaction:

(1) was not solely for the purpose of producing the tax loss and but also had some commercial purpose; and

(2) involved a change in the taxpayer's economic position,

then paragraph 2 of Schedule 13 operated mechanistically and without regard to whether or not there had been a real commercial loss in economic terms.

100. Lewison J had deliberately not said that, in order to fall within the ambit of a provision dealing with a commercial concept such as a gain or loss, it was necessary for there to be a real gain or a real loss. Instead, he had simply referred to the need for there to be a change in economic position. Those words had been carefully chosen. In this case, each party's commercial position had clearly changed and therefore, looking at the way that the language in paragraph 2 of Schedule 13 required a loss to be computed, there had been a loss falling within the ambit of the provision.

The Respondents' position

101. Mr Macklam noted that *Berry* was a case which related to paragraph 14A of Schedule 13, as opposed to paragraph 2 of Schedule 13, but that the language used in the two provisions was the same in all material respects. Both referred in their opening sub-paragraph to the relevant person's sustaining a loss and then set out in a subsequent sub-paragraph or subsequent sub-paragraphs how the loss so sustained was to be calculated. In *Berry* at paragraphs [34] to [36], Lewison J, based on the decision in *Astall*, had expressly rejected the proposition (which had been advanced by the taxpayer in *Berry*) to the effect that the prescriptive manner in which the provision describing the calculation of the loss had been framed meant that the legislation should be applied mechanistically. Lewison J had held that:

(1) the relevant provisions needed to be construed purposively and that, insofar as the Special Commissioners in *Campbell* had held otherwise, he was bound to follow the Court of Appeal in *Astall* to the contrary;

(2) the Special Commissioners in *Campbell* were not saying that the fact-finding tribunal should ignore the reality of the transactions that in fact took place. They were merely saying that the purpose of the holder of the relevant loan notes should not inform the construction of the term "loss"; and

(3) in *Campbell*, once the Special Commissioners had decided (or the Respondents had conceded) that no part of the amount paid to the issuer of the relevant loan notes when the loan notes were issued was a gift and that the reality of the situation was that the entire amount so paid constituted the acquisition price of the loan notes, the legislation operated to give rise to the loss.

102. The crucial paragraphs in *Berry* were paragraphs [51] and [52]. In those paragraphs, Lewison J had approved of the approach which had been adopted by the First-tier Tribunal in that case in the following terms:

> "This is not a case in which Parliament has used algebra (amount A and B) to create a notional profit or loss. It has used words which have a recognised commercial meaning; and it is to be expected that Parliament intended to tax (or relieve) real commercial outcomes. The FTT were right not to adopt a slavishly literal 'tick-box' interpretation of the legislation. This is precisely how the Ramsay principle is meant to operate."

103. Lewison J had gone on to conclude that the First-tier Tribunal in that case had taken a realistic view of the facts in concluding that no loss had been sustained by the taxpayer - because the arrangement was essentially self-cancelling – and therefore that no loss arose under paragraph 14A of Schedule 13.

Bretten

The Appellant's position

104. Mr Avient submitted that, in the light of the decisions in *Berry* and *Campbell, Bretten* was wrongly decided. This was because the First-tier Tribunal in that case had determined that there needed to be a real commercial loss as a pre-condition to falling within paragraph 2 of

Schedule 13 – see paragraphs [89], [90], [102] and [105]. In Mr Avient's opinion, the First-tier Tribunal had allowed the enactment of paragraph 9A of Schedule 13 in 2002 to colour its approach to interpreting the intention of Parliament in enacting paragraph 2 of Schedule 13. The enactment of paragraph 9A of Schedule 13 merely showed that, in 2002, when that provision was introduced, the purpose of Parliament was to preclude a loss arising under the schedule on facts such as those of the taxpayer in *Bretten* where there had been no real commercial loss but it said nothing about the purpose of Parliament in relation to the schedule when the schedule was first enacted or the meaning of the schedule in 1999, when the transactions which were relevant to these proceedings were implemented. The legislation as it stood at that time did not require there to be a real commercial loss but merely a change in economic position – i.e a real commercial outcome.

105. In addition, the First-tier Tribunal in *Bretten* at paragraphs [92], [96], [101] and [102] had been wrong to say that a planned loss could not fall within paragraph 2 of Schedule 13, as the First-tier Tribunal in the subsequent case of *Andrew* had pointed out at paragraphs [91] and [92].

The Respondents' position

106. Mr Macklam submitted that *Bretten* had been correctly decided. It was perfectly correct for the First-tier Tribunal:

(1) to conclude, from the decisions in *Astall* and *Berry*, that, in enacting paragraph 2 of Schedule 13, Parliament intended to relieve only real commercial losses; and

(2) to reconcile the statements in *Campbell* to the effect that loss for the purposes of paragraph 2 of Schedule 13 was an artificial concept and that the paragraph operated mechanistically with the subsequent decisions in *Astall* and *Berry* by observing that, whilst paragraph 2(2) might operate mechanistically once the two figures which were relevant for that paragraph were known, those figures had to be determined in a manner which was consistent with commercial reality. This was because "[the] calculation must have been intended to give effect to the notion of a "real" loss envisaged by Parliament when it legislated the phrase "…a person sustains a loss…"" (see *Bretten* at paragraph [90]).

The First-tier Tribunal in *Andrew* had agreed with these points (see *Andrew* at paragraphs [88] to [93]).

107. The First-tier Tribunal in *Bretten* had also been correct in concluding – at paragraphs [136] to [148] – that, although it might seem to be a "radical interpretation", the taxpayer should be regarded as not having "acquired" the subject loan notes for the purposes of paragraph 2 at all because:

(1) the various steps could be seen as one composite transaction in which each step proceeded in accordance with a plan laid out in advance;

(2) the taxpayer was never at risk of making a real gain or loss on the subject loan notes; and

(3) there was an expectation that each step in the plan would be carried out and the chances that it would not be carried out were remote.

Precisely the same could be said in this case.

108. Finally, the First-tier Tribunal in *Bretten* had observed at paragraph [167] that paragraph 9A of Schedule 13 had been enacted in the mistaken apprehension in 2002 that arrangements of the kind set out in *Audley* actually worked but that the decisions in *Astall* and *Audley* had shown that, on a proper interpretation of paragraph 2 of Schedule 13, this was not the case and

therefore the provision was in fact superfluous. Mr Macklam noted that the same observation had been made by the First-tier Tribunal in *Pike*, at paragraphs [76] to [78].

109. Having said that, Mr Macklam accepted that the First-tier Tribunal in *Bretten* may have been too definitive in stipulating that a planned loss could never be a loss for the purposes of paragraph 2 of Schedule 13, as the First-tier Tribunal in *Andrew* had pointed out at paragraphs [91] and [92].

Other cases

110. Mr Macklam sought to rely on two other cases to support his position.

111. He said that, in *Andrew* at paragraph [93], the First-tier Tribunal had identified that:

> (1) a purposive construction of paragraph 14A of Schedule 13 was that it provided for relief to a person who sustained a loss from a discount on a gilt strip where that loss reflected a real commercial outcome and involved the taxpayer's suffering some real economic detriment; and
>
> (2) the way in which this was achieved in practice was to ensure that the inputs into the calculation in paragraph 14A(3) of Schedule 13 reflected the reality of the transaction.

The same approach should be adopted in relation to paragraph 2(2) of Schedule 13 in this case.

112. He also mentioned *Pike*, noting that, whilst the ratio in that case had no relevance to the present proceedings - because the reason why no loss in respect of the subject loan stock had been found to arise in that case was because it was considered not to qualify as a relevant discounted security for the purposes of Schedule 13 - the First-tier Tribunal had held, at paragraphs [89] to [93], that, although it hadn't had the benefit of hearing submissions on the point, its preliminary view was that, even if the subject loan stock had been a relevant discounted security for the purposes of Schedule 13, the transactions would still not have given rise to a loss for the purposes of Schedule 13 because the difference between the amount paid by the taxpayer to the issuer on issue and the value of the subject loan stock when issued had been paid in order to capitalise the issuer and not in respect of the acquisition of the subject loan stock. Mr Macklam agreed with that conclusion.

113. Finally, Mr Macklam drew our attention to three cases in which a disparity between an amount purportedly paid for something and the market value of that thing had led the relevant court or tribunal to conclude that the excess over the market value had not been paid for the thing in question – *Acornwood LLP and others v The Commissioners for Her Majesty's Revenue and Customs* [2016] STC 2317 at paragraphs [65] and [66], *Tower MCashback LLP 1 and another v The Commissioners for Her Majesty's Revenue and Customs* [2011] UKSC 19 ("*Tower*") at paragraphs [55], [67], [72] and [88] and *Acamar Productions LLP v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKFTT 74 (TC) at paragraphs [65(8)] and [109(5)]. He said that, although those cases related to different legislation and different facts, they were all cases where a court or tribunal had looked at the market value of the thing being acquired in order to determine the amount paid for that thing.

114. In response to the point referred to in paragraph 113 above, Mr Avient said that the cases to which Mr Macklam had referred all related to the question of whether expenditure had been incurred "wholly and exclusively on" the thing to which it purportedly related and that was a totally different question from whether expenditure had been incurred "in respect of the acquisition of" the thing to which it purportedly related.

Conclusions in relation to the substantive appeal

115. We have concluded, essentially for the reasons given by Mr Macklam, that, when the terms of paragraph 2 of Schedule 13 are viewed purposively and the facts of the transactions

implemented by the Appellant in this case are viewed realistically, those transactions did not give rise to a loss under paragraph 2 of Schedule 13 and therefore the substantive appeal fails.

116. The starting point in our examination of the relevant case law must be the two cases which are binding on us and most relevant in this context – namely, *Astall* and *Berry*. (The other cases which were cited to us in argument were first instance decisions which we have considered in reaching the above conclusion but are technically not binding on us).

117. From *Astall*, we derive the following principles which are relevant to this case:

(1) the usual principles of statutory interpretation apply in the case of paragraph 2 of Schedule 13 – thus, it is necessary:

(a) to give the provision a purposive contruction in order to determine the nature of the transactions to which it is intended to apply; and

(b) then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answers to the statutory description,

and to conduct that process iteratively (see *Astall* at paragraphs [41], [42] and [45]);

(2) the mere fact that, in entering into the transaction, the taxpayer intended to obtain a tax advantage is irrelevant; (see *Astall* at paragraph [41]);

(3) in determining the nature of the actual transaction:

(a) the court or tribunal is entitled to have regard to the full sequence of the transaction (see *Astall* at paragraph [62]);

(b) no account is to be taken of artificially contrived possibilities that are irrelevant to the true transaction (see *Astall* at paragraphs [46], [49], [51] and [52] to [57]); and

(c) the court or tribunal is not entitled to treat any transaction as having some nature which in law in did not have but is entitled to assess the transaction by reference to reality and not simply the transaction's form (see *Astall* at paragraph [44]); and

(4) the purpose of paragraph 2 of Schedule 13 was to give relief for a loss accruing from a relevant discounted security (see *Astall* at paragraph [46]).

118. *Berry* was a case which related to paragraph 14A of Schedule 13 and not paragraph 2 of Schedule 13. However, we agree with Mr Macklam that the language used in the two paragraphs was, in all material respects, identical. In both cases, the relevant provision:

(1) referred to the "sustaining" of a "loss" from the discount on the relevant security; and

(2) then went on to say that, for the purposes of the relevant paragraph, a person "sustained" a "loss" from the discount on the relevant security where he transferred or redeemed the security and the amount paid for (or in respect of the acquisition of) the relevant security exceeded the amount payable on the transfer or redemption. (For completeness, we would note that, whereas paragraph 14A of Schedule 13 simply referred to "the amount paid for the security", paragraph 2 of Schedule 13 referred to "the amount paid in respect of the acquisition of the security" but we can see no meaningful differences between those two formulations in this context).

119. It follows that we can see no basis for distinguishing the decision in *Berry* from the facts in this case on the ground that it related to paragraph 14A of Schedule 13 and not paragraph 2 of Schedule 13. Indeed:

(1) Lewison J made exactly the same point in *Berry* at paragraph [36] when he said that he was bound to follow the decision in *Astall*; and

(2) the First-tier Tribunal in *Andrew* made the same observation at paragraph [67].

120. From *Berry,* we derive the following principles which are relevant to this case in addition to those set out above in relation to *Astall*:

(1) in seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words but must have regard to the context and scheme of the relevant Act as a whole (see *Berry* at paragraph [31(v)]);

(2) however, the more comprehensively Parliament sets out the scope of a statutory provision, the less room there is for an appeal to a purpose which is not the literal meaning of the words (see *Berry* at paragraph [31(vi)]);

(3) it is not an unreasonable generalisation to say that, if Parliament refers to some commercial concept such as a gain or a loss, it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction (see *Berry* at paragraph [31(viii)]). In view of Mr Avient's submissions at the hearing in relation to Lewison J's use of the phrase "change in the overall economic position of the parties", we need to explain what we consider Lewison J meant by that reference. In our view, Lewison J was referring there to the realisation of a genuine gain or loss in economic terms and contrasting it to a situation where no such genuine gain or loss arises. We do not agree with the suggestion by Mr Avient that Lewison J was merely referring there to the creation of enduring economic consequences falling short of the realisation of a genuine gain or loss in economic terms. We say that because:

(a) it is clear from the context in which the phrase appears – immediately after the distinction which he had drawn between real gains and losses and illusory ones – that Lewison J was merely expanding on what the term illusory gain or loss meant;

(b) the various cases cited as authority for the proposition in the paragraph are cases where the absence of a genuine commercial loss in economic terms was fatal to the claim for the relevant relief; and

(c) it makes no sense to conclude that a transaction which merely gives rise to enduring commercial consequences but does not give rise to a genuine commercial gain or loss in economic terms should be regarded as falling within the ambit of a statutory provision which refers to a gain or a loss;

(4) the ratio of *Campbell* was that there was no room for the purpose of the taxpayer in entering into the transactions to inform the construction of the term "loss". The ratio was not that, in applying paragraph 2 of Schedule 13, the relevant court or tribunal should ignore the reality of the transactions which had in fact taken place. (In any event, on the facts in *Campbell*, the Special Commissioners had found that the taxpayer in *Campbell* had had a commercial purpose – at least in subscribing for the relevant loan notes – and that the taxpayer had suffered a genuine commercial loss (see *Berry* at paragraph [43]));

(5) paragraph 2 of Schedule 13 is a closely-articulated provision which operates mechanistically once the two inputs into the calculation as described in paragraph 2(2)(b)

of Schedule 13 – the amount paid in respect of the acquisition of the securities and the amount received on the transfer of the securities – have been identified. However, it is necessary to identify those inputs by reference to the reality of the transactions. In *Campbell*, it had been accepted that the reality of the transactions was that no part of the amount which had been paid by the taxpayer to the issuer of the loan notes was a gift and that the entire amount had been paid by the taxpayer in respect of the acquisition of the loan notes (see *Berry* at paragraphs [43] to [45]); and

(6) the purpose of paragraph 2 of Schedule 13 is to provide relief for genuine commercial losses (or "real commercial outcomes" as Lewison J put it). This is not an example of a provision – such as the one which was being addressed in *SPI* – which operates algebraically without reference to economic reality (see *Berry* at paragraph [52]).

121. We now turn to applying the principles set out above to the facts in this case. There are two questions to answer in that regard. One is to ascertain on a purposive construction of paragraph 2 of Schedule 13 exactly what transactions answer to the statutory description and the other is to ascertain whether, on a realistic view of the facts in this case, the transactions in question did so.

122. The first of these questions is straightforward as it has already been answered by Lewison J in *Berry* at paragraph [52]. This is that paragraph 2 of Schedule 13 is intended to provide relief for a genuine commercial loss arising from a difference between the amount paid in respect of the acquisition of a relevant discounted security and the amount received on the disposal or redemption of that security. As we have already noted in paragraph 120(3) above, that means a genuine commercial loss and not merely enduring economic consequences falling short of the realisation of a genuine loss in economic terms.

123. The second of these questions is slightly more difficult to answer as it turns on the facts of this particular case. As such, it has not been addressed by either of the two authorities set out above although, as we shall see below, there are various first-instance decisions dealing with similar facts. The question may be simply put. On a realistic view of the facts, did the Appellant make a genuine commercial loss of £694,684 because he paid £750,000 in respect of the acquisition of the Loan Notes and transferred the Loan Notes to the Trustees of the Settlements at a time when their market value was £55,316? If he did, then the Appellant is entitled to succeed in the appeal.

124. However, in our view, the Appellant did no such thing.

125. Key to an unblinkered approach to the facts in this case are the following:

(1) it is clear from the evidence in this case that the Appellant had no real understanding of the import of the transactions which he was implementing. As far as he was concerned, he had been introduced to arrangements which would save him a considerable amount of tax and which had been blessed by each of HW, PB and Mr Sherry. He had merely to sign the documents which HW had prepared for him and circle some cash and that would generate the tax relief which he needed to shelter his income in the Tax Year. In that regard, the Appellant was in an identical position to the position of the taxpayer in *Audley* (see *Audley* at paragraph [33(1)]);

(2) this leads on naturally to a related point, which is that, at the time when the Loan Notes were issued, the Appellant clearly did not direct his mind to the vast discrepancy which existed between the amount which he was purportedly paying in return for the issue of the Loan Notes and the market value of the Loan Notes on issue. As far as he was concerned, he didn't care about the value of the Loan Notes when they were issued

because the issuers of the Loan Notes were his own wholly-owned companies. As such, he knew that the entirety of the amount which he was purportedly paying for the issue of the Loan Notes would remain under his control within the companies and that any difference between the amount he was paying and the value of the Loan Notes on issue would augment the value of his equity in the companies. At the hearing, the Appellant freely admitted that he would not have been prepared to pay the same amount for the issue of the Loan Notes had the issuers been companies unrelated to him;

(3) the only commercial loss suffered by the Appellant as a result of the arrangements was £11,063.20 – the value of the Loan Notes which were transferred by way of gift to the Trustees of Children's Trust – or conceivably £55,316 – the value of the Loan Notes which were transferred by way of gift to the Trustees of the two Settlements. The reason for expressing some doubt over the question of whether the Loan Notes which were given to the KJP Settlement gave rise to a commercial loss for the Appellant is because the Appellant was a beneficiary of the KJP Settlement and held a life interest in that Settlement and so, arguably, his gift to that Settlement involved no commercial loss at all;

(4) regardless of whether the commercial loss suffered by the Appellant as a result of the arrangements was £11,063.20 or £55,316, as referred to in paragraph 126(3) above, crucially, that commercial loss arose solely from the fact that that was the value which the Appellant gave to the Children's Trust or, as the case may be, the two Settlements by virtue of the transactions. It was not a loss which related in any way to the difference between the amount paid in respect of the acquisition of the Loan Notes and the amount deemed to be received in respect of the disposal of the Loan Notes, which is to say a loss of the type at which paragraph 2 of Schedule 13 was aimed;

(5) the Appellant did not make a loss of the latter type because:

(a) the Loan Notes had the same value when they were transferred to the Settlements as they had on the day they were issued; and

(b) although there was a difference between the amount paid by the Appellant when the Loan Notes were issued and the market value of the Loan Notes on issue, that difference increased the value of companies in which the Appellant was the sole shareholder. As such, that difference - £694,684 – was, in reality, capital contributions by the Appellant to the companies which increased the value of his equity in the companies. It had nothing whatsoever to do with the issue of the Loan Notes; and

(6) the transactions in question – the issue of the Loan Notes and their subsequent transfer - were an integrated whole. They were a single composite transaction, so that, once the Loan Notes were issued, there was no realistic possibility that they would not be transferred at some point to a person connected with the Appellant such as the Trustees of the Settlements. The only things that remained to be determined when the Aggregate Loan Notes were issued was the exact portion of the Aggregate Loan Notes which was to be transferred in the Tax Year, as opposed to the following tax year of assessment and the precise identity of the connected person in question - see paragraph 65(3) above – and these were determined shortly after issue.

126. Taking all of the above facts into account, and bearing in mind that the purpose of paragraph 2 of Schedule 13 was to provide relief for a genuine commercial loss arising from a difference between the amount paid in respect of the acquisition of a relevant discounted security and the amount received on the disposal or redemption of that security, we consider that there is no meaningful sense in which the whole of the £750,000 which was paid by the

Appellant to the companies on 4 March 1999 in return for the issue of the Loan Notes a day later can be said to have been paid in respect of the Appellant's acquisition of the Loan Notes. The Appellant certainly paid that amount to the companies on that date but, on a realistic view of the facts, and assuming for the moment that the Appellant can be said to have acquired the Loan Notes at all – as to which, see paragraphs 138 to 140 below - only £55,316 of that payment can be said to have been in respect of the acquisition of the Loan Notes. The remaining £694,684 of that payment was simply capital contributions to the companies in which the Appellant was the sole shareholder and was not, in any meaningful sense, in respect of the acquisition of the Loan Notes. Adopting the language used by Arden LJ in *Astall* at paragraph [44], that is not to treat what happened when the Loan Notes were issued "as having some nature which in law it did not have". It merely involves assessing what happened "by reference to reality and not simply to its form."

127. The fact that the Appellant was unconcerned about the market value of the Loan Notes when they were issued and the relationship of that market value to the amount which he was paying to the companies at the time of issue, is, in our view, an important part of this conclusion. It reveals that there is no meaningful sense in which:

(1) the Appellant can be said to have directed his mind to the fact that he wanted to acquire the Loan Notes and was prepared to pay the full £750,000 in order to acquire them; or

(2) there can be said to have been a genuine agreement – in the sense of a meeting of minds – between the Appellant and the companies to the effect that the Loan Notes would be issued for the aggregate amount which was stipulated in the documents recording the subscriptions to be the issue price of the Loan Notes.

Instead, each party to the issue of the Loan Notes was simply following the script that had been prepared by HW. As such, the mere fact that the documents recording the subscriptions said that £750,000 was the amount which the Appellant was paying for the Loan Notes does not mean that that is what the parties had consciously agreed. The fact that there was no such genuine agreement in relation to the issue price means that it is tempting to analyse the facts as amounting to a gift of £750,000 made by the Appellant to the companies, with a corresponding bonus issue of Loan Notes for no consideration made by the companies. A similar temptation appears to have been felt by the First-tier Tribunal in *Audley*, when it prefaced its conclusion in paragraph [89] of the decision, to the effect that part of the cash and property which passed from the taxpayer to the trust issuer in that case amounted to a payment for the acquisition of the loan note, with the words "[to] the extent that any amount can be said to have been paid for the acquisition of the loan note…". However, we have decided that, in the absence of any evidence to the effect that the companies acted gratuitously in issuing the Loan Notes, a more realistic view of the facts in this case is that the Loan Notes were issued in consideration for £55,316 of the amount which was paid by the Appellant to the companies and that only £694,684 of the amount which was paid by the Appellant to the companies was capital contributions.

128. In reaching the above conclusion, we are reminded of the words of Arden LJ in *Bankway Properties Limited v Pensfold-Dunsford* [2001] 1 WLR 1369 ("*Bankway*") in a different context, which were set out in *Audley* at paragraph [63], to the effect that the question in each case is "what was the substance and reality of the transaction entered into by the parties? The court is not bound by the language which the parties have used. It may for instance conclude, when it examines the substance of the transaction, that what the parties have in their agreement called a sale and repurchase of book debts is in truth a registerable charge over them" (see *Bankway* at paragraph [43], quoting Lord Ackner in *Antoniades v Villiers* [1990] 1 AC 417 at 466). In this case, the Appellant and the companies may have said in the document effecting the subscription that the entire £750,000 was being paid in respect of the issue of the Loan Notes but, viewed

realistically in the light of the relevant legislation construed purposively, £694,684 of that amount was capital contributions to the companies and only £55,316 was attributable to the issue of the Loan Notes.

129. In *Tower*, in the High Court (*Tower MCashback LLP 1 and another v The Commissioners for Her Majesty's Revenue and Customs* [2008] STC 3366 ("*Tower HC*")), Henderson J (as he then was) stated that "[in] order to say that the wrong label has been attached to a transaction, it is first necessary to identify with clarity the transaction which is said to have been misdescribed" (see *Tower* at paragraph [82] and *Audley* at paragraph [88]). In this case, as in *Audley*, we consider that to be straightforward – in reality, the transaction involved aggregate capital contributions to the companies of £694,684 and the payment of £55,316 in respect of the issue of the Loan Notes. As such, on the assumption that the Loan Notes were actually issued to the Appellant and then transferred to the Trustees of the Settlements – as to which, see paragraphs 138 to 140 below - the only amount which was paid by the Appellant in respect of his acquisition of the Loan Notes was £55,316.

130. The above is sufficient to dispose of the substantive appeal. Our conclusion means that, on the assumption that the Loan Notes were acquired by the Appellant before being transferred to the Trustees of the Settlements (as opposed to being issued by the companies directly to the Trustees of the Settlements), the application of the language in paragraphs 2(2) and 2(3) of Schedule 13 gives rise to no loss because there was no difference in this case between the amount paid by the Appellant in respect of his acquisition of the Loan Notes and the amount which the Appellant was deemed to receive in respect of the transfer of the Loan Notes to the Trustees of the Settlements.

131. To be clear, we are not saying that the substantive appeal fails simply because the transactions did not give rise to a commercial loss for the Appellant. We are instead saying that:

(1) whether or not there is a loss for the purposes of paragraph 2 of Schedule 13, and the amount of that loss if it arises, is to be determined mechanistically by reference to the two inputs set out in paragraphs 2(2) and 2(3) of Schedule 13;

(2) that requires the amount paid by the Appellant in respect of his acquisition of the Loan Notes to be identified because that is one of the inputs into the calculations in paragraphs 2(2) and 2(3) of Schedule 13;

(3) in implementing the transactions, the Appellant did not make a commercial loss of the kind at which paragraph 2 of Schedule 13 is aimed, viewed purposively;

(4) that fact needs to be taken into account, along with all of the other facts, in determining, on a realistic basis, how much the Appellant paid in respect of his acquisition of the Loan Notes (if he acquired them) and therefore the figure which is to be taken into account as the relevant acquisition price input in making the calculations in paragraphs 2(2) and 2(3) of Schedule 13; and

(5) when one takes all of those facts into account, the only logical conclusion is that, viewed realistically, only £55,316 of the amount paid by the Appellant to the companies was attributable to the issue of the Loan Notes and the balance was capital contributions to the companies so that, if the Appellant acquired the Loan Notes, he did so for only £55,316 and therefore no loss arose under paragraph 2 of Schedule 13.

132. The approach which we have described above - to the effect that, on a purposive approach, paragraph 2 of Schedule seeks to give relief for real commercial losses and that the way in which that purpose is achieved is to consider, without applying the blinkers of the labels which the parties have used to describe the transactions which occurred, whether, viewed

realistically, the amount which was purported to be paid in respect of the acquisition of the subject securities (or, in the case of *Andrew*, purported to be received in respect of the disposal of the subject securities) was as alleged in the transaction documents and to ensure that the inputs into the calculations in paragraphs 2(2) and 2(3) of Schedule 13 properly reflect commercial reality - is entirely consistent with the approach adopted by the First-tier Tribunal in each of:

(1) *Audley* – see *Audley* at paragraphs [88] and [89];

(2) *Andrew* - see *Andrew* at paragraphs [83] and [93];

(3) *Bretten* - see *Bretten* at paragraphs [90], [102] and [124] to [130]; and

(4) *Pike* – see *Pike* at paragraphs [90] to [93].

133. As for *Campbell*, on which Mr Avient placed considerable reliance, we do not think that it assists the Appellant because a key distinction is that, in *Campbell*, the Respondents had accepted that the full amount paid by the taxpayer to the issuer of the loan notes was in respect of the acquisition of the loan notes and was not a gift to the issuing company (see *Campbell* at paragraph [68]). As such, when it came to applying the formula in paragraphs 2(2) and 2(3) of Schedule 13, the loss inevitably arose. That is very different from this case, where we agree with the Respondents that, on a realistic view of the facts, assuming that the Appellant did in fact acquire the Loan Notes, the only amount which he paid in respect of that acquisition was £55,316.

134. There are four final points which we should make in this context.

135. The first point relates to our finding of fact in paragraph 65(8) above to the effect that the sole purpose of the Appellant in implementing the transactions was to secure the loss under paragraph 2 of Schedule 13. That finding has not played a direct part in the conclusion we have reached above. The reason for this is that the Special Commissioners in *Campbell* at paragraphs [87] to [91] and, more importantly, the Upper Tribunal in *Berry* at paragraph [31(ix)], and implicitly in its analysis of *Campbell* at paragraph [43] and its approach to construing the relevant legislation, made it plain that the mere fact that a taxpayer had only a tax advantage purpose in entering into a transaction which, viewed realistically, fell within the ambit of paragraph 2 of Schedule 13 should not prevent the transaction from giving rise to a loss for tax purposes. Instead, the court or tribunal needs to look at what was done, on a realistic view of the facts, as opposed to why it was done. However, we have made the finding of fact because the purpose of the Appellant in implementing the transactions was very much the focus of both parties in making their submissions at the hearing and, when questioned about the relevance of purpose in this context, Mr Avient made the point that, in paragraph [31(ix)] of *Berry,* Lewison J had said that "[a] provision granting relief from tax is generally (although not universally) to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief".

136. Despite the fact that the Appellant's purpose has not played a direct part in the conclusion we have reached in relation to the substantive appeal, we would observe that that purpose was part of the overall circumstances in which the transactions occurred and thus, to that extent, indirectly affected what was done as well as why it was done. For example, had the commercial purposes which the Appellant claims to have had for implementing the transactions truly been part of the Appellant's purposes, the transactions would undoubtedly have taken a different form and therefore the facts viewed realistically would have been different. We agree with the similar observations in this regard made by the First-tier Tribunal in *Andrew* at paragraph [83(3)].

137. The second point is that we do not agree with the statements made in *Bretten* at paragraphs [91], [92], [96] and [102] to the effect that a pre-planned loss can never be a loss falling within paragraph 2 of Schedule 13. Instead, we share the view of the First-tier Tribunal in *Andrew* at paragraphs [91] and [92] to the effect that there may well be circumstances where a pre-planned loss is capable of falling within the ambit of paragraph 2 of Schedule 13 – *Camp*bell's being a case in point.

138. The third point is to deal briefly with the submissions made by Mr Macklam in relation to his primary contention which is that, on a realistic view of the facts, the Appellant did not acquire the Loan Notes at all and that, instead, the £55,316 which the Appellant paid to the companies in respect of the issue of the Loan Notes was to procure the issue of the Loan Notes directly to the two Settlements.

139. In relation to those submissions, we would comment as follows:

(1) we have already found as a fact that this was a single composite transaction in which, at the time when the Aggregate Loan Notes were issued, there was no meaningful prospect that the Appellant would not transfer the Aggregate Loan Notes to a person connected with him, such as the Trustees of the Settlements, either within the Tax Year, shortly after the Loan Notes were issued, or in the following tax year of assessment, depending on the Appellant's tax capacity in the Tax Year. Thus, the Appellant never really acquired the risks and rewards of ownership of the Loan Notes despite the fact that he was the registered holder of the Loan Notes for a brief period;

(2) there are examples in the authorities of cases where a step inserted into a composite transaction which had no commercial purpose apart from the avoidance of tax has been disregarded in determining the reality of the transaction which has been implemented – see, for example, the House of Lords decision in *Furniss v Dawson* [1984] STC 153 ("*Furniss*") and the Privy Council decision in *Carreras Group Limited v Stamp Commissioner* [2004] STC 1377 ("*Carreras*");

(3) in *Furniss,* the taxpayers negotiated a sale of their shares in two operating companies to an unrelated purchaser for cash and then, as part of a scheme to defer their liability to capital gains tax, exchanged those shares for shares in a newly-incorporated Isle of Man company, which then sold the shares to the purchaser for cash. The initial share exchange was designed to bring the disposal by the taxpayer into a provision in the UK tax legislation conferring a deferral from capital gains tax. The House of Lords concluded that this was a pre-ordained series of transactions and that the initial exchange by the taxpayers of shares in the operating companies for shares in the Isle of Man company was a step with no commercial or business purpose apart from tax avoidance. That step could therefore be disregarded in applying the relieving provision in the legislation and the transaction should instead be analysed as if the taxpayers had sold the shares in the operating companies directly to the purchaser and directed the purchaser to pay the cash consideration to the Isle of Man company. This was the case even though the transaction as a whole was commercially-motivated and gave rise to enduring legal consequences. Lord Fraser noted that, despite the enduring legal consequences, "the fiscal consequences of a preordained series of transactions, intended to operate as such, are generally to be ascertained by considering the result of the series as a whole, and not by dissecting the scheme and considering each individual transaction separately" (see *Furniss* at 155e);

(4) in *Carreras*, the taxpayer agreed to sell shares to an unrelated purchaser in exchange for a debenture issued by the purchaser which was unsecured, non-transferable and non-interest-bearing and was repaid two weeks after its issue. The purpose of the debenture issue was to take advantage of a stamp duty exemption in Jamaica which

applied to reorganisations. The Privy Council held that, despite the existence and legality of the intervening step comprising the debenture issue, it was a step inserted into a single pre-ordained transaction comprising a sale for the cash redemption price of the debenture and, as such, should be disregarded in considering whether the stamp duty exemption applied;

(5) in both *Furniss* and *Carreras*, the inserted step (which was disregarded by the relevant court) was designed to bring the taxpayer within a provision conferring relief from a liability to tax – UK capital gains tax in the case of *Furniss* and Jamaican stamp duty in the case of *Carreras*. Similarly, in this case, the inserted steps - the acquisition of the Loan Notes by the Appellant and the disposal of the Loan Notes to the Trustees of the Settlements – were designed to bring the Appellant within a provision conferring on the Appellant a loss for income tax purposes;

(6) in this case, at the time when the Aggregate Loan Notes were issued, the only uncertainties as regards the Aggregate Loan Notes were:

> (a) the extent to which the Aggregate Loan Notes would be transferred to the person connected with the Appellant in the Tax Year, as opposed to in the following tax year of assessment -i.e. the profile of the transfers of the Aggregate Loan Notes; and
>
> (b) the precise identity of the connected person to which the Aggregate Loan Notes would be transferred.

The resolution of those uncertainties was entirely within the control of the Appellant and his advisers. Moreover, the uncertainties had no bearing on the nature of the arrangements. They merely related to the timing of the transfers and the precise identity of the connected person to whom the transfers would be made;

(7) thus, the facts in this case are very different from those referred to in *Craven v White; Baylis v Gregory and Inland Revenue Commissioners v Bowater Property Developments Limited* [1989] AC 398 ("*Craven*"), where, at the time when the initial share exchanges took place, it was wholly uncertain whether the eventual disposal would take place and the identity of the ultimate purchasers, the prices to be paid by the ultimate purchasers and the other terms of the contracts with the ultimate purchasers were unknown (see Lord Fraser in *Craven* at 481). In the words of Lord Fraser at page 481, "both the transactions in the series can properly be regarded as pre-ordained if, but only if, at the time when the first of them was entered into the taxpayer is in a position for all practical purposes to secure that the second also is entered into". That was very much so in this case;

(8) in the circumstances, we can see no meaningful distinction between the facts in the present case and the facts in *Furniss* and *Carreras*. This means that, although it is not necessary to decide the point given the conclusion which we have already reached, we are inclined to agree with Mr Macklam that the reality of the arrangements in this case is that the Appellant paid the £55,316 which was paid to the companies in respect of the issue of the Loan Notes not in order to acquire the Loan Notes himself but instead to procure the issue of the Loan Notes directly to the two Settlements and that the Appellant never acquired the Loan Notes at all so that, on a purposive construction of paragraph 2 of Schedule 13, no loss arose from the transactions for a quite separate reason from the reason given above – i.e. there simply was no acquisition of the Loan Notes by the Appellant at all; and

(9) we note that this was an analysis which appealed to the First-tier Tribunal in *Bretten* at paragraphs [136] to [148], in relation to similar facts.

140. For completeness, we should say that the conclusion which we have just expressed is limited to the portion of the Aggregate Loan Notes which are the subject of these proceedings – which is to say, the portion of the Aggregate Loan Notes which were issued on 5 March 1999 and transferred to the Trustees of the Settlements a few days later, within the Tax Year. We do not need to express a view on whether the same conclusion would necessarily also apply to the portion of the Aggregate Loan Notes which were not transferred to the Trustees of the Settlements until some months after the Aggregate Loan Notes were issued – in the tax year of assessment following the Tax Year. We are inclined to think that the fact that the gap between the issue of the Loan Notes and their transfer in that case was longer would not affect the analysis from that set out above because the key point was that this was a single integrated transaction, conceived as a whole, where the timing of the transfers was dictated solely by the Appellant's tax capacity in the Tax Year. The logic of the Privy Council in addressing a similar question in *Carreras* at paragraphs [15] and [16] suggests that the answer in relation to that portion of the Aggregate Loan Notes would be the same but we do not need to decide that question in this decision.

141. The final point which we should make before finishing our conclusions in relation to the substantive appeal relates to paragraph 9A of Schedule 13 which was inserted in 2002 and which, had it applied when the transactions were implemented, would have expressly restricted the Appellant to a market value acquisition cost. In relation to that paragraph, we share the view of both counsel that it sheds no light on the application of Schedule 13 as it stood before the amendment in question. It may well be that, in the light of the conclusions we have reached above and the conclusions reached in each of *Astall*, *Berry*, *Audley*, *Bretten* and *Pike*, the introduction of that provision was unnecessary, which was the conclusion drawn in both *Bretten* at paragraph [167] and *Pike* at paragraphs [76] to [78], but, even if it wasn't, it merely reflects the view of Parliament in 2002, when the provision was introduced, and therefore sheds no light on the application of the schedule in 1999.

The penalty appeal

The submissions of the parties

Introduction

142. The parties were agreed that there were three distinct questions which needed to be addressed in relation to the Penalty Assessment as follows:

(1) was the decision in *Audley* a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice?

(2) if *Audley* was a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice, was it reasonable in all the circumstances for the Appellant not to have taken the necessary corrective action in response to the Follower Notice? and

(3) if *Audley* was a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice and it wasn't reasonable in all the circumstances for the Appellant not to have taken the necessary corrective action in response to the Follower Notice, should the Penalty Assessment have been lower than it was because of the extent and nature of the Appellant's co-operation with the Respondents in relation to the Follower Notice?

143. In relation to the first of those questions, it was apparent from the language used in Section 214(3)(b) of the FA 2014 that the relevant question in the context of the appeal was not whether the Respondents were of the opinion that the decision in *Audley* was a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice but rather the slightly different question of whether the decision in *Audley* was a "relevant" judicial ruling

in relation to the arrangements described in the Follower Notice – see *R (on the application of Haworth) v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKSC 25 ("*Haworth*") at paragraph [63] and *Barlow v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 486 (TC) at paragraph [16].

144. Mr Macklam submitted that the burden of proof in relation to all three questions lay with the Appellant. In particular, he said that the location of the burden of proof in relation to the first question had been a matter of dispute in the recent case of *Whispering Smith Limited v The Commissioners for Her Majesty's Revenue and Customs* [2022] UKFTT 165 (TCC) ("*Whispering Smith*"), where the First-tier Tribunal had concluded that the burden lay with the taxpayer in that case – see *Whispering Smith* at paragraphs [30] to [37]. Mr Avient did not demur from that proposition.

"Relevant" judicial ruling

The Appellant's position

145. Turning first to the question of whether *Audley* was a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice, Mr Avient accepted that the decision in *Audley*:

(1) was a "judicial ruling" (as defined in Section 205(2) of the FA 2014);

(2) related to "tax arrangements" (as defined in Section 201 of the FA 2014); and

(3) was a "final ruling" (as defined in Section 205(4) of the FA 2014).

146. However, he submitted that it was not a "relevant" judicial ruling within the meaning of Section 205(3) of the FA 2014 in relation to the arrangements described in the Follower Notice because it could not be said that the principles laid down in, or the reasoning given in, *Audley* would, if applied to the transactions which the Appellant had implemented, deny all or any part of the loss sought by the Appellant by virtue of his having entered into the transactions (see Section 205(3)(b) of the FA 2014).

147. The leading authority in relation to this question was the Supreme Court decision in *Haworth*. In *Haworth*, Lady Rose (giving the judgment of the Supreme Court) had observed that, given the severe consequences of the follower notice regime for a taxpayer, in order for a court or tribunal to conclude that a judicial ruling was "relevant", it must be of the view that "there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage. Only then can they be said to have formed the opinion that the relevant ruling "would" deny the advantage. An opinion merely that it is likely to do so is not sufficient" (see *Haworth* at paragraphs [59] to [62]).

148. Lady Rose had then set out, in paragraphs [64] to [68] of the decision, some guidance in relation to matters which the relevant court or tribunal needed to consider when applying that threshold, as follows:

(1) how fact-sensitive the judicial ruling was and, if it was, the similarities and differences between the facts in the judicial ruling and the facts in the case being addressed;

(2) whether the relevance of the judicial ruling to the case being addressed turned on the rejection of the evidence of the taxpayer in the case being addressed as being untruthful. If so, the court or tribunal needed to consider whether it was satisfied that the untruthfulness of the factual assertions by the taxpayer in the case being addressed was so clear that the judicial ruling was relevant;

(3) the fact that some situations were less fact-sensitive – for example, where the taxpayer in the case being addressed had entered into the same mass-marketed scheme as the taxpayer who was the subject of the judicial ruling and there was no material difference between the arrangements in the two cases;

(4) whether:

(a) the taxpayer in the case being addressed was putting forward legal arguments which had not been raised in the judicial ruling; or

(b) the conclusion in the judicial ruling had been based on a concession by one of the parties as to some aspect of the legal framework which the taxpayer in the case being addressed had not made and wished to contest; and

(5) finally, the nature of the judicial ruling – for example, if it had been reached in circumstances where the taxpayer had been unrepresented or had not appeared or where the reasoning set out in the judicial ruling was brief or unclear, that might make it less capable of being "relevant" than where the converse was the case.

149. In his submissions, Mr Avient reminded us of the high bar in identifying a "relevant" judicial ruling which had been set out by Lady Rose in *Haworth* at paragraphs [59] to [62] and referred to in paragraph 147 above and relied primarily on the points made in paragraphs 148(1) and 148(3) above in demonstrating that the decision in *Audley* was not a "relevant" judicial ruling in the present case. In his view:

(1) the Respondents had produced no evidence to show that the Appellant had participated in a mass-marketed scheme. The transactions into which the Appellant had entered were pursuant to advice rendered to him by HW on the basis of his specific facts and related to how the Appellant might refinance his wholly-owned companies and then subsequently achieve his commercial purposes in relation to his retirement, his children and his potential creditors, including his wife, by transferring securities to a connected trust whilst benefiting from a tax deferral. These transactions could not be seen as forming part of a scheme made available to a number of different taxpayers and involving artificial steps; and

(2) the decision in *Audley* was extremely fact-sensitive and he had already set out the numerous ways in which the facts in *Audley* differed from the facts in the Appellant's case (see paragraphs 89 to 91 above). *Audley* did not lay down any general principles because it was specific to its own peculiar facts.

This meant that, not only could it not be said that the principles laid down in, and the reasoning given in, *Audley* would apply to deny the Appellant the sought-after tax advantage to the level of certainty required by the Supreme Court in *Haworth* but also that was not even likely to do so.

150. He contrasted this case with the facts in *Whispering Smith* – a case in which a judicial ruling had been held to be "relevant" - which he said had involved a mass-marketed scheme and in which the judicial decision on which reliance was placed was a Supreme Court decision setting out some general principles in relation to the application of the law in the relevant area. That was very different, he said, from a heavily-fact-based decision by the First-tier Tribunal such as *Audley*.

The Respondents' position

151. Mr Macklam said that *Audley* was a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice. In his view:

(1) the transactions which were the subject of the appeal had been implemented pursuant to a mass-marketed scheme;

(2) *Audley* was not a fact-sensitive decision. In other words, it was not a case where a small difference in the fact pattern would mean that the principles laid down in the case would not apply;

(3) the relevance of *Audley* in this case did not turn on our finding that the Appellant's evidence was untruthful but, even if it did, the decision in *Whispering Smith* showed that that would be no bar to our deciding that *Audley* was a "relevant" judicial ruling;

(4) no legal arguments which had been raised in this case were new – they had all been raised in *Audley*; and

(5) the decision in *Audley* was reliable – it was a detailed decision citing Court of Appeal authority in *Astall* and carefully distinguishing the decision in *Campbell*. It clearly set out the relevant principles and applied them to the facts in that case.

152. As regards the points made in paragraphs 151(2) and 151(3) above, Mr Macklam relied on the points made in paragraphs 92 to 96 above.

153. As regards the point made in paragraph 151(4) above, Mr Macklam said that, in *Audley*:

(1) the taxpayer:

(a) had relied on *Campbell* to establish that the value transferred by the taxpayer to the issuer had been paid in respect of the acquisition of the relevant discounted securities; and

(b) had argued that, in the absence of an express statutory provision which deemed market value to have been paid on the acquisition of relevant discounted securities from a connected party, there was no basis for the Respondents to assert that that was the case; and

(2) the Respondents had submitted that labels to transactions were not determinative and that the focus should be on substance over form.

These were the same as the arguments which had been made by the parties in this case.

154. As regards the point made in paragraph 151(5) above, Mr Macklam said that the First-tier Tribunal in *Audley* had referred extensively to *Astall* and had held that:

(1) the various steps in *Audley* were part of a single pre-ordained unitary transaction;

(2) *Campbell* could be distinguished on the basis of its facts and, in particular, the acceptance by the Respondents in *Campbell* that the entire amount paid by the taxpayer to the issuer had been in respect of the acquisition of the relevant loan notes; and

(3) the excess of the value transferred to the issuer by the taxpayer over the value of the loan note on issue was, when viewed realistically, a gift and not in respect of the acquisition of the loan note and that therefore no loss arose under paragraph 2 of Schedule 13.

These were reasoned conclusions and they were the same conclusions as the Respondents were seeking in this case.

155. Thus, there was no scope for a reasonable person to conclude that the principles laid down in, and the reasoning given in, *Audley* did not apply on the facts in this case.

Reasonable not to take the necessary corrective action

The Appellant's position

156. Mr Avient submitted that, even if, notwithstanding the above, we were to conclude that *Audley* was a "relevant" judicial ruling, it was reasonable in all the circumstances for the Appellant not to have taken the necessary corrective action. In this regard, the phrase "reasonable in all the circumstances" in Section 214(3)(d) of the FA 2014 involved the application of a straightforward test which did not need elucidation by reference to the wording of different tests applied in different contexts. The phrase should be given its ordinary and natural meaning – see the Upper Tribunal decision in *The Commissioners for Her Majesty's Revenue and Customs v Comtek* [2021] STC 776 ("*Comtek*") at paragraphs [32] and [33]. Applying that test in the present case, the Appellant's failure to take the necessary corrective action was reasonable in all the circumstances because:

(1) he reasonably believed that *Audley* was not a "relevant" judicial ruling;

(2) he had taken all actions that he could reasonably have taken in relation to the Follower Notice other than giving up the substantive appeal; and

(3) he had made arrangements to pay the accelerated payment notice, thereby ensuring that he received no cash-flow advantage between the issue of the Follower Notice and the determination of the substantive appeal.

The Respondents' position

157. In response, Mr Macklam pointed out that:

(1) if we were to conclude that *Audley* was a "relevant" judicial ruling, then we would, by definition, have concluded that there was no scope for a reasonable person to conclude that the principles laid down in, and the reasoning given in, *Audley* did not apply on the facts in this case. As such, any belief that *Audley* was not a "relevant" judicial ruling would, by definition, be an unreasonable belief;

(2) moreover, even if it might be argued that that unreasonable belief was based on the advice which the Appellant had received following the issue of the Follower Notice, and there was some doubt from the evidence that the Appellant had actually sought that advice or, if so, when he had sought that advice, that advice had, to put it at its strongest, been given orally by PB and HW, the very people who had advised the Appellant to enter into the transactions. After his receipt of the Follower Notice and prior to the deadline for taking the necessary corrective action of 29 June 2017, the Appellant had not sought formal written advice on the efficacy of the transactions from an independent legal adviser (as he had in fact done before entering into the transactions in 1999). That was not reasonable in all the circumstances;

(3) moreover, it was clear from the letter from PB to the Respondents of 29 June 2017 – which was the day by which the necessary corrective action needed to be taken in order to avoid a penalty – that the Appellant was still awaiting advice on that day in relation to the question of whether or not he needed to take the necessary corrective action from Mr Edwards of HW, who was off on long-term sick leave. It followed inexorably that, by the day that he was required to take the necessary corrective action, the Appellant had not yet received the advice that he did not need to take the necessary corrective action;

(4) the facts in this case fell well short of those in *Whispering Smith* where even the fact that the taxpayer had taken written advice from independent counsel to the effect that there were reasonable grounds for judicial review was insufficient to amount to reasonable grounds for failing to take the necessary corrective action – see *Whispering Smith* at paragraphs 117, [126(3)], [126(7)(a)], [126(9)(e)] and [130]; and

(5) in this context, the fact that the Appellant had taken steps to discharge the accelerated payment notice was wholly irrelevant. The purpose of the follower notice legislation was to prevent taxpayers from pursuing their disputes in avoidance cases where the arrangements in question had been shown to fail in other litigation. Continuing to pursue litigation in those circumstances frustrated that statutory purpose and that was why the legislation provided for a penalty. Discharging an accelerated payment notice was no more than complying with another statutory obligation and had nothing to do with meeting the purpose of the follower notice legislation – see *Comtek* at paragraph [46].

The quantum of the penalty

The Appellant's position

158. Mr Avient submitted that, if, notwithstanding the above, we were to conclude that *Audley* was a "relevant" judicial ruling and that the Appellant's failure to take the necessary corrective action was not reasonable in all the circumstances, so that a penalty was properly due, that penalty should have been 10% - the minimum for which the legislation provided – and not 30%, as set out in the Penalty Assessment. The correct approach to this question was the one set out by the Upper Tribunal in *Comtek* at paragraphs [51] and [52]. This was not to adopt an "arithmetic" exercise of simply allocating a notional 20% of the maximum mitigation amount to each of the 5 categories of co-operation specified in Section 210(3) of the FA 2014 but instead:

(1) to approach the question "holistically";

(2) to recognise that the overall purpose of the regime was to discourage taxpayers from pursuing, without good reason, disputes about tax advantages which the Respondents reasonably considered to have been determined in their favour in other finally-decided cases so that co-operation which came closest to addressing that purpose should, accordingly, attract the greatest credit; and

(3) where the taxpayer had taken steps falling with Section 210(3) of the FA 2014, to consider the overall effectiveness of those steps in meeting the purpose of the provisions.

159. In this case, the Appellant had at all times fully engaged with the Respondents in relation to the Follower Notice and had discharged the accelerated payment notice, as the Respondents had already acknowledged in reducing the penalty from the maximum amount of 50% to 30%. Moreover, viewed holistically and purposively, the only relevant co-operation categories were those set out in Sections 210(3)(a), 210(3)(c) and 210(3)(e) of the FA 2014. The Appellant reasonably believed that Audley was not a "relevant" judicial ruling and that he was entitled to succeed in the substantive appeal. As such, he had done all that he could do to co-operate with the Respondents except taking a step which would preclude him from pursuing that appeal. This was particularly relevant given that the Appellant had co-operated to the fullest extent in the enquiry into the Return and had found himself within the follower notice legislation only because the Respondents:

(1) had been dilatory in their pursuit of the enquiry so that the follower notice legislation had been enacted before the enquiry was completed; and

(2) had chosen to issue the Follower Notice before issuing the Closure Notice.

160. Indeed, as the Appellant had made clear in the representations made on his behalf against the issue of the Follower Notice, the Appellant had been under the impression that the enquiry had been concluded and the matter had been closed.

161. Given the above, the Appellant was entitled to the maximum reduction in the penalty.

The Respondents' position

162. In response, Mr Macklam submitted that the level of the Penalty Assessment was perfectly appropriate, given that:

(1) the various categories of co-operation were exhaustively listed in Section 210(3) of the FA 2014 – see *Comtek* at paragraph [37] – and taking the necessary corrective action was one of those categories;

(2) the purpose of the follower notice legislation was to discourage the continuation of an appeal when there was a relevant judicial decision which indicated that the appeal would fail. As such the timing, nature and extent of the taxpayer's co-operation needed to be assessed by reference to whether or not the taxpayer had taken the necessary corrective action and a failure to take the necessary corrective action should mean that a material part of the credit for co-operation should be denied – see *Comtek* at paragraphs [45], [51] and [52(2)] and *Barlow* at paragraph [94]; and

(3) in this case, the Appellant had failed to take the necessary corrective action.

Conclusions in relation to the penalty appeal

"Relevant" judicial ruling

163. In our view, it makes no difference whether the burden of proof in relation to the first question lies with the Appellant or with the Respondents because it is clear beyond any doubt that *Audley* is a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice. For the reasons given by Mr Macklam in paragraphs 151 to 155 above, we consider that, to paraphrase Lady Rose in *Haworth*, there is no scope for a reasonable person to disagree that the principles laid down in, and the reasoning given in, *Audley* denies the Appellant the advantage he sought by entering into the arrangements.

164. We would make the following points in this context:

(1) contrary to the submissions made by Mr Avient, we do not consider *Audley* to be an acutely fact-sensitive decision. The principles which it laid down were straightforward and its reasoning was comprehensive and transparent. Those principles and that reasoning were to the effect that a taxpayer is not entitled to a loss under paragraph 2 of Schedule 13 if :

(a) he deliberately purports to subscribe at an over-value for a relevant discounted security in circumstances where he is indifferent to the fact that he is paying substantially more for the security than it is worth because he is content to make a gift of the excess to the issuer of the security; and

(b) then disposes of the security to a connected party shortly afterwards.

Those were the material facts in *Audley* and they are also the material facts in this case;

(2) it is not entirely surprising that the facts in the two cases are so similar because we have concluded that the structure described above was a mass-marketed scheme (see paragraph 65(12) above);

(3) the arguments which were made by the taxpayer in *Audley* were the same as the arguments made by Mr Avient on behalf of the Appellant in this case. The taxpayer in *Audley* sought to rely on the decision in *Campbell* and reference was made to *Astall*, which was distinguished. This is not a case where the Appellant has raised some novel point which the taxpayer in *Audley* did not raise. In both cases, the submissions made by the relevant appellant were and are identical and were and are that, because the subscription purported to be for a specified amount, that amount should be accepted as

the amount paid in respect of the acquisition of the relevant discounted security notwithstanding the over-value payment;

(4) the taxpayer in *Audley* was represented by a Queen's Counsel who comprehensively argued the taxpayer's case before the First-tier Tribunal. *Audley* was not a case where the taxpayer was not adequately represented;

(5) the conclusion in *Audley* did not depend on some concession made by the taxpayer in that case which the Appellant is contesting in his case;

(6) the First-tier Tribunal in *Audley* provided a fully-reasoned decision which set out its conclusions and the reasons for those conclusions. Those conclusions were entirely consistent with the conclusions which we have reached in relation to the substantive appeal, to the effect that, of the amount which was paid by the Appellant at the time when the Loan Notes were issued, only such part of that amount as was equal to the market value of the Loan Notes at the time of issue was paid in respect of the issue of the Loan Notes and the balance was capital contributions to the companies; and

(7) we consider that none of the differences between the facts in *Audley* and the facts in this case, on which Mr Avient sought to rely as set out in paragraphs 89 to 91 above, is in any way material to the applicability to the Appellant's case of the principles laid down in, and the reasoning set out in, *Audley*. In that regard, taking each of Mr Avient's points in those paragraphs in order, we would comment as follows:

> (a) nothing turns on the specific identity of the issuer in each case – i.e. a newly-formed trust as compared to companies of long-standing. The only relevant feature of the proposal in each case was that the issuer needed to be an entity to which the taxpayer was prepared to make a gift, whether that was the settlement of an amount in a family trust (*Audley*) or capital contributions to wholly-owned companies (this case). There is nothing in the reasoning of the First-tier Tribunal in *Audley* to indicate that the fact that the issuer was a newly-formed trust and not a long-standing company had any relevance to the decision;
>
> (b) in *Audley*, the First-tier Tribunal found as a fact that the transaction in question arose out of an initial meeting to discuss wealth planning in general and the use of trusts in particular – see paragraph [8]. Thus, if anything, there was more of a commercial purpose to the arrangements in *Audley* than there were in this case – see paragraph 65(8) above;
>
> (c) the arrangements in *Audley* amounted to a single composite transaction, as did the arrangements in this case. Contrary to the submissions made on behalf of the Appellant, we have found that the whole of the arrangements in this case were conceived as one composite transaction on the advice of HW and Mr Sherry. It is irrelevant that the precise nature of the connected person which was going to receive the gifts of the Loan Notes had not yet been determined when the Loan Notes were issued;
>
> (d) there are two distinct points to make in relation to the submissions of Mr Avient which are summarised in paragraph 91(4) above.
>
> The first is that, if we focus solely on the cash element of the purported acquisition consideration which was paid by the taxpayer in *Audley*, that cash element considerably exceeded the market value of the relevant loan note on issue. It was £250,000 in comparison to the market value of the loan note on issue of £35,700. Moreover, the fact that the taxpayer in *Audley* paid that cash element on the direction of his advisers and without really understanding the nature of the

transaction – see *Audley* at paragraphs [20] and [33(1)] – is no different from what we have concluded to be the reason for the payment by the Appellant of the purported acquisition consideration in this case (see paragraph 62 above). In both cases:

(i) the cash amount which the taxpayer purportedly paid in respect of the acquisition of the relevant loan note or loan notes was considerably greater than the market value of the loan note or loan notes on issue; and

(ii) the taxpayer had a limited understanding of the arrangements which he was implementing but wanted to secure a loss to shelter his taxable income and was simply following the instructions of his advisers.

Thus, even if we disregard entirely the property element of the purported acquisition consideration in *Audley*, and focus exclusively on the principles laid down in, and the reasoning set out in, *Audley* so far as they pertain to the cash element of that purported acquisition consideration, it is clear that there is no difference between the cash element of the purported acquisition consideration in *Audley* and the entirety of the purported acquisition consideration in this case. And, since the First-tier Tribunal in *Audley* concluded that such part of the purported acquisition consideration in that case as exceeded £35,700 was a gift to the trust issuer in that case, the same principle and reasoning must, logically, apply to the entirety of the purported acquisition consideration in this case.

Turning then to the property element of the purported acquisition consideration, we consider that the points made by Mr Avient in relation to that element have no bearing on the question of whether the facts in this case are governed by the principles laid down in, and the reasoning set out in, *Audley*. We say that because those points all go to the question of whether there really was a transfer of the property to the trust issuer of the loan note or whether, in reality, the property was not transferred to the trust issuer at all but in fact remained within the ownership and control of the taxpayer. The deficiencies in relation to the transfer of the property to which the First-tier Tribunal adverted in *Audley* might very well have led the First-tier Tribunal in *Audley* to conclude that the property did not form part of the amount paid in respect of the acquisition of the loan note by the taxpayer in that case - not because its value exceeded the market value of the loan note on issue but rather because it wasn't, in any meaningful sense, actually "paid" by the taxpayer to the trust issuer but instead remained vested in the taxpayer. That would have been a perfectly understandable way of reaching the conclusion that, viewed realistically, the value of the property did not form part of the amount which was paid by the taxpayer in respect of the acquisition of the loan note. And, had the First-tier Tribunal in *Audley* actually approached its analysis in that way, that would have been a matter which distinguished the facts in *Audley* from the present facts. (It would ultimately not have changed the answer to the question of whether or not *Audley* was a "relevant" judicial ruling in relation to the Follower Notice – for the reason given in the immediately preceding paragraph - but it would nevertheless have been correct to note that it was a point of distinction). However, that is not what the First-tier Tribunal in *Audley* actually said in its analysis. Instead, it simply accepted that the property had actually been transferred to the trust issuer despite the identified shortcomings and concluded that the value of the property was part of the gift made to the trust issuer by the taxpayer – see *Audley* at paragraphs [88] to [90].

It follows from the reasoning adopted by the First-tier Tribunal in *Audley* in this regard that the points made by Mr Avient in relation to the shortcomings in the property element of the purported acquisition consideration are simply not relevant to the principles which *Audley* lays down and the reasoning which is set out in *Audley*; and

(e) finally, we see very little difference between the arrangements in *Audley* and the arrangements in this case in terms of enduring commercial consequences. In *Audley*, even if one discounts the property element of the purported acquisition consideration as being illusory, the result of the arrangements was that £250,000 minus £35,700 had been settled on trust in the trust issuer and the trust transferee held a long-term loan note. Those were no less enduring commercial consequences than the consequences of the arrangements in this case.

165. On the basis of the above, we have concluded that *Audley* is a "relevant" judicial ruling in relation to the arrangements described in the Follower Notice.

Reasonable not to take the necessary corrective action

166. We consider that it was not reasonable in all the circumstances for the Appellant not to have taken the necessary corrective action by 29 June 2017. We say that for the reasons given by Mr Macklam and set out in paragraph 157 above. In particular:

(1) given the conclusion which we have reached in relation to the relevance of the principles laid down in, and the reasoning given in, *Audley*, it was not reasonable for anyone – whether it be the Appellant or his advisers – to believe that those principles and that reasoning did not also apply to the Appellant's arrangements. As such, it was reasonable to expect that the Appellant would take the necessary corrective action by the deadline;

(2) we consider that the Appellant did not take reasonable steps to satisfy himself that he did not need to take the necessary corrective action by the specified date. Reasonable steps would have involved taking written advice from a person who had not been involved in the original advice and could therefore consider the position wholly objectively and untrammelled by any conflict of interest. On his own admission, the Appellant failed to do this;

(3) it is not relevant to this issue that the Appellant took all actions that he could reasonably take in relation to the Follower Notice other than giving up his appeal. The purpose of the follower notice regime is to discourage the litigation of points which have already been decided in a relevant judicial decision. As such, the reasonableness that is being tested in this instance is the reasonableness of continuing with the dispute by failing to take the necessary corrective action and not the reasonableness of other behaviour; and

(4) similarly, we agree with Mr Macklam that the fact that the Appellant discharged the accelerated payment notice is nothing to the point. That was a liability which had nothing to do with the Appellant's obligations under the follower notice legislation.

167. It follows from the above, that, in our view, the Respondents were entitled to impose a penalty on the Appellant for failing to take the necessary corrective action by 29 June 2017 in response to the Follower Notice.

The quantum of the penalty

168. Finally, we consider that the penalty which the Respondents have imposed is wholly appropriate and that the Penalty Assessment should be upheld.

169. In reaching that conclusion, we are following the approach set out by the Upper Tribunal in *Comtek* at paragraphs [51] and [52], as suggested by Mr Avient. It is clear from those paragraphs that, in assessing the penalty for a failure to take the necessary corrective action, the extent of the taxpayer's co-operation should be viewed "holistically", recognising that:

(1) the overall purpose of the regime is to discourage taxpayers from pursuing, without good reason, disputes about tax advantages which have already been determined in favour of the Respondents in a prior case;

(2) co-operation which comes closest to addressing that purpose should, accordingly, attract the greatest credit; and

(3) where the taxpayer has taken steps falling with Section 210(3) of the FA 2014, the overall effectiveness of those steps in meeting the purpose of the regime should be considered.

170. It follows from this that the failure on the part of the Appellant to take the necessary corrective action by the deadline for doing so was a critical failure of co-operation because it meant that the Respondents had to pursue the litigation with the Appellant notwithstanding the decision in *Audley*. In the circumstances, we think that the Respondents were perfectly entitled assess the penalty at 30% and that an assessment at 10% as the Appellant has suggested would have been wholly inappropriate.

DISPOSITION

171. For the reasons set out above, we hereby dismiss each of the substantive appeal and the penalty appeal and accordingly uphold the Closure Notice and affirm the Penalty Assessment.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

172. 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.

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 19 JULY 2022

APPENDIX 1

1. The substantive appeal relates to the relevant discounted securities legislation in Schedule 13. The relevant provisions of Schedule 13 (as it applied in the Tax Year) were as follows:

"**2 Realised losses on discounted securities**

(1) Subject to the following provisions of this Schedule, where—

(a) a person sustains a loss in any year of assessment from the discount on a relevant discounted security, and

(b) makes a claim for the purposes of this paragraph before the end of twelve months from the 31st January next following that year of assessment,

that person shall be entitled to relief from income tax on an amount of the claimant's income for that year equal to the amount of the loss.

(2) For the purposes of this Schedule a person sustains a loss from the discount on a relevant discounted security where—

(a) he transfers such a security or becomes entitled, as the person holding the security, to any payment on its redemption; and

(b) the amount paid by that person in respect of his acquisition of the security exceeds the amount payable on the transfer or redemption.

(3) For the purposes of this Schedule the loss shall be taken—

(a) to be equal to the amount of the excess increased by the amount of any relevant costs; and

(b) to be sustained for the purposes of this Schedule in the year of assessment in which the transfer or redemption takes place."

(4) Sub-paragraph (4) of paragraph 1 above applies for the purposes of this paragraph as it applies for the purposes of that paragraph.

3 Meaning of "relevant discounted security"

(1) Subject to sub-paragraph (2) and paragraph 14(1) below, in this Schedule "relevant discounted security" means any security which (whenever issued) is such that—

(a) taking the security as at the time of its issue, and

(b) assuming redemption in accordance with its terms,

the amount payable on redemption is an amount involving a deep gain or might be an amount which would involve such a gain.

(2) The following are not relevant discounted securities for the purposes of this Schedule—

(a) shares in a company;

(b) gilt-edged securities that are not strips;

(c) excluded indexed securities;

(d) life assurance policies;

(e) capital redemption policies (within the meaning of Chapter II of Part XIII of the Taxes Act 1988); and

(f) subject to paragraph 10 below, securities issued (at whatever time) under the same prospectus as other securities which have been issued previously but (disregarding that paragraph) are not themselves relevant discounted securities.

(3) For the purposes of this Schedule the amount payable on redemption of a security involves a deep gain if—

(a) the issue price is less than the amount so payable; and

(b) the amount by which it is less represents more than the relevant percentage of the amount so payable.

(4) In this paragraph "the relevant percentage", in relation to the amount payable on redemption of a security, means —

(a) the percentage figure equal, in a case where the period between the date of issue and the date of redemption is less than thirty years, to one half of the number of years between those dates; and

(b) in any other case, 15 per cent.;

and for the purposes of this paragraph the fraction of a year to be used for the purposes of paragraph (a) above in a case where the period mentioned in that paragraph is not a number of complete years shall be calculated by treating each complete month, and any remaining part of a month, in that period as one twelfth of a year.

(5) References in this paragraph to redemption—

(a) do not include references to any redemption which may be made before maturity otherwise than at the option of the holder of the security; but

(b) in the case of a security that is capable of redemption at the option of the holder before maturity, shall have effect as references to the earliest occasion on which the holder of the security may require the security to be redeemed.

(6) For the purposes of this paragraph the amount payable on redemption shall not be taken to include any amount payable on that occasion by way of interest.

4 Meaning of "transfer"

(1) Subject to sub-paragraph (2) below, in this Schedule references to a transfer, in relation to a security, are references to any transfer of the security by way of sale, exchange, gift or otherwise.

(2) Where an individual who is entitled to a relevant discounted security dies, then for the purposes of this Schedule—

(a) he shall be treated as making a transfer of the security immediately before his death;

(b) he shall be treated as obtaining in respect of the transfer an amount equal to the market value of the security at the time of the transfer; and

(c) his personal representatives shall be treated as acquiring the security for that amount on his death.

(3) For the purposes of this Schedule a transfer or acquisition of a security made in pursuance of an agreement shall be deemed to take place at the time when the agreement is made, if the person to whom the transfer is made, or who makes the acquisition, becomes entitled to the security at that time.

(4) If an agreement is conditional, whether on the exercise of an option or otherwise, it shall be taken for the purposes of this paragraph to be made when the condition is satisfied (whether by the exercise of the option or otherwise).

(5) This paragraph is without prejudice to paragraph 14(2) to (4) below…

8 Transfers between connected persons

(1) This paragraph applies where a relevant discounted security is transferred from one person to another and they are connected with each other.

(2) For the purposes of this Schedule—

(a) the person making the transfer shall be treated as obtaining in respect of it an amount equal to the market value of the security at the time of the transfer; and

(b) the person to whom the transfer is made shall be treated as paying in respect of his acquisition of the security an amount equal to that market value.

(3) Section 839 of the Taxes Act 1988 (connected persons) shall apply for the purposes of this paragraph."

2. The relevant provisions of Section 839 (as it applied in the relevant tax year) were as follows:

"**839. Connected persons.**

[…]

(3) A person, in his capacity as trustee of a settlement, is connected with—

(a) any individual who in relation to the settlement is a settlor,

(b) any person who is connected with such an individual, and

(c) any body corporate which is connected with that settlement.

In this subsection "settlement" and "settlor" have the same meaning as in Chapter IA of Part XV (see section 660G(1) and (2).

(3A) For the purpose of subsection (3) above a body corporate is connected with a settlement if—

(a) it is a close company (or only not a close company because it is not resident in the United Kingdom) and the participators include the trustees of the settlement; or

(b) it is controlled (within the meaning of section 840) by a company falling within paragraph (a) above.

(4) Except in relation to acquisitions or disposals of partnership assets pursuant to bona fide commercial arrangements, a person is connected with any person with whom he is in partnership, and with the wife or husband or relative of any individual with whom he is in partnership.

(5) A company is connected with another company—

(a) if the same person has control of both, or a person has control of one and persons connected with him, or he and persons connected with him, have control of the other; or

(b) if a group of two or more persons has control of each company, and the groups either consist of the same persons or could be regarded as consisting of the same persons by treating (in one or more cases) a member of either group as replaced by a person with whom he is connected.

(6) A company is connected with another person if that person has control of it or if that person and persons connected with him together have control of it.

(7) Any two or more persons acting together to secure or exercise control of a company shall be treated in relation to that company as connected with one another and with any person acting on the directions of any of them to secure or exercise control of the company.

(8) In this section—

"company" includes any body corporate or unincorporated association, but does not include a partnership, and this section shall apply in relation to any unit trust scheme as if the scheme were a company and as if the rights of the unit holders were shares in the company;

"control" shall be construed in accordance with section 416; and

"relative" means brother, sister, ancestor or lineal descendant.

[…]"

3. For completeness while setting out the relevant legislation, we should observe that, by virtue of Section 104 of the Finance Act 2002, a new provision – paragraph 9A - was inserted into Schedule 13 with effect in relation to transfers taking place on or after 26 March 2002. That provision provided that, upon a transfer of a relevant discounted security by a person (the "relevant person") to a person connected with him where:

(1) the relevant person acquired the security by way of issue;

(2) inter alia, the relevant person was, at the time of issue, connected with the issuer; and

(3) the amount paid by the relevant person on acquisition exceeded the market value of the security at the time of issue,

the relevant person was to be taken as not sustaining a loss from the discount on the relevant discounted security.

APPENDIX 2

1. Section 204 of the FA 2014 sets out the circumstances in which a follower notice may be given. It provides as follows:

"204 Circumstances in which a follower notice may be given

(1) HMRC may give a notice (a "follower notice") to a person ("P") if Conditions A to D are met.

(2) Condition A is that—

(a) a tax enquiry is in progress into a return or claim made by P in relation to a relevant tax, or

P has made a tax appeal (by notifying HMRC or otherwise) in relation to a relevant tax, but that appeal has not yet been—

determined by the tribunal or court to which it is addressed, or

abandoned or otherwise disposed of.

(3) Condition B is that the return or claim or, as the case may be, appeal is made on the basis that a particular tax advantage ("the asserted advantage") results from particular tax arrangements ("the chosen arrangements").

(4) Condition C is that HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements.

(5) Condition D is that no previous follower notice has been given to the same person (and not withdrawn) by reference to the same tax advantage, tax arrangements, judicial ruling and tax period.

(6) A follower notice may not be given after the end of the period of 12 months beginning with the later of—

the day on which the judicial ruling mentioned in Condition C is made, and

(b) the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) the day the tax appeal to which subsection (2)(b) refers was made."

2. Section 201 of the FA 2014 provides as follows:

"201 "Tax advantage" and "tax arrangements"

(1) This section applies for the purposes of this Part.

(2) "Tax advantage" includes—

(a) relief or increased relief from tax,

(b) repayment or increased repayment of tax,

(c) avoidance or reduction of a charge to tax or an assessment to tax,

(d) avoidance of a possible assessment to tax,

(e) deferral of a payment of tax or advancement of a repayment of tax, and

(f) avoidance of an obligation to deduct or account for tax.

(3) Arrangements are "tax arrangements" if, having regard to all the circumstances, it would be reasonable to conclude that the obtaining of a tax advantage was the main purpose, or one of the main purposes, of the arrangements.

(4) "Arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)."

3. Section 205 of the FA 2014 provides as follows:

"205 "Judicial ruling" and circumstances in which a ruling is "relevant"

(1) This section applies for the purposes of this Chapter.

(2) "Judicial ruling" means a ruling of a court or tribunal on one or more issues.

(3) A judicial ruling is "relevant" to the chosen arrangements if—

(a) it relates to tax arrangements,

(b) the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage or a part of that advantage, and

(c) it is a final ruling.

(4) A judicial ruling is a "final ruling" if it is—

(a) a ruling of the Supreme Court, or

(b) a ruling of any other court or tribunal in circumstances where—

(i) no appeal may be made against the ruling,

(ii) if an appeal may be made against the ruling with permission, the time limit for applications has expired and either no application has been made or permission has been refused,

(iii) if such permission to appeal against the ruling has been granted or is not required, no appeal has been made within the time limit for appeals, or

(iv) if an appeal was made, it was abandoned or otherwise disposed of before it was determined by the court or tribunal to which it was addressed.

(5) Where a judicial ruling is final by virtue of sub-paragraph (ii), (iii) or (iv) of subsection (4)(b), the ruling is treated as made at the time when the sub-paragraph in question is first satisfied."

4. Section 217 of the FA 2014 provides as follows:

"217 Transitional provision

In the case of judicial rulings made before the day on which this Act is passed, this Chapter has effect as if for section 204(6) there were substituted—

"(6) A follower notice may not be given after—

(a) the end of the period of 24 months beginning with the day on which this Act is passed, or
(b) the end of the period of 12 months beginning with the day the return or claim to which subsection (2)(a) refers was received by HMRC or (as the case may be) with the day the tax appeal to which subsection (2)(b) refers was made,

whichever is later."

(2) Accordingly, the reference in section 216(10) to the period of 12 months includes a reference to the period of 24 months mentioned in the version of section 204(6) set out in subsection (1) above."

5. Section 207 of the FA 2014 provides as follows:

"207 Representations about a follower notice

(1) Where a follower notice is given under section 204, P has 90 days beginning with the day that notice is given to send written representations to HMRC objecting to the notice on the grounds that—

(a) Condition A, B or D in section 204 was not met,

(b) the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements, or

(c) the notice was not given within the period specified in subsection (6) of that section.

(2) HMRC must consider any representations made in accordance with subsection (1).

(3) Having considered the representations, HMRC must determine whether to—

(a) confirm the follower notice (with or without amendment), or withdraw the follower notice,

and notify P accordingly."

6. Section 208 of the FA 2014 provides as follows:

"208 Penalty if corrective action not taken in response to follower notice

(1) This section applies where a follower notice is given to P (and not withdrawn).

(2) P is liable to pay a penalty if the necessary corrective action is not taken in respect of the denied advantage (if any) before the specified time.

(3) In this Chapter "the denied advantage" means so much of the asserted advantage (see section 204(3)) as is denied by the application of the principles laid down, or reasoning given, in the judicial ruling identified in the follower notice under section 206(a).

(4) The necessary corrective action is taken in respect of the denied advantage if (and only if) P takes the steps set out in subsections (5) and (6).

(5) The first step is that—

(a) in the case of a follower notice given by virtue of section 204(2)(a), P amends a return or claim to counteract the denied advantage;

(b) in the case of a follower notice given by virtue of section 204(2)(b), P takes all necessary action to enter into an agreement with HMRC (in writing) for the purpose of relinquishing the denied advantage.

(6) The second step is that P notifies HMRC—

(a) that P has taken the first step, and

(b) of the denied advantage and (where different) the additional amount which has or will become due and payable in respect of tax by reason of the first step being taken.

(7) In determining the additional amount which has or will become due and payable in respect of tax for the purposes of subsection (6)(b), it is to be assumed that, where P takes the necessary action as mentioned in subsection (5)(b), the agreement is then entered into.

(8) In this Chapter—

"the specified time" means—

(a) if no representations objecting to the follower notice were made by P in accordance with subsection (1) of section 207, the end of the 90 day post-notice period;

(b) if such representations were made and the notice is confirmed under that section (with or without amendment), the later of—

(i) the end of the 90 day post-notice period, and

(ii) the end of the 30 day post-representations period;

"the 90 day post-notice period" means the period of 90 days beginning with the day on which the follower notice is given;
"the 30 day post-representations period" means the period of 30 days beginning with the day on which P is notified of HMRC's determination under section 207.

[…]"

7. Section 209 of the FA 2014, as it applied at the time when the penalty assessment was issued, provided as follows:

"209 Amount of a section 208 penalty

(1) The penalty under section 208 is 50% of the value of the denied advantage.

(2) Schedule 30 contains provision about how the denied advantage is valued for the purposes of calculating penalties under this section.

(3) Where P before the specified time—

(a) amends a return or claim to counteract part of the denied advantage only, or

(b) takes all necessary action to enter into an agreement with HMRC (in writing) for the purposes of relinquishing part of the denied advantage only,

in subsections (1) and (2) the references to the denied advantage are to be read as references to the remainder of the denied advantage."

8. Section 210 of the FA 2014 provides as follows:

"210 Reduction of a section 208 penalty for co-operation

(1) Where—

(a) P is liable to pay a penalty under section 208 of the amount specified in section 209(1),

(b) the penalty has not yet been assessed, and

(c) P has co-operated with HMRC,

HMRC may reduce the amount of that penalty to reflect the quality of that cooperation.

(2) In relation to co-operation, "quality" includes timing, nature and extent.

(3) P has co-operated with HMRC only if P has done one or more of the following—

(a) provided reasonable assistance to HMRC in quantifying the tax advantage;

(b) counteracted the denied advantage;

(c) provided HMRC with information enabling corrective action to be taken by HMRC;

(d) provided HMRC with information enabling HMRC to enter an agreement with P for the purpose of counteracting the denied advantage;

(e) allowed HMRC to access tax records for the purpose of ensuring that the denied advantage is fully counteracted.

(4) But nothing in this section permits HMRC to reduce a penalty to less than 10% of the value of the denied advantage."

9. Section 211 of the FA 2014 provides as follows:

"211 Assessment of a section 208 penalty

(1) Where a person is liable for a penalty under section 208, HMRC may assess the penalty.

(2) Where HMRC assess the penalty, HMRC must—

(a) notify the person who is liable for the penalty, and

(b) state in the notice a tax period in respect of which the penalty is assessed.

(3) A penalty under section 208 must be paid before the end of the period of 30 days beginning with the day on which the person is notified of the penalty under subsection (2).

(4) An assessment—

(a) is to be treated for procedural purposes in the same way as an assessment to tax (except in respect of a matter expressly provided for by this Chapter),

(b) may be enforced as if it were an assessment to tax, and

(c) may be combined with an assessment to tax.

(5) No penalty under section 208 may be notified under subsection (2) later than—

(a) in the case of a follower notice given by virtue of section 204(2)(a) (tax enquiry in progress), the end of the period of 90 days beginning with the day the tax enquiry is completed, and

(b) in the case of a follower notice given by virtue of section 204(2)(b) (tax appeal pending), the end of the period of 90 days beginning with the earliest of—

(i) the day on which P takes the necessary corrective action (within the meaning of section 208(4)),

(ii) the day on which a ruling is made on the tax appeal by P, or any further appeal in that case, which is a final ruling (see section 205(4)), and

(iii) the day on which that appeal, or any further appeal, is abandoned or otherwise disposed of before it is determined by the court or tribunal to which it is addressed.

(6) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination."

10. Section 214 of the FA 2014, as it applied at the time when the penalty assessment was issued, provided as follows:

"214 Appeal against a section 208 penalty

(1) P may appeal against a decision of HMRC that a penalty is payable by P under section 208.

(2) P may appeal against a decision of HMRC as to the amount of a penalty payable by P under section 208.

(3) The grounds on which an appeal under subsection (1) may be made include in particular—

(a) that Condition A, B or D in section 204 was not met in relation to the follower notice,

(b) that the judicial ruling specified in the notice is not one which is relevant to the chosen arrangements,

(c) that the notice was not given within the period specified in subsection (6) of that section, or

(d) that it was reasonable in all the circumstances for P not to have taken the necessary corrective action (see section 208(4)) in respect of the denied advantage.

(4) An appeal under this section must be made within the period of 30 days beginning with the day on which notification of the penalty is given under section 211.

(5) An appeal under this section is to be treated in the same way as an appeal against an assessment to the tax concerned (including by the application of any provision about bringing the appeal by notice to HMRC, about HMRC's review of the decision or about determination of the appeal by the First-tier Tribunal or Upper Tribunal).

(6) Subsection (5) does not apply—

(a) so as to require a person to pay a penalty before an appeal against the assessment of the penalty is determined, or

(b) in respect of any other matter expressly provided for by this Part.

(7) In this section a reference to an assessment to tax, in relation to inheritance tax, is to a determination.

(8) On an appeal under subsection (1), the tribunal may affirm or cancel HMRC's decision.

(9) On an appeal under subsection (2), the tribunal may—

(a) affirm HMRC's decision, or

(b) substitute for HMRC's decision another decision that HMRC had power to make.

(10) The cancellation under subsection (8) of HMRC's decision on the ground specified in subsection (3)(d) does not affect the validity of the follower notice, or of any accelerated payment notice or partner payment notice under Chapter 3 related to the follower notice.

(11) In this section "tribunal" means the First-tier Tribunal or Upper Tribunal (as appropriate by virtue of subsection (5))."

11. Section 218 of the FA 2014 provides that references to "HMRC" in the provisions set out above mean the Respondents.