Neutral Citation: [2022] UKFTT 408 (TC)

Case Number: TC08634

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/00407

TAX AVOIDANCE – INCOME TAX – loss determination on disposal of gilt strips – paragraph 14A Schedule 13 Finance Act 1996 – grant of option to trustee followed by assignment of option to a third party purchaser – whether the concept of 'loss' pursuant to para 14A(1) is a 'commercial' or 'legal' concept – whether the amount paid by the purchaser to the trustee as a person other than the transferor is an 'amount payable on the transfer' under para 14A(3)(b) – 'Ramsay' *application,* 'MacNiven' *on the commercial/legal dichotomy*, 'Campbell' *revisited,* 'Berry' *considered – quantum of loss claim reduced – appeal allowed in part*

Heard on: 13 to 17 September 2021
Judgment date: 07 November 2022

Before

TRIBUNAL JUDGE HEIDI POON

Between

TIMOTHY WATTS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Aparna Nathan KC and Colm Kelly, Counsel, instructed by Anthony Collins Solicitors

For the Respondents: Jonathan Davey KC and Joshua Carey, Counsel, instructed by HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Mr Timothy Watts ('the appellant') appeals against the closure notice issued by the respondents ('HMRC') on 3 August 2018, which amended his self-assessment return for the tax year ended 5 April 2004 (the '**2004 Return**'). The amendments disallowed the appellant's claim to income tax loss in the quantum of £1,349,600. The sum of tax at stake is £529,838.26.

2. The loss claim arose in consequence of the appellant's participation in a gilt strip planning scheme (the '**Scheme**' or '**Arrangements**') promoted by Grant Thornton. The claim is pursuant to paragraph 14A(1) of Schedule 13 to the Finance Act 1996 ('**FA 1996**') as respects losses sustained from 'Strips of government securities' ('**para 14A relief**').

LEGISLATION

3. The provisions of Schedule 13 applicable in the tax year 2003-04 relevant to this appeal is set out in **Annex 1**. At the relevant time, para 14A, Sch 13 FA 1996 provides as follows.

> '**14A Strips of government securities: losses**
>
> (1) A person who sustains a loss in any year of assessment from the discount on a strip shall be entitled to relief from income tax on an amount of his income for that year equal to the amount of the loss.
>
> (2) The relief is due only if the person makes a claim before the end of twelve months from the 31st January following that year.
>
> (3) For the purposes of this paragraph a person sustains a loss from the discount on a strip where —
>
> (a) he transfers the strip or becomes entitled, as the person holding it, to any payment on its redemption; and
>
> (b) the amount paid by him for the strip exceeds the amount payable on the transfer or redemption (no account being taken of any costs incurred in connection with the transfer or redemption of the strip or its acquisition).
>
> The loss shall be taken to be equal to the amount of the excess, and to be sustained in the year of assessment in which the transfer or redemption takes place.
>
> (4) In sub-paragraph (3) above the reference to a transfer in paragraph (a) includes a reference to a deemed transfer under paragraph 14(4) above (and paragraph (b) shall be read accordingly.)
>
> (5) This paragraph does not apply in the case of –
>
> (a) any transfer of a strip for the time being held under a settlement the trustees which are not resident in the United Kingdom, or
>
> (b) any redemption of a strip which is so held immediately before its redemption.'

AUTHORITIES

4. The authorities lodged for the hearing, together with further documents referred to in this decision notice are set out in **Annex 2**.

EVIDENCE

5. Three witnesses were called for the appellant, who appeared in the order of Mr Martin Green, Mr Clive Hamilton, and Mr Timothy Watts. Mr Green is the independent financial adviser who introduced the Scheme to Mr Watts. Mr Hamilton is a retired chartered accountant, and had worked formerly in various accounting roles in the appellant's business, including giving assistance to Mr Watt's tax agent in relation to the preparation of the 2004 Return.

6. Each witness has lodged a statement, and their evidence was tested against documentary evidence during cross-examination. Whilst I have no issue with the general credibility of the witnesses, and accept their evidence as to matters of fact in relation to their understanding of the Scheme, I have a few qualifications to Mr Watt's evidence, as noted in my findings of fact.

7. A transcriber was in attendance throughout the hearing and the daily transcript was made available to the parties and the Tribunal the following day. References to the PDF transcripts are in the format of '(Day, Page, Line numbers)'.

THE FACTS

Background

8. At the material times in 2003, Mr Watts was (and still is) Chairman of Pertemps Network Group Limited, which is a group of 114 companies ('**Pertemps**'). Pertemps Group is one of the largest recruitment companies in the UK with 40,000 employees and a turnover of £1billion. Mr Watts' evidence is summarised as follows.

(1) Prior to 2003, Mr Watts' previous experience with government gilts was limited to purchasing for his parents and a small self-administered pension fund. He was aware that income from a gilt was taxable, but that the gain arising on disposal was not.

(2) Mr Green provided advice to Pertemps and its employees as a qualified independent financial adviser ('IFA'), and introduced Eric Williams, the regional senior partner of Grant Thornton to Mr Watts. According to Mr Watts, Mr Green had 'specifically' been asked 'to identify people of significant wealth in the Midlands so that [Eric Williams] might be introduced to them'.

(3) In October 2003, Mr Williams, accompanied by Mr Green, visited Mr Watts with Mr Hamilton in attendance. During the hour-long meeting, Mr Williams explained to Mr Watts that the government had difficulty selling sufficient gilts to cover the difference between public spending and revenues.

(4) Mr Watts said that he did not have sufficient liquid cash at the time, and Mr Williams explained that under the gilt strip scheme, Mr Watts would be lent cash to purchase gilt strips.

(5) Mr Watts said that he had previously been approached by Ernest & Young with similar arrangements but did not enter into them as he 'did not feel comfortable with those arrangements'. He was 'comfortable entering into the arrangements marketed by Grant Thornton as they had been advised by the same counsel' who, as understood by Mr Watts, had also advised the government 'to devise arrangements that would be more attractive to wealthy persons who wished to purchase gilts'; and that the government had brought in legislation to allow the interest element on gilts to be split into different strips.

(6) Mr Watts said that he was 'sold these arrangements as a way of helping the government by purchasing gilts'; and that to his mind, was a 'win-win scheme'.

9. In evidence, Mr Watts named 'the senior QC' supposed to have advised the government on 'reforming' the legislation on gilt strips, and who was said to be the same counsel advising Grant Thornton in relation to the Scheme; that the named 'pre-eminent tax barrister should

have been subpoenaed' since Mr Watts had drawn comfort from the fact that it was the same counsel advising Grant Thornton on the Scheme; and that Ernest Young (agent for the appellant's personal tax affairs at the time) had 'looked at it and gave their blessing'.

The entities involved in the Scheme

10. The following entities were involved in the Scheme as implemented:

(1) Grant Thornton LLP as the scheme promoter ('**Grant Thornton**');

(2) SG Hambros and Trust (Jersey) Limited as the loan provider and adviser in respect of government securities ('**Hambros**' or the '**Bank**');

(3) Cobbetts LLP based in Manchester as the provider of the legal services in relation to the execution of the instruments to implement the Scheme ('**Cobbetts**');

(4) Timothy Watts IIP Settlement 2003 created with the appellant as the settlor and life tenant (the '**Trust**');

(5) Cobbetts as the trustee company by the name 'Timothy Watts IIP Settlement 2003 Limited' (the '**Trustee**');

(6) Investec Bank as the 'third-party purchaser' of the Gilt Strips ('**Investec**').

Introduction to the Scheme

Marketing literature

11. Mr Green works in the area of wealth management as an IFA, and said he had known Mr Watts as a friend (for some 15 years) and a client (for 10 years) prior to introducing him to Eric Williams in 2003. Mr Green recalled attending a promotional presentation given by Mr Williams of Grant Thornton on 'trading in gilt strips to generate income tax loss', and he was made aware of similar 'tax planning products' to reduce tax for high net-worth individuals promoted by Ernest Young and KPMG at the time.

12. From Mr Williams' presentation, Mr Green considered that the arrangements Grant Thornton would put in place were 'watertight', and that he was told that 'a "top" tax QC had said that these arrangements worked'. In evidence, he described the scheme as 'well thought-out' and the 'construction appeared simple', and that it was based on the legislative statement in the relevant Finance Act. Having introduced Mr Williams to Mr Watts, Mr Green understood that 'Mr Watts entered into the arrangements marketed to him by Grant Thornton' after the meeting attended by Mr Green with Mr Williams, to meet with Mr Watts and Mr Hamilton.

13. On Grant Thornton's marketing literature, Mr Watts' annotated instruction for Mr Hamilton to file the 'Janet-and-John version' of the marketing material, which would appear to be the presentation slides used by Mr Williams to explain the working of the scheme to Mr Watts. The title page says: '*Income Tax Loss Planning, Using Government Stocks*', followed by a brief reference on the second slide with regard to the legislative background, namely:

> 'The Government (by parliamentary announcement on 27 March 2003 and in the 2003 Finance Act) stopped RDS [Realised losses on Discounted Securities] schemes.
>
> **However**, the new rules specifically exempt "Gilt Strips" from the changes designed to stop the RDS planning…' (emphasis original)

14. The material then introduces 'Gilt Strips' in the following terms:

> 'FA 1996, s202 and FA1996 Sch 40 make various provisions to enable the creation of the facility operated by the Bank of England, for gilt-edged securities to be stripped into their 2 components, i.e. income payments and redemption proceeds.

> A person who holds a gilt that is designated as "strippable" will then be able to surrender it to the Bank of England and in its place receive a number of gilt strips. Each strip will be a fully fledged gilt-edged stock in its own right.'

Costs for entering the Scheme

15. The literature summarises the '*Costs*' under two sub-headings:

(1) *No borrowing*: (i) acquisition of gilt strips 0.25% commission payable; (ii) stamp duty 0.5%; (iii) Gilt strip sale costs 0.6%; (iv) Grant Thornton 6%.

(2) *With borrowing*: (i) costs as above 7.35%; (ii) arrangement fee 0.5% (minimum £2,500); (iii) interest costs 5% for the period outstanding (estimated 14 days = £1,918 on £1m).

(3) Grant Thornton's fee is stated to include: (i) all trustees costs (excepting trust return filing of £400); (ii) all planning time; (iii) all legal costs; (iv) all relevant documentation.

Calculation of the loss illustrated

16. The two slides with the heading '*Calculation of the loss*' show tabulated figures, with the acquisition value of £1 million being used for illustration, and against which Mr Watt's manuscript ('**MS**') notations with figures for the scenario of £1.5 million (in italics below).

Economic loss				***MS Figures***
Acquisition of Gilt strips (day 1)		1,000,000		*1,500,000*
Option price received (day 10)		(900,000)		*(1,350,000)*
Strike price received (day 21)		(100,000)		*(150,000)*
Loss		**NIL**		--

Tax loss				***MS Figures***
Acquisition of Gilt strips		1,000,000		*1,500,000*
Strike price received		(100,000)		*(150,000)*
Loss		**(900,000)**		*(1,350,000)*
				x 40%
				= 540,000

Mr Watt's evidence on 'nil economic loss'

17. With reference to the tabulated manuscript figures in Grant Thornton's marketing literature, Mr Watts was cross-examined on his understanding of 'nil economic loss'. The exchanges between Mr Davey and Mr Watts in this respect are as follows:

> 'Q: Mr Watts, as Grant Thornton put it in their own literature, there was "Nil economic loss" here, was there not?
>
> A: I wouldn't call a hundred thousand pounds nil economic loss. I wouldn't call interest on the money nil economic loss. I wouldn't call putting my family silver and my house at risk nil economic loss …
>
> Q: There was simply a mechanism (the "Meccano" as you put it) designed to spit out the win that you referred to, supposedly giving the very significant tax saving which Grant Thornton referred to in relation to what they called their "Tax avoidance planning idea" [§§ 24 and 27 below] – that is correct, is it not?
>
> A: To the best of my knowledge, in UK law, tax avoidance is a perfectly legal and moral thing to do. Tax evasion is not.

> Q: Mr Watts, you said that you wished to help the government, does it, to avoid half a million pounds of tax?
>
> A: … the government managed to sell one and a half trillion … of government interests, most of which were gilts. I would say it fantastically helped the Exchequer and the government … ' (Day 3, p80, L12-25; and p81, L1-20]

Implementation of the Scheme

The engagement of Grant Thornton

18. The letter of engagement dated 15 October 2003 addressed to the appellant was headed: '*Core Investment Business Advice and Taxation Advice on Gilt Strip Scheme*'. The scope of the engagement was stated to be limited to 'only the acquisition and disposal of Gilt Strips', and that the advice by Grant Thornton was given 'as an independent intermediary'. It is also stated that whilst Grant Thornton had an agreement with Hambros to provide the appellant with advice in respect of government securities, that would be a separate engagement with Hambros.

19. The terms of engagement are set out in a separate document whereby Grant Thornton 'will advise on an income tax planning strategy involving the sale of options over gilt strips and on the implementation of that strategy'. The services also include disclosure documentation and wording for the self-assessment tax return for the year in which the strategy was implemented, with the caveat that if the wording was changed in any way, Grant Thornton would not be able to accept any responsibility.

20. The total fees for the work were set at 5% of the value of the gilt strips acquired plus VAT, and the terms of engagement stipulated the quantum of fees payable to be £75,000 plus VAT, with the qualifier that the 'fees in relation to the planning arrangement do not include fees in relation to Inland Revenue enquiries or challenges'.

Cobbetts Solicitors in the terms of engagement

21. The firm of solicitors Cobbetts based in Manchester was specified as 'being sub-contracted' to prepare the relevant legal documents for 'the proposed structure (ie formation and administration of the settlement)'. The role of Cobbetts includes:

> '[Cobbetts] will also provide the trustees of the settlement (via a corporate trustees company wholly owned by the partners of Cobbetts) and in that capacity will administer the trust. In their capacity as trustees, Cobbetts will be acting independently under the Trustee Acts and not under our instructions.'

The 'proposed structure' in summary

22. The engagement letter required it to be read with the accompanying document entitled 'Using Gilt Strips', which sets out 'in more detail the use of gilt strips in income tax planning' as having 'been developed by Grant Thornton in conjunction with Counsel'. The content of the document is 'confidential to Grant Thornton', and the outline of the proposal is stated as:

> 'In summary, the proposed structure is implemented as follows:
>
> (i)You will purchase gilt strips in the market to the value of, say, £1,500,000.
>
> (ii) You settle a sum on a settlement of, say, £150,000.
>
> (iii) You grant an option to the trustees to acquire the strips at a strike price of, say, £150,000. The premium for which will be its then market value and this will be paid to you.
>
> (iv) The trustees may then look to sell the, as yet, unexercised option to a third party, e.g. a bank.

> (v) The bank exercise the option requiring you to transfer the strips to it for consideration of £150,000.
>
> (vi) The strip will mature and the bank will receive the £1,500,000.
>
> The difference in value between the amount paid by you for the strip (e.g. £1,500,000) and the consideration received from the bank (e.g. £150,000) will be an income tax loss and will be available to shelter other income arising in the same tax year.'

Money in trust 'yours as of right'

23. Under the heading 'Money in the trust', the 'Using the Gilt Strips' document states, *inter alia*, as follows:

> 'The monies in the trust are held on your behalf by the trustees and all income arising thereon is yours as of right. The trustees have the power to lend money to you or even appoint capital out to you as a beneficiary.'

Risk factors – potential challenge from Revenue

24. Under the heading of 'Risk factors – important', the document states the potential challenge by HMRC in the following terms:

> 'As with any tax planning arrangements there are risks that the arrangements will not achieve the desired outcome. The risks outlined below are not intended to be an exhaustive list. …Whilst we and Tax Counsel are confident that this is a *legitimate tax avoidance planning idea* we cannot guarantee that the Inland Revenue will not seek to attack it. … The Finance Act 2003 changed the law with the aim of preventing similar arrangements. As this planning idea is based on broadly similar principles to those arrangements, the Inland Revenue are likely to take exception to the planning … (italics added, see §14)
>
> One avenue of attack … would be to argue that the premium received for the grant of the option should be included in the calculation of the income loss which would negate the benefit of the planning idea. …
>
> A further possibility is that the … Revenue may seek to argue that the position should be analysed on a commercial basis rather than a strictly technical (or juristic basis). … that as a commercial matter no loss arose after all …'

25. The caveats against the use of the gilt strip as an investment vehicle, and the efficacy of the scheme are stated as follows:

> 'The purchase of the gilt strip for these purposes is not intended to be for investment gain and you will not get back the amount originally invested.
>
> Grant Thornton cannot guarantee the efficacy of these arrangement, which would be a matter for the court to decide in the event of an Inland Revenue challenge. … For the avoidance of doubt, the fees for the implementation of this scheme do not include fees in relation to an Inland Revenue challenge.'

The 'saving' as quantified

26. After stating the costs again in terms of fees for 'advising on and implementing the income tax planning strategy', the final paragraph to the document quantifies the 'saving':

> 'You will appreciate that the proposed acquisition of gilt strips up to a value of £1.5m could generate an income tax saving of up to £540,000.'

Risk-disclosure statement

27. Another document in the cohort of pre-implementation literature is a two-page document entitled '*Risk Warning – Gilt Strip Scheme*', which sets out the risks associated with the Scheme, whereby 'the arrangements will not achieve the desired outcome', even though:

> '[Grant Thornton] and Tax Counsel are confident that this is *a legitimate tax avoidance planning idea* we cannot guarantee that the Inland Revenue will not seek to attach it. This would mean that you will not obtain tax relief for the relevant loss and you would lose money.' (emphasis added)

28. The document sets out the 'avenue of attack' whereby HMRC would argue: (a) 'that the premium received for the grant of the option should be included in the calculation of the income loss which would negate the benefit of the planning idea', or (b) 'that the position should be analysed on a commercial basis rather than a strictly technical (or juristic basis)'.

29. The uncertainty as to the efficacy of the Scheme in generating income tax loss against PAYE, or Schedule DIII (interest) income is expressly stated.

Third-party purchaser and the 'actual economic loss'

30. As to the uncertainty in finding a third-party purchaser, it is set out in terms as follows:

> 'Grant Thornton cannot guarantee that a purchaser will buy the option. We have approached a number of institutions who have indicated in principle that they would be interested in buying such options but they are not required to do so. *The price at which you can sell the option determines the actual economic loss and is not guaranteed*. Any potential purchasers would look at each option in isolation and decide whether or not they are prepared to purchase that option and at what price. You could, therefore, get back less than anticipated at the outset or the option may not be sold at all.' (emphasis added)

31. The document concludes with a statement of 'Acknowledgement by client' supposed to be signed and dated by Mr Watts to confirm that he had read the risk disclosure statement.

The 'Suitability Letter'

32. After the cohort of engagement documents (signed off by Mr Williams in the name of Grant Thornton), Mr Williams sent the 'Suitability Letter' to Mr Watts, dated 16 October 2003. The letter was accompanied by a questionnaire, which had been completed and signed by Mr Watts apparently during the meeting with Mr Williams on 15 October 2003. The Suitability Letter refers to key aspects of what Mr Watts had stated in the questionnaire:

> '… you stated that you will receive significant income, (at least £1,500,000) in the current tax year and you would like to enter into some form of planning to shelter this income from income tax liability. … In the financial questionnaire, you have described your attitude to risk as "adventurous", … This attitude to risk has been taken into account in formulating the recommendations made to you.'

33. The recommendations, as stated in the 'Suitability Letter' are as follows:

> 'In view of your objective and attitude to risk, … we have recommended that you purchase Gilt Strips with a view to the possibility of those strips subsequently being sold in circumstances that might give rise to an allowable loss for income tax purposes. …'

Requirement to contribute £150,000 into IIP Trust

34. At paragraph 11 of the Suitability Letter, and under the heading of 'Interest in Possession Trust', the purpose of the trust in the Scheme is explained as follows:

> 'In order to use gilt strips for the purpose of mitigating income tax it is necessary to establish an interest in possession (IIP) and Cobbetts solicitors will deal with the trust deeds in this respect. An initial amount of £10 is all that is required to establish the trust. However, an additional contribution of £150,000 will need to be made …'

Schedule of cash and tax positions for a scheme user

35. Amongst the engagement documents provided by Grant Thornton is a schedule of the cash and tax positions for a scheme user under different scenarios. The schedule would appear to carry pre-populated formulae that generate the sets of relevant figures for illustration by inserting a lead figure as suggested by the prompt: '*Insert value of gilt strips to be acquired*'.

36. The value of the gilt strip figure inserted on the schedule is 1,500,000, which then gives rise to the following two figures at 90% and 10% respectively of the inserted value, namely:

Granted option to trust for say	1,350,000
Strike price of option say	150,000

Scenario 1: Option Lapses

37. The figures relevant to the first scenario if the '*Option Lapses*' are:

> 'Individual purchases gilt strips (1,500,000)
> Result of option lapsing is that individual hold
> gilt strips to maturity with a value of 1,500,000
> Individual has also received the option proceeds of 1,350,000
> Trust has paid for an option and has no asset and therefore has lost (1,350,000)
> Tax consequences none as the grant of the option is not a chargeable event
> No income tax consequence
> Unless the trust has been funded with full value it will be insolvent'

Scenario 2: Trustees exercise the option

38. The figures relevant to the second scenario where the '*Trustees exercise the option*' are:

> 'Individual purchases gilt strips (1,500,000)
> Individual receives option proceeds 1,350,000
> Individual receives strike price from trust 150,000
>
> Trust could now hold to maturity and receive full value or sell at market value depending on market value between date of exercise and redemption
>
> Technically the loss still arises but this is very aggressive and open to serious challenge under the *Ramsey* case.
> GT [i.e. Grant Thornton] will not claim a loss in these circumstances.'

Scenario 3: Trustees sell the option

39. The figures relevant to the third scenario where the '*Trustees sell the option*' are:

> 'Individual purchases gilt strips (1,500,000)
> Individual receives option proceeds 1,350,000
> Individual receives strike price 150,000
>
> Any third party purchaser is almost certain to exercise the option and therefore assumed to do so.
>
> If not then the example is as number 1 but the trust does not become insolvent, the individual is better off by the option proceeds paid by the third party.
>
> Tax consequences the option proceeds are ignored for the purposes of income tax if the option is exercised by a third party purchaser. As such the individual suffers a loss for tax of 1,350,000
>
> This is available for offset against income of the year.

> Trustees may make a profit or loss on sale depending on market value of option at date of sale.'

Scenario 4: FTSE 100 above 5,500

40. The fourth scenario is under the heading *FTSE 100 rises above 5,500 for > 10 days* and is set in the following terms:

> 'In the period before the option is exercised, should the FTSE 100 index rise above 5,500 for a continuous period of 10 days then the option would unravel and the proceeds would be repayable back to the trustees as if the option has not been granted.'

FTSE 100 rising above 5,500 in evidence

41. Mr Hamilton was cross-examined as 'an additional pair of ears' at the introductory meeting of the scheme by Mr Williams, and his understanding of what he referred to as 'meaningful risk' in that the scheme 'could fail if the stock exchange went above a particular level', and for that reason, 'he was fully satisfied that there was a risk in the scheme'. It was put to Mr Hamilton that the likelihood of FTSE 100 rising beyond 5,000 in 'a matter of days against the backdrop of the Iraq war breaking out' was 'vanishingly remote'. Mr Hamilton said it was not 'a vanishing small event', given the fact that 'the stock exchange can be very volatile, especially on occasions such as home price, Iraq wars, Twin Towers events et cetera'.

42. It was then put to Mr Hamilton that earlier in 2003 the FTSE was closer to 3,000 than 5,000[1] (see §53(2)(a)) and it would have to go up by more than 10 percent' to reach the figure needed, and that it was a 'once in a blue moon event' to achieve a 'double digit FTSE rise'. Mr Hamilton deferred to 'better folk' with 'more experience of the stock market to comment as to the percentage change of this happening in a particular set of circumstances'.

Documents to implement the Scheme

43. In relation to the implementation of the scheme, Mr Hamilton described his role as 'a middleman', 'a filter' to screen documents 'worthy of Mr Watt's attention', and a filer of relevant documents sent by Grant Thornton or EY.

(1) The loan arrangement with Hambros

44. On 16 October 2003, Grant Thornton wrote to Hambros on behalf of the appellant to arrange the loan of £1.5 million. The letter was accompanied by a statement of assets and liabilities of the appellant, stating that he is the chairman and an 80% shareholder of Pertemps Group Limited, which had a turnover of £343 million in the year to 31 December 2002 (£351 million to 31 De3cember 2001), and pre-tax profits of £3.089 million (£2.06 million to 31 December 2001). A prudent valuation of the company was around £50 million. The appellant was said to 'draw salary and bonuses totalling around £1.5 million in the current tax year'.

45. On 21 October 2003, Eric Williams of Grant Thornton wrote to the appellant to 'remind' him of 'the issues that had been discussed', in particular, that the appellant intended to purchase gilt strips in the sum of £1.5 million and to borrow this sum plus a small additional amount to cover costs from Hambros. The purpose of the borrowing was stated as: 'to put you in the position to make this purchase'. The rate of borrowing was advised to be at 5%, (being 1.5% over the then base rate of 3.5%), and the arrangement fee will be 0.5% of the amount borrowed.

46. The key terms of the loan facility for £1.5 million as set out in Hambros' letter of 28 October 2003, (signed by the appellant on 29 October 2003) include: (a) the purpose was to assist with the purchase of gilt strips or other investments acceptable to the Bank; (b) the term

[1] The FTSE 100 index was at 3,287 on 12 March 2003, around 4,000 in July 2003, and steadily rose to 4,308 on 20 November 2003, and closed the year at 4,476.

was expected to be for a period of one month, subject to the Bank's right to seek immediate repayment; (c) the rate of interest was 5% per annum, payable quarterly; (d) an arrangement fee of 0.5% of the facility amount was payable to the Bank; (e) the Bank was to have a charge over the gilt strips as security for the borrowing.

47. On or around 28 and 29 October 2003, the execution of the following instruments took place, whereby:

(1) The appellant entered into a loan facility with Hambros for the sum of £1.5 million to 'assist with the purchase of gilt strips' (the '**Loan Agreement**').

(2) By a Deed of Charge, the appellant covenanted that he would charge the gilt strips to be acquired in favour of Hambros, such charge being in respect of the appellant's obligations and liabilities under the Loan Agreement (the '**Gilt Strips Charge**'), including the right to take possession of the gilt strips; to sell, exchange or convert into money or otherwise dispose of the gilt strips. The appellant was obliged to take all action necessary to enable the Bank to exercise these rights.

(3) The appellant executed a further power of attorney in favour of Hambros, whereby the Bank was appointed as the appellant's attorney with power to exercise the Bank's rights in respect of the property (i.e. the Gilt Strips) to like effect of the Charge.

(2) The appellant created the IIP Trust

48. By deed dated 29 October 2003 produced by Cobbetts solicitors:

(1) The Timothy Watts IIP Settlement 2003 was created by deed (the '**Trust Deed**') between the appellant as settlor and Timothy Watts IIP Settlement 2003 Ltd as Trustee. The Trust Deed stated the initial fund was £10 (documentation absent).

(2) The appellant was appointed as 'Life Tenant' under the Trust (clause 1.4); was a beneficiary under the Trust; the other beneficiaries were members of the appellant's family (clause 1.5); the appellant was entitled to income of the Trust (clause 3.1). The appellant reserved to himself the power to appoint new trustees (clause 10.1), and to remove any trustee (clause 10.3).

(3) The Trustee had wide powers of appointment, (clause 4.1), such as the power to advance the trust property for the benefit of any beneficiary (including the appellant), and to borrow on the security of the trust fund, and with all the powers of an absolute beneficial owner in relation to the management and administration of the trust fund.

49. On 29 October 2003, the following payments were made Mr Hamilton's instruction via a banking system called Hexagon, as recorded in reports generated: (a) a payment of £150,000 to Cobbetts Client Account in relation to the IIP Trust settlement, and (b) a sum of £11,500 to the appellant's Call Deposit account with Hambros.

(3) The appellant purchased gilt strips

50. The gilt strips were purchased by Hambros on behalf of the appellant by drawing down on the loan facility. The correspondence and documents as concerns the gilt strip purchase are as follows:

(1) By letter dated 29 October 2003, Mr Hartland (Tax Manager) of Grant Thornton wrote to the appellant to 'enclose copies of the documentation signed in the meeting [of 15 October 2003]' and confirmed that Hambros would be 'looking to draw down the loan and acquire the necessary gilt strips later this week' and would telephone Mr Watts 'to fulfil their compliance requirements' prior to the purchase.

(2) As part of the compliance requirements, Mr Watts sent Hambros (Grant Thornton copied in) a facsimile with the subject heading of 'Purchase of Gilt Strips', which stated:

> 'Further to our conversation of 4th November 2003, I write to confirm my agreement to the purchase of the Gilt Strips to the amount of £1,500,000 as advised.'

(3) On or before 7 November 2003, pursuant to the Loan Agreement with Hambros, the Gilt Strips were acquired on behalf of the appellant using funds provided by Hambros. After the acquisition, Hambros held the Gilt Strips as nominee.

(4) The appellant granted option to Trustee

51. To implement the part of the Scheme in relation to the grant of option by the appellant to the Trustee, the following correspondence and instruments took place:

(1) On 7 November 2003, the appellant wrote to Hambros to advise of his intention to grant an option over the Gilt Strips to the Trustee, and to request written consent thereto from Hambros as nominee holder of the strips, and over which it had a charge.

(2) By undated deed (the '**Consent Deed**'), Hambros consented to: (i) the appellant granting the Trustee the Option; (ii) the appellant granting the Trustee a charge over the Gilt Strips as security for the obligations of the appellant under the Option (the '**Option Charge**'); (iii) the release of the Charge; (iv) the appellant agreed to grant Hambros a charge over his interest under the Option Contract (the '**Option Contract Charge**').

(3) On 7 November 2003, the appellant wrote to the Trustee to grant an option to purchase the gilt strips, stating:

> 'I should like to grant an option to the trustees to purchase the UK Treasury Principal Gilt Strip 7 December 2003, nominal amount £1,504,212 SEDOL 0219055, which I currently own.
>
> 'I enclose for your consideration a draft option deed and would be grateful if you could [unclear] the deed for me if this is acceptable to you. I propose that the consideration for the grant of the option is £1,346,200 and I also propose an option consideration payable on exercising the option of £150,400.'

(4) On 13 November 2003, Hambros issued a notice of assignment (the '**Notice of Assignment**') providing that the Trustee had assigned the rights in respect of the Option Contract and the Option Charge to Hambros under the Option Contract Charge (the '**Assignment**').

(5) The appellant acknowledged the Notice of Assignment by way of written notice (the '**Acknowledgement of Notice of Assignment**'), which was witnessed but undated, whereby he agreed that: 'upon payment of the relevant exercise price by the Secured Party when the option conferred by the Option Contract is capable of exercise perform the Option Contract in favour of Secured Party and effect any required transfer of the Gilt Strips or any other property to the Secured Party'.

(5) The Trustee assigned Option to Investec

52. On 19 November 2003, Cobbetts wrote to Hambros in relation to documents executed by the appellant and/or the Trustee. The minute of a trustee meeting referred to various matters in respect of the Scheme, and the completion of a written resolution whereby:

(a) The Trustee would enter into the Option Contract with the appellant;

(b) Hambros having been requested to, had agreed to provide a loan facility of £1,350,000 for the purpose of funding the consideration due under the Option Contract (the '**Trustee Loan Agreement**').

53. On or around 19 November 2003, the following events took place:

(1) The Option Contract was entered into by way of deed (the '**Option Contract Deed**'). The terms of the Option Contract included that the consideration payable for the grant of the Option was £1,338,749 and the consideration payable on exercise of the Option was £150,400.

(2) The terms of the Option Contract included a condition for the Option to be exercisable until 28 November 2003 if the following condition was *not* met:

(a) 'That the FTSE 100 index had not sustained a level of 5,101 or greater for three consecutive business days during the period commencing with the date of the Option Contract Deed and ending six business days thereafter ("the expiry date").'

(b) The parties were permitted to assign the benefit of the Option with the prior consent of the other.

(3) The appellant and the Trustee entered into a deed of charge dated 19 November 2003, whereby the appellant granted the Trustee a first fixed charge over the gilt strips to secure the appellant's obligations under the Option (the '**Option Charge**') whose terms were substantially similar to the Gilt Strips Charge.

(4) Hambros entered into a deed which consented to: (i) the granting of the Option, (ii) the granting by the appellant to the Trustee of the Option Charge, (iii) the releasing of the Gilt Strips Charge in exchange for the granting by the appellant to the Bank of a charge over the Option (the '**Consent**').

(5) Hambros and the Trustee entered into a loan facility dated 19 November 2003 in the sum of £1,350,000 with the purpose being to assist with the purchase of the Option from the appellant.

(6) Hambros and the Trustee entered into a deed of charge, also dated 19 November 2003, by which the Trustee assigned to the Bank all its rights in the Option and the Option Charge in exchange for the Trustee Loan Facility.

54. After entering into the Trustee Loan Agreement and executing the Option Contract Deed, the following events took place culminating in the Trustee assigning the Option to Investec.

(1) On or around 21 November 2003:

(a) Hambros transferred £1,338,749 to the Trustee pursuant of the Trustee Loan Agreement.

(b) On or around the same day, the Trustee transferred £1,338,749 to the appellant.

(c) The Trustee entered into a guarantee agreement with Hambros (the '**Guarantee**') whereby in consideration of Hambros providing credit and/or banking facilities to the appellant, the Trustee undertook to make payment to Hambros on demand in writing of all sum due from the appellant to Hambros.

(2) On or around 25 November 2003:

(a) The Trustee entered into a deed headed 'Deed of Assignment of Option for purchase of Strips' with Investec (the '**Deed of Assignment**') recording the Trustee as the holder of the Option and had agreed to assign the Option to Investec for the sum of £1,347,049.

(b) Pursuant to the Deed of Assignment, the Trustee assigned (i) the Option, (ii) all rights granted to the Trustee by the Option, and (iii) the Option Charge, in exchange for a purchase price of £1,347,049.

(c) Investec gave notice to the appellant pursuant to the Option Contract Deed that it was exercising the Option.

(3) On or around 26 November 2003:

(a) Investec transferred £1,347,049 to the Trustee.

(b) The Trustee transferred £1,338,749 to Hambros, being the sum lent by Hambros to the Trustee pursuant to the Trustee Loan Agreement.

(c) Investec transferred to the appellant £150,400.

The flow of funds to implement the Scheme

55. Apart from the legal instruments, the implementation of the Scheme was reflected in the various bank accounts of the parties involved. The account statements from Hambros of the relevant accounts during the implementation period are summarised below. Where two different dates are assigned to the same entry: (a) the date under the column headed 'VALUE' is always the earlier of the two, as contrast with (b) the date under the first column headed 'DATE' for the same entry: the later date is taken to refer to the date when the ledger was updated. The earlier date under 'Value'[2] is adopted as the transaction date when the funds were moved (and therefore relevant to present purposes). The debit and credit entries recorded below are per entries on the bank statements, and therefore from the Hambros' perspective.

(1) Hambros' statement dated 28 November 2003 of the appellant's **Call Deposit** Account recorded the following transactions in a 5-day period in November, followed by deposit from the Trustee to fund interest payments in December 2003:

(a) At 31 October 2003, the brought forward balance stood at £11,500 in credit.

(b) On 5 November 2003, a debit entry of £1,503,749.79 for the '*Purchase of UK Treasury Strip 0% 07/12/03*';

(c) On 5 November 2003, a debit entry of £**7,500** as '*Arrangement Fee*';

(d) On 5 November 2003, a credit entry of £1.5 million for '*Loan drawn down*' (date of value 5 November 2003); bringing the credit balance down to £250.21.

(e) On 23 December 2003, Cobbetts paid in £13,820.18, which would appear to fund the interest payment on the appellant's loan account of £**10,851** which was charged on 23 December 2003.

(f) On 31 December 2003, an interest payment for the Trust Loan Account with Hambros in the sum of £**3,214**.77 was made out of the Call Deposit account, leaving the account in credit of £4.62.

(g) On 31 December 2003, interest of £9.98 was received (on the Deposit balance), bringing the ledger balance to £14.60 in credit.

(2) The appellant's **Call Loan** Account with Hambros (annual statement dated 27 August 2004) recorded the following transactions in an 18-day period in November 2003, when the brought forward balance stood at nil:

[2] See also *Berry FTT* at [34] where the FTT referred to '"Account Statements", apparently compiled on later dates, record Mr Berry as being credited with a "value" date of 3 December …'

(a) On 5 November 2003, a debit entry of £1.5 million as '*Loan Proceeds*';

(b) On 19 November 2003, a credit entry of £1,338,749 from '*Watts Settlement*';

(c) On 26 November 2003, a credit of £150,400 as '*Transfer from Investec*';

(d) On 23 December 2003, a credit of £10,851 from '*Deposit account*' to clear the debit balance of £10,851 (interest charge), bringing the account balance to nil.

(3) The Trust's **Call Deposit** account statement with Hambros dated 28 November 2003 recorded transactions in a 7-day period, when the opening balance was nil.

(a) On 19 November 2003, a debit entry '*To Timothy Watts*' of £1,338,749;

(b) On 19 November 2003, a credit entry '*From Loan A/c*' of £1,338,749;

(c) On 26 November 2003, a debit as '*Transfer to Loan Account*' of £1,338,749;

(d) On 26 November 2003, a credit as '*Transfer from Investec*' of £1,347,049;

(e) The closing credit balance stood at £8,300 after the above transactions.

Mr Watts' evidence on the documents

56. In evidence, Mr Watts referred to the parts of the Scheme as 'Meccano sets':

> 'Q: Each of the three accounts[3] were opened specifically for the purposes of the scheme, were they not?
>
> A: I would imagine so. It is part of the Meccano sets, that we are looking for a plural noun, yes.
>
> Q: Once the Meccano sets had been built, the activity stopped, did it not?
>
> A: I would ask you to refer – I am not going to avoid your question, sir, but construction of this, I left with Mr Hamilton. …' (Day 2, p161, L15-25)

57. When asked if 'prior to entering into the arrangements' he had taken 'independent legal advice in relation to the documents', given that he had signed 'a large number of documents', (whose nature and titles were read out to Mr Watts), and Mr Watts replied:

> '… did I go to a firm of lawyers? I probably, certainly, maybe, did not. I would in my, and I use the word "layman" in inverted commas, I am not an ignoramus, but within my knowledge of what was being spoken of, put before me, I would have considered it more of a professional tax matter than a general purpose lawyer. If I'm wrong, so be it.' (Day 3, p10, L14-25, p11, L1-2)

58. When asked if Grant Thornton was asked to 'drop their price tag', having heard Mr Watts in evidence stating that his approach to negotiations was generally to be 'equitable or to meet in the middle', Mr Watts replied:

> 'I certainly challenged them on it and they did give me a breakdown. £20,000 went to the chambers that gave the advice of what they describe as the leading expert in the United Kingdom on this particular subject. And they went on to say that not only was he the leading expert, he was the very person that the government relied upon to draft the phrase which has become common as gilt strip that originated all of this.' (Day 3, p11, L3-17)

59. In relation to the suite of documents to request the interest-free loan and his signature on an undated promissory note to the Trustee prior to the loan advance, Mr Watts was asked if he could recall how they were provided to him, and where he might have signed them, he replied:

[3] The three accounts referred to in the question were opened with Hambros, two being in the appellant's name: the Call Loan, and the Call Deposit; and a third in the Call Deposit account in the Trust's name.

> 'There must be a purpose to your question, but if you can ask another ten of a similar ilk and the answer will always be no. … they are my signatures and would have been put in front of me at the appropriate time by the appropriate people, after we have received the appropriate advice, and with all things considered, … I was putting the family silver on the line again, and such instances do, maybe it is the synapses of the brain, create a memory. But does that memory extend to the room and the persons in it? With all honesty … I have agreed that the documents were signed by me. …' (Day 3, p14, L1-25)

60. When asked whether he knew the date he signed the 'Power of Attorney' of 28 October 2003 in favour of Hambros, Mr Watts replied:

> 'I've mentioned the family silver. I have mentioned £100,000 being the first step on this journey. There was considerable risk involved in this particular piece of Meccano, … Was I advised? Yes. Did I take multiple advice? Yes. Did I sign at the appropriate time? I would believe so, sir.' (Day3,p15, L7-19)

Post-implementation Correspondence

Fee note and advice on loan request

61. Correspondence between Grant Thornton and the appellant after the Scheme was implemented included:

(1) On 1 December 2003, Grant Thornton sent the appellant a fee note in the sum of £88,125 (being £75,000 plus VAT) for the services provided in respect of the Scheme.

(2) On or around 19 December 2003, Grant Thornton's fee note was paid by way of a cheque from a company bank account of the Pertemps Group.

(3) On 6 January 2004, Grant Thornton wrote to the appellant stating that:

(a) The Option had been exercised by Investec;

(b) The cash that appellant had received both on the grant of the Option and its subsequent exercise had been applied to repaying the loan which the appellant had obtained from Hambros to fund the acquisition of the Gilt Strips;

(c) As a beneficiary of the Trust, the appellant may wish to make a request to the Trustee for an interest free loan out of the trust fund;

(d) Grant Thornton considered that the Trustee would be unlikely to grant a loan exceeding 90% of the current value of the trust fund, estimated to be £130,000.

62. A copy of a cheque dated 19 December 2003 made payable to Grant Thornton in the sum of £88,125 to be drawn on the bank account for Pertemps Group of Companies is exhibited. Mr Hamilton was asked why the company was paying for the fee to implement the scheme which was not a company matter. Mr Hamilton replied that the sum would have been treated as a debit on the director's loan account, against the credit on Pertemps' bank balance, and these balance sheet entries would have no impact on the Pertemps' profit and loss account.

Trust advanced interest-free loan

63. In an undated letter, Mr Watts wrote to the Trustee 'to request an advance in the form of an interest free loan of £130,000' from the IIP Trust, to be paid into the account of '*Pertemps Group Limited*' (not Mr Watt's personal account). The letter concluded by requesting the Trustee advise their decision 'by 16 January 2003'. A manuscript note '*Posted 7/1/04*' on the letter suggests that the date for a reply should have been 16 January 2004 (not 2003).

64. On 9 January 2004, the Trustee replied by email via Mr Hamilton for as follows:

> 'The [Trustee] have considered Mr Watt's request for a loan of £130,000. They have decided that it would be in the trustees' interests to retain

> approximately 10% of the original trust fund. The trustees are therefore prepared to make a loan of £128,000. This is good evidence, of course, of the independence of the trustees, which in turn helps to demonstrate the robustness of the planning.'

65. The Trustee required a promissory note to be signed (attached with the email) to evidence and record the loan, and such a note was signed by Mr Watts but undated other than to the extent of the year being 2004, wherein Mr Watts stated:

> 'I promise to pay to Timothy Watts IIP Settlement 2003 Limited of [address] on demand the sum of One hundred and twenty-eight thousand pounds (£128,000) for value received.'

66. On 12 January 2004, the appellant was provided with the Interest Free Loan. In evidence, Mr Hamilton confirmed that the loan of £128,000 advanced by the IIP Trust to Mr Watts has *not* been repaid at the date of his retirement on 28 February 2017.

67. Mr Watts was asked to confirm whether he has evidence to the contrary that the loan has not been repaid at the date of Mr Hamilton's retirement, and he replied:

> 'To the best of my knowledge today, it probably hasn't been repaid then, no. I have no evidence to the contrary as I sit here.' (Day 2, p169, L8-14)

Grant Thornton's intimation of new legislation

68. By email dated 15 January 2004, Mr Williams wrote to Mr Hamilton to advise that 'the Government [had] today announced new legislation to stop gilt strip planning of the type that [had] been recently completed', and attached the Revenue's Press Release. The letter stated that Grant Thornton considered the change to be 'positive news', on the basis that (a) 'the legislation is not retrospective' and (b) 'the urgency of the announcement' would suggest 'a real concern' of the Government that the planning was 'effective'.

The loss relief claim

Entries on 2004 return

69. On 25 June 2004, Ernest & Young ('EY') submitted the appellant's tax return for the tax year to 5 April 2004, wherein box 15.8 claimed £1,349,600 for '*Post-cessation expenses, pre-incorporation losses brought forward and losses on relevant discounted securities*'. The relevant wording contained in box 23.5 (as agreed by the parties) is as follows:

> 'On 4 November 2003 I purchased UK Treasury Principal Gilt Strip 7 December 2003, nominal amount £1,504,212 (SEDOL 0219055), for £1,500,000. On 19 November 2003 I granted an option to the Timothy Watts IIP Settlement 2003 Limited in their capacity as trustees of the Timothy Watts IIP Settlement 2003 of which I am settlor and life tenant. I understand that the trustees sold this option to Investec Bank (UK) Ltd who subsequently exercised the option by paying £150,400 to me. As a result of this exercise of the option I have suffered an income tax loss of £1,349,600. It is considered this loss is allowable under para 14A Schedule 13 to the Finance Act 1996 and is reflected at Box 15.8 in the attached tax return.'

70. The following correspondence followed the submission of the 2004 Return:

(1) On 12 July 2004 HMRC advised EY that an enquiry into the loss claim in relation to the Gilt Strip transaction was likely, and the repayment claim could not be processed,

(2) The appellant's 2004 Return also claimed film partnership loss and EIS deferment, which HMRC confirmed in writing to EY on 27 August 2004 that the repayment claims in relation thereto as having been processed.

(3) On 27 September 2004, HMRC gave notice of intention to enquire into the 2004 Return under s 9A of the Taxes Management Act 1970 ('TMA') and that pursuant to ss 59B(4A) of TMA, no repayment would be made.

71. Documents and information requests were initially sent to EY, which confirmed that Grant Thornton would be dealing with the enquiry as the adviser of the Gilt Strips transactions.

Grant Thornton on litigation prospect of 'Gilt Strip planning'

72. By letter dated 6 June 2008, Mr Williams of Grant Thornton wrote to Mr Watts to update him on the Gilt Strip Planning enquiries being opened by HMRC, stating that:

> 'HMRC has clearly indicated in its Litigation and Settlement Strategy paper that it is willing to pursue litigation in all enquiry cases where it is advised by Tax Counsel that there is a more than a 50% chance of success. …'

73. A further update came in the form of a three-page letter dated 18 December 2012, wherein Mr Williams advised Mr Watts of HMRC's intention to litigate Gilt Strip planning, and related the revised opinion of the same counsel (who originally had advised Grant Thornton on the Scheme) on the likely outcome of the proposed litigation:

> 'Counsel advised that while he originally held the view that Gilt Strip planning should achieve its intended outcome, he would now not expect to win if he were to take a case forward….'

74. The 2012 letter continued by giving a more nuanced assessment of the prospect of litigation success in the following terms:

> '… we understand there may be Tax Counsel who are more optimistic of the chances of success for Gilt Strip planning. This was mainly because in the recent case of Commissioners for *HMRC v David Mayes* [2011] EWCA Civ 407, the Court of Appeal decided in the taxpayer's favour on a highly artificial piece of tax planning based on the "corresponding deficiency level" legislation. HMRC were refused a further hearing of the appeal by the Supreme Court so the decision is final….
>
> We believe that the chance of successfully litigating Gilt Strip planning remains law but cannot be totally ruled out. …'

75. Mr Hamilton's evidence referred to Mr Watts being 'extremely frustrated' and was asked to write to Mr Williams to convey Mr Watts' anger over the counsel's change of view, which was by letter dated 27 December 2012, in which it stated that what 'has greatly angered' Mr Watts was that he could 'not understand how the position of [that the tax counsel] has changed completely with the passage of time'.

Closure notice

76. The enquiry was concluded on 3 August 2018 by the issue of a closure notice, which amended the 2004 Return by disallowing the para 14A loss claim. The appellant requested a review and the review conclusion dated 21 December 2018 upheld the closure notice amendments, which resulted in the additional tax of £529,838.26 now sought by HMRC.

PARTIES' SUBMISSIONS IN OUTLINE

Appellant's case

77. The appellant contends that given that the Arrangements were not a sham, his entitlement to the loss relief is, in gist, a matter of statutory construction of para 14A, Sch 13 to FA 1996.

(1) The Respondents have accepted that the Arrangements entered into by the appellant were not a sham. Accordingly, the individual deeds, agreements, notices etc effected the matters stated therein.

(2) The correct approach to the interpretation of para 14A is as stated in *UBS*, which requires the Tribunal to start with the statutory language to determine to which facts that statute should be applied.

(3) The language of para 14A(3)(b) is clearly and tightly drawn: it prescribes an 'A-B' calculation of a taxpayer's loss, with no room for wider enquiry into commercial loss.

(4) The effectiveness of the Arrangements followed from the definition of '*loss from a discount on a strip*' contained in para 14A, namely '*the amount paid by him for the strip exceeds the amount payable on the transfer or redemption*' (appellant's emphasis).

(5) It is asserted that the premium paid for the grant of the Option was not a sum '*payable on the transfer*' of the gilt strips, and is therefore excluded from the 'A-B' calculation of the appellant's loss.

(6) Nothing in the background and context to the enactment of Sch 13, or its subsequent amendment, suggests that it had the statutory purpose of permitting relief only in respect of 'commercial' losses.

(7) The Upper Tribunal in *Berry* failed to apply the *UBS* approach and *Berry* therefore cannot be applied to the facts of the present case, which are in any event different to those in *Berry*.

HMRC's case

78. HMRC submit that the 'contrived' set of arrangements involved in the present case were not '*real world transactions*' (*Barclays Mercantile CA* at [66]) resulting in the appellant suffering any real economic detriment, and hence the tax treatment contended for the appellant fails. At all events, the appellant's position is not one which was intended by Parliament to be relieved under Sch 13 FA1996.

DISCUSSION

The burden of proof

79. The appealable decision, being in the form of a closure notice, requires the issue of burden to be settled by reference to s 50(6) of the Taxes Management Act 1970 ('**TMA**'). Unless the appellant succeeds in proving that the closure notice conclusion is incorrect, the assessment consequent upon the closure notice conclusion 'shall stand good' in accordance with the terms of s 50(6) TMA. There was initial contentions. Aside the initial contention as to whether the appellant bears the burden to prove the facts as regards the implementation of the Scheme, it is common ground that the appellant bears the onus to prove his entitlement to the para 14A loss relief claim pursuant to the terms of the statute.

80. The Notice of Appeal stated eight grounds, six of which were subsequently withdrawn, and the two remaining grounds are slightly amended. These two remaining grounds are the appellant's case in summary, as stated at paragraph 3 of the skeleton as follows:

> '(a) the Arrangements which the appellant entered into were not a sham; and
>
> (b) the Arrangements resulted in a loss from the discount on a strip as defined in paragraph 14A, Schedule 13, Finance Act 1996.' (emphasis original)

81. The appellant's case is therefore founded on two premises. The first premise requires the Tribunal to make a relevant finding of fact that the Arrangements entered into were not a sham. The second premise is predicated on the Tribunal reaching the conclusion pertaining to the construction of para 14A loss provision in like manner as advanced for the appellant.

Whether the Arrangements a 'sham'

The 'positive' case pleaded in the Amended Statement of Case

82. The appellant's main skeleton argument was dated 30 August 2021, and was followed by a supplemental skeleton argument dated 6 September 2021 in reply to the respondents' skeleton argument served on 31 August 2021, wherein the respondents stated at paragraph 7:

> 'HMRC's understanding of the relevant factual context, based on the available material and prior to seeing the Appellant's skeleton argument, is as follows. See also HMRC's Amended Statement of Case ("**HMRC's Amended SoC**") at paragraphs 74 to 98A [**64-70**]. For the avoidance of doubt, the burden of proof is on the Appellant to establish the facts and that the tax treatment claimed by him is correct. Nothing in the paragraphs below or in HMRC's Amended SoC should be taken as an admission as to the facts or the consequences alleged by the Appellant, as to which the Appellant is put to proof.' (underlining as in the appellant's supplemental skeleton)

83. The appellant's supplemental skeleton took issue with paragraph 7 of HMRC's skeleton argument as cited above. With reference to Rule 25 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, and the guidance set out on the contents of notices of appeal and statements of case in *Ecko Limited*. The appellant submits that:

> (1) The Amended SoC pleads a positive case on the facts, which is not conditional on proof by the appellant. The appellant can and will rely on those pleaded facts which are not in dispute.
>
> (2) HMRC cannot transform their pleaded case on the facts from a positive one to a conditional one by means of a skeleton argument. Thus far, HMRC have not claimed, either during the enquiry or the present appeal, that the appellant has failed to prove that he implemented the arrangements.

84. In summary, the appellant avers that it is 'striking' that there is no trace in the Amended SoC of any attempt to put the appellant to proof in the manner suggested by paragraph 7 of HMRC's skeleton. Given that the respondents have positively pleaded that a particular act or event occurred, HMRC cannot be permitted to resile from that pleading and put the appellant to proof, because the appellant would be ambushed with the need to discharge an evidential burden in respect of matters which were understood to be common ground.

85. The appellant's supplemental skeleton was lodged as 'a matter of prudence', in case HMRC were to 'deploy their skeleton argument to amend their [Amended SoC] to convert their positively pleaded factual case into a conditional one', while leaving open the possibility that: 'It may be that there is in fact no real dispute between the parties.'

86. There is indeed no real dispute between the parties in this respect, in that HMRC do not intend to put the appellant to proof that the arrangements had been implemented as those set out in the Amended Statement of Case. It is for the sake of completeness that this is noted here.

HMRC's position on the issue of 'sham'

87. Neither is it contended by HMRC that the arrangements were a 'sham' in the sense in which that concept is used in *Snook*. However, Mr Davey refers to the Supreme Court in *UBS* that the concept of 'sham' is distinct from the jurisprudence which has long emphasised the importance of viewing arrangements realistically and as a composite whole and/or as interrelated where appropriate, in order to ascertain the correct analysis.

88. HMRC's position is that the arrangements in which the appellant was involved, comprising a set of pre-ordained steps intended to produce a situation which would enable the

appellant to claim that he had suffered a 'loss' for para 14A purposes, fall to be analysed as a composite whole and/or as interrelated.

89. A central premise to the appellant's case is that if the arrangements were not a sham, then they have the legal effect as intended. To that end, the appellant relies on what Ms Nathan describes as the 'unchallenged' evidence of the appellant. However, Mr Davey qualifies the claim that the appellant's evidence is 'unchallenged' by reference to his cross-examination of Mr Watts on the concept of 'nil economic loss'; the transcript of the exchanges that Mr Davey reiterates to be a challenge to Mr Watts' evidence is recorded at §17 (Day 3, p81).

Conclusion on the issue of 'sham'

90. Given that HMRC do not contend that the arrangements were a 'sham', it is not really an issue that requires a judicial decision. Insofar as this is a stated ground of appeal, I find that the Arrangements were *not* a 'sham' in the classic definition by Diplock LJ in *Snook*, meaning thereby, that the transactions in the Scheme were not intended to give the appearance of having a legal effect different from the actual legal effect intended by the parties.

91. As to Mr Davey's emphasis that the concept of 'sham' in the case of *Snook* is distinct from the line of authority which emphasises the importance of viewing a series of transactions realistically as a composite whole, it is being addressed by both parties in their submissions on the appellant's main ground of appeal.

Whether the Arrangements resulted in a para 14A loss

The *Ramsay* principle to statutory construction

92. The parties do not dispute that the *Ramsay* principle applies in the instant case, which is unsurprising, given that the principle (or approach) after Lord Wilberforce's judgment in *Ramsay* is the general applicable principle for statutory construction, as observed by Lord Nicholls in *MacNiven*:

> '[7] *Ramsay* did not introduce a new legal principle. … The need to consider a document or transaction in its proper context, and the need to adopt a purposive approach when construing taxation legislation, are principles of general application.'

93. In *Barclays Mercantile*, Lord Nicholls set out the two-fold *Ramsay* principle in the following terms:

> '[29] The *Ramsay* case … liberated the construction of revenue statutes from being both literal and blinkered … [quoting from *Ramsay* at 179]
>
> > "What are 'clear words' is to be ascertained upon normal principles; these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded: .."
>
> [30] Secondly ([*Ramsay* at 180]) on the application of a statutory provision so construed to a composite transaction:
>
> > "It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded."'

94. In *Barclays Mercantile* Lord Nicholls continued by explaining what it means to apply the *Ramsay* principle, which involves construing tax legislation purposively as intended to operate in '*the real world*', and for facts to be viewed realistically whereby the concepts of gains or losses are to have '*a commercial reality*', and for a series of transactions to be analysed as '*a single continuous operation*' (a composite whole) for its overall fiscal effect.

> '[31] The application of these two principles led to the conclusion, as a matter of construction, that the statutory provision with which the court was concerned, namely that imposing capital gains tax on chargeable gains less allowable losses was referring to gains and losses having a commercial reality ("The capital gains tax was created to operate in the real world, not that of make-belief") and [*Ramsay* at 182]:
>
> > "To say that a loss (or gain) which appears to arise at one stage in an indivisible process, and which is intended to be and is cancelled out by a later stage, so that at the end of what was bought as, and planned as, a single continuous operation, is not such a loss (or gain) as the legislation is dealing with, is in my opinion well, and indeed essentially, within the judicial function."'

The real world of tax legislation

95. Lord Wilberforce in *Ramsay* observed that 'the capital gains tax was created to operate in the real world, not that of make-belief'. The 'real world' in which tax legislation is intended to operate is developed further by Lord Hoffmann in *MacNiven* at [41] by distinguishing a transaction that is 'a legal reality' from a transaction 'in the real world':

> 'In saying that the transactions in *Ramsay* were not sham transactions, one is accepting the juristic categorisation of the transactions as individual and discrete and saying that each of them involved no pretence. They are intended to do what they purported to do. They had a legal reality. But in saying that they did not constitute a "real" disposal giving rise to a "real" loss, one is rejecting the juristic categorisation as not being necessarily determinative for the purposes of the statutory concepts of 'disposal' and 'loss' as properly interpreted. The contrast here is with a commercial meaning of these concepts. And in saying that the income tax legislation was intended to operate 'in the real world', one is gain referring to the commercial context which should influence the construction of the concepts by Parliament.'

96. The concept of 'reality' in earlier authorities was expounded by Lord Reed in *UBS*, which both parties have referred to, and with the appellant's emphasis noted as follows:

> '[67] References to "reality" should not, however, be misunderstood. In the first place, the approach described in *Barclays Mercantile* and the earlier cases in this line of authority has nothing to do with the concept of a sham, as explained in *Snook* … On the contrary, as Lord Steyn observed in *McGuckian* … tax avoidance is the spur to executing genuine documents and entering into genuine arrangements.
>
> [68] Secondly, it might be said that transactions must always be viewed realistically, if the alternative is to view them unrealistically. <u>The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose</u>. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application.' (emphasis by the appellant)

Commercial versus legal concepts in tax legislation

97. Following *Ramsay*, other cases that found on the commercial concepts apposite to tax legislation include judgments by the House of Lords in *Burmah Oil*, *Furniss v Dawson* and *Cerreras*, which were decided by looking at the overall effect of the composite transactions

and treating the elements inserted into the transactions without any commercial purpose as having no significance. These cases caused Lord Nicholls to sound a word of caution at [36] of *Barclays Mercantile v Mawson*:

> '[36] … Cases such as these gave rise to a view that, in the application of *any* taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so…' (italics original)

98. In *Barclays Mercantile*, the House of Lords upheld the decision by the Court of Appeal and allowed the appeal of the taxpayer company ('BMBF'), which carried on the trade of finance leasing or providing asset-based finance. The matter before the courts was whether BMBF's claim of written down allowances for a gas pipeline was allowable. The House of Lords found that the only relevant fact for the purposes of the capital allowances legislation was that the capital expenditure had been incurred by BMBF wholly and exclusively for the purposes of its trade, and was therefore entitled to the claim of the written down allowances, notwithstanding the complex network of fiscal agreements for BMBF to acquire the funds to incur the capital expenditure, or the fiscal element of passing on the allowances to the lessee in the form of lower rentals. The House of Lords concluded in *Barclays Mercantile*:

> '[40] These statutory requirements … are in the case of a finance lease concerned entirely with the acts and purposes of the lessor.'
>
> '[41]… None of these transactions, whether circular or not, were necessary elements in creating the entitlement to the capital allowances.'

99. Lord Nicholls in *Barclays Mercantile* (2004) referred to *MacNiven* (2001) and *Campbell* (2004) as cases where 'the requirements of the statute were purely by reference to its legal nature', and offered a generalised position as follows:

> '[38] In a speech of Lord Hoffmann in *MacNiven* it was said that if a statute laid down requirements by reference to some commercial concept such as gain or loss, it would usually follow that elements inserted into a composite transaction without any commercial purpose could be disregarded, whereas if the requirements of the statute were purely by reference to its legal nature (in *MacNiven*, the discharge of a debt) then an act having that legal effect would suffice, whatever its commercial purpose may have been.
>
> This is not an unreasonable generalisation, indeed perhaps something of a truism, but we do not think that it was intended to provide a substitute for a close analysis of what the statute means. It certainly does not justify the assumption that an answer can be obtained by classifying all concepts *a priori* as either "commercial" or "legal". That would be the very negation of purposive construction …' (sub-paragraphing added)

100. *MacNiven* is concerned with construing the meaning of s 338(2) of the 1998 Act in relation to whether interest had been paid by the taxpayer to give rise to an allowable deduction. The House of Lords found that 'payment' under s 338 was 'a legal concept' and did not have some other commercial meaning to remedy the fact that the interest payment made to an exempt lender, and upheld the Court of Appeal's finding that the '"transaction under which the interest was paid" is the original loan and not the arrangements which enabled WIL [Westmorland Investments Ltd, the taxpayer company] to pay it' (at [74]). On the facts:

> '[79] The Special Commissioners … found as a fact that the loans which were made by the pension scheme to WIL were real loans. It is clear that, but for

> the loans, WIL could not have afforded to pay the interest which it owed to the pension scheme. Nevertheless the fact is that the loans were made and the interest was paid. WIL's claim is therefore based upon transactions which have been found by the commissioners to be genuine. There was no step that falls to be ignored because it was artificial. It cannot be said that there was no business or commercial reason for the interest to be paid. The payment reduced the amount of WIL's accrued liability to pay interest. It was received as interest in the hands of the payee. WIL's obligation to pay interest to that extent was discharged….'

101. Although it was Lord Nicholls who gave the leading judgment in *MacNiven*, it is Lord Hoffmann's speech (also being the longest) which contains the ratio of the case, and with whom the other four judges (including Lord Nicholls) expressly agreed. Lord Hoffmann's speech started with examining 'the characteristically compressed reasoning' in *Ramsay* (at 180) where Lord Wilberforce referred to capital gains tax as not imposed '*on arithmetical differences*':

> '[32] … The contrast being made throughout Lord Wilberforce's speech is between juristic or arithmetical realities on the one hand and commercial realities on the other. He is construing the words "disposal" and "loss" to refer to commercial concepts which are not necessarily confined by the categories of juristic analysis. … The innovation in *Ramsay* was to give the statutory concept of "disposal" and "loss" a commercial meaning. The new principle of construction was a recognition that the statutory language was intended to refer to commercial concepts, … the court was required to take a view of the facts which transcend the juristic individuality of the various parts of a preplanned series of transactions.'

102. Lord Hoffmann then gave as an example the term '*profits or gains of the year of assessment*' which forms the basis of the charge to tax under Case I of Sch D (s 60 of the 1988 Act) as being construed by reference to business or commercial concepts beyond 'the confines of juristic analysis', citing Viscount Haldane in *Sun Insurance Office v Clark (Surveyor of Taxes)* [1912] AC 443 at 455:

> 'It is plain that the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the test of ordinary business.'

103. Lord Hoffmann ventured his suggested resolution of the difficulty which may have been felt in reconciling *Ramsay* with *Duke of Westminster*, which, as he put it, 'arises out of an ambiguity in Lord Tomlin's statement [in *Duke of Westminster*] that the courts cannot ignore "the legal position" and have regard to "the substance of the matter"':

> '[39] … If "the legal position" is that the tax is imposed by reference to a legally defined concept, such as stamp duty payable on a document which constitutes a conveyance on sale, the court cannot tax a transaction which uses no such document on the ground that it achieves the same economic effect. On the other hand, if the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the business "substance" of the matter is not to ignore the legal position but to give effect to it.'

Limitations of the Ramsay principle

104. Lord Hoffmann's speech in *MacNiven* referred to the 'limitations of the *Ramsay* principle' which 'arise out of the paramount necessity of giving effect to the statutory language' (at [58]). This paramount necessity is behind the decision of *Mayes* (2011), wherein the Court of Appeal affirmed the statutory interpretation of Proudman J, who found in favour of the taxpayer, holding that the relevant legislation in relation to the availability of the 'Corresponding Deficiency Relief' in the scheme known as SHIPS 2 'does not admit of a purposive interpretation' (at [23] of *Mayes HC*) for the reasons as follows:

> '[23] … [The legislation] shows a lack of interest in (a) attributing gains to the person who made them, (b) not attributing gains to a person who did not make them and (c) timing the taxation of the gain fairly. Instead it operates mechanically according to a series of statutory formulae.'
>
> '[44] … This is legislation that does not seek to tax real or commercial gains. This it makes no sense to say that the legislation must be construed to apply to transactions by reference to their commercial substance.'
>
> '[47] In summary it seems to me that [the relevant legislation] adopts a formulaic and prescriptive approach. No overriding principle can be extracted from the legislation, or from the authorities, that some types of transaction should be ignored in the application of the Chapter. To say that there is no premium and no partial surrender, that those steps should be ignored, is in my judgment simply to sidestep the question of construction altogether. The pre-arranged and self-cancelling nature of the transaction was no different and no more extreme than that in *MacNiven*.'

The concept of a composite transaction/ a commercial unity

105. In *SPI* (i.e. *Scottish Provident*) the Special Commissioners hearing the case at first instance allowed the taxpayer's appeal, having made a finding of fact that there was an outside but commercially real possibility that circumstances might occur in which the two options within the scheme would not be exercised so as to cancel each other out. The Inner House of the Court of Session dismissed the Revenue's appeal. On appeal, Lord Nicholls, noting that the Special Commissioners had made a finding of fact that the appellate court is not entitled to disturb, considered the question of law in front of the House of Lords at [16] as follows:

> 'The question of law is whether, in a case in which [the options] were in fact exercised so as to cancel each other out, the existence of this contingency prevented the commissioners from applying the statute to the scheme as it was intended to operate and as it actually did operate. The commissioners thought that it obliged them to treat the options as separate transactions.'

106. The conclusion to that question is set out at [22] to [24] of *SPI*:

> '[22] … Here, the uncertainty arises from the fact that the parties have carefully chosen to fix the strike price for the SPI option at a level which gives rise to an outside chance that the option will not be exercised. There was no commercial reason for choosing a strike price of 90. Form the point of view of money passing (or rather, not passing), the scheme could just as well have fixed it at 80 and achieved the same tax saving by reducing the Citibank strike price to 60. It would all have come out in the wash. Thus the contingency upon which SPI rely for saying that there was no composite transaction was a part of that composite transaction; chosen not for any commercial reason but solely to enable SPI to claim that there was no composite transaction. It is true that it created a real commercial risk, but the odds were favourable enough to make it a risk which the parties were willing to accept in the interests of the scheme.
>
> [23] … The composite effect of such a scheme should be considered as it was intended to operate and without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned.
>
> [24] It follows that in our opinion the special commissioners erred in law in concluding that their finding that there was a realistic possibility of the options not being exercised simultaneously meant, without more, that the scheme could not be regarded as a single composite transaction. We think that it was and that, so viewed, it created no entitlement to gilts and that there was therefore no qualifying contract.'

107. In *SPI,* the short question is whether the Citibank option gave it an entitlement to gilts, and Lord Nicholls observed at [19]:

> 'That depends upon what the statute means by "entitlement". If one confines one's attention to the Citibank option, it certainly gave Citibank an entitlement, by exercise of the option to the delivery of the gilts. On the other hand, if the option formed part of a larger scheme by which Citibank's right to the gilts was bound to be cancelled by SPI's right to the same gilts, then it could be said that in a practical sense Citibank had no entitlement to gilts. … *the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have regard to the whole of a series of transactions* which were intended to have a commercial unity. … If the scheme amounted in practice to a single transaction, the court should look at the scheme as a whole. …' (italics added)

108. In *Astall*, the schemes (entered into by Mr Astall and Mr Edwards) were designed to generate a loss from the discount on a security under Sch 13 to FA 1996. Under the terms of issue, there were two occasions when the securities could potentially be redeemed for a deep gain for the purposes of para 3(3), Sch 13 FA 1996. The terms of issue also provided for the holder to transfer the security to a third party, subject to a market change condition. The Special Commissioner dismissed the appeal, in part for the reason that each of the schemes could be viewed as a composite whole based on the findings of fact that:

(1) 'The 85% chance of the market change condition being satisfied was favourable enough to make it a risk which the appellants were willing to accept in the interests of the scheme'; and the market change provision is fully within the principle in *SPI*: *Astall SpC* at [16] and [17]; and

(2) That 'it was a practical certainty that at the time of issue of the securities KPMG would succeed in finding purchasers willing and able to purchase the securities within the time scale at a discount of not more than about 10%': *Astall SpC* at [18].

109. The Court of Appeal in *Astall* likewise dismissed the taxpayers' appeal, and in relation to the elements of uncertainty incorporated into the schemes, Arden LJ observed:

> '[34] Both *Mawson* and *SPI* emphasise the need to interpret the statute in question purposively, unless it is clear that that is not intended by Parliament. The court has to apply that interpretation to the actual transaction in issue, evaluated as a commercial unity, and not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way the scheme was intended to operate. *SPI* also illustrates another important point, namely that the fact that a real commercial possibility has been injected into a transaction does not mean that it can never be ignored. It can be disregarded if the parties have proceeded on the basis that it should be disregarded.'

110. In *Astall*, the court developed by extension of the principle of viewing a series of transactions as a composite whole to a multi-faceted transaction is put forward by Arden LJ:

> [42] … This principle [in *Mawson*] is not expressed to be limited to a composite transaction. It can thus apply to a single multi-faceted transaction which on its face operates in a particular way but which when examined against the facts of the case does not operate as a transaction to which the statute was intended to apply.'

The cases of *Campbell, Berry, Andrew* and *Pitt*

111. In common with *Astall*, these four cases are all concerned with schemes involving discounted securities for obtaining loss relief under Sch 13 FA 1996. HMRC rely on *Berry* (2011), and the FTT decisions in *Andrew* (2019) and *Pitt* (2022), which follow *Berry*. The

appellant relies on *Campbell* (2001), and submits that *Berry* is wrongly determined, and hence also *Andrew* and *Pitt* for following *Berry*.

112. Given *Campbell* is so central to the appellant's case, with the corollary assertion that *Berry* is wrongly determined, it is necessary to set out the seemingly conflicting decisions by the Special Commissioners in *Campbell* and the Upper Tribunal in *Berry*.

113. In *Campbell*, the taxpayer, Mr Campbell ('C'), was recommended a scheme which would give rise to income loss to offset the taxable income arising on the exercise of his share options in the GM Group Ltd of which he was the chief executive. The relevant facts in *Campbell* are:

(i) On 14 December 1999, C formed a company; he was the sole shareholder and director.

(ii) On 23 December 1999, C borrowed £3.9m from NatWest; security was given by a charge over the share portfolios of Mr Campbell and his wife, a second mortgage over their matrimonial home, a charge over a life policy, and a lien over certain loan notes to be issued by the company.

(iii) On 24 December 1999, C subscribed £3.75m loan notes in the company, and the company received the £3.75m borrowed from NatWest.

(iv) On 14 March 2000, the GM Group Ltd was acquired by another media group; C's taxable income from his share options was £3.35m.

(v) On 15 March 2000, C gifted the loan notes to his wife by a deed of gift.

(vi) As at 31 March 2001, the company had made a number of investments in both listed and unlisted securities.

(vii) C claimed a loss of £2,483,100 on the transfer of the loan notes to his wife in his tax return for 1999-2000; the loss was calculated based on the aggregate market value of the loan notes on the date of the transfer being £1,266,900.

(viii) A market value of £1.5m for the loan notes at 15 March 2000 was agreed, which made the 'loss' figure (if allowed) £2.25m, being the difference of £3.75m and £1.5m.

114. The Special Commissioners' decision (Theodore Wallace and Julian Ghosh QC) in *Campbell* underpins Ms Nathan's submissions on the construction of para 14A relief in the present case. The findings of fact in *Campbell* for determining the case are:

(1) That the main purpose of C in establishing the Company and subscribing for the Loan Notes was to obtain tax relief under Sch 13 FA 1996; C also had the commercial, non-tax purpose of making investments through the Company; [66].

(2) The Loan Notes were issued after taking tax advice, in particular as regards the redemption price and the redemption date, which were critical terms to their status as relevant discounted securities, since the definition of RDS depends on the rate of return by reference to the redemption date and redemption amount: Sch 13, para 3(3); at [66].

(3) The gift of the Loan Notes to C's wife was wholly tax motivated so as to generate the loss under Sch 13, para 2(1), and the transfer to a connected person was purely to generate the loss for which C seeks relief and for no other reason; at [67].

(4) That the Revenue had accepted two important facts, namely (i) that the entire subscription monies of £3.75m were paid for the Loan Notes and were in no part a gift to the Company, and (ii) that the gift to C's wife was a 'transfer'; at [68].

(5) On the facts as conceded by the Revenue, 'the only issue' for the Special Commissioners to decide is then stated in terms as follows at [68]:

(i) whether the difference between the subscription price of £3.75m and their market value at the time of the gift transfer of £1.5m is a 'loss' within the meaning of para 2(2) and para 2(3); or

(ii) C's tax motivation in subscribing for the Loan Notes in the form in which they were issued to him denies relief on the application of the *Ramsay* doctrine.

115. The key paragraphs in *Campbell* relied upon by the appellant in the present case to set the statutory context for Sch 13 are the following:

> '[86] In this case, we are concerned with the terms of Sch 13, para 2 in circumstances in which the Inland Revenue accepts that the subscription price was entirely paid in respect of the acquisition of the Loan Notes and that there was a transfer by the Appellant to a connected person. Paragraph 2(3) is an entirely mechanistic provision which calculates the "loss" by deducting the subscription price "paid in respect of [the] acquisition of [the Loan Notes]", within para 2(2)(b), from the market value deed by para 8 to be obtained on the "transfer", within para 2(2)(a), and deducting any relevant costs.
>
> [87] Once an amount paid in respect of a relevant discounted security is ascertained and the amount received (or deemed to be received) on transfer or redemption is determined, there is a "loss" where the former exceeds the latter. There is no room for the purpose of the holder of the relevant discounted security to inform the construction of the term "loss".
>
> In other words, once the terms "amount paid … in respect of [an] acquisition of [of the relevant discounted security]' have been construed in the context of para 2(2), the "loss" is also automatically ascertained. This is confirmed by the terms of para 2(3) which provides that 'For the purposes of [Sch 13] the loss *shall be taken ... to be* equal to the amount of the excess increased by the amount of any relevant costs …'.
>
> Paragraph 2(3) confirms the term "loss" is, to use the terminology of The Lord President (Lord Cullen of Whitekirk) (at para 43) in *Scottish Provident* a 'construct which has a specific statutory meaning', so that, like s 155 of the Finance Act 1994, in *Scottish Provident*, para 2(2), of Sch 13 is "an artificial framework … [which] does not indicate that a commercial meaning falls to be given to "loss"'. (italics original, sub-paragraphing added)

116. The exposition in *Campbell* on the statutory meaning of 'loss' for Sch 13, para 2(1), (2), is a reflection on what *Campbell* has referred to as 'the commercial/legal dichotomy' discussed in *MacNiven*, and it is this 'legal' meaning of 'loss' as explicated in *Campbell* which Ms Nathan submits is the correct construction of para14A of Sch 13 in like manner.

> '[88] The artificial (legal) meaning of the term "loss" in Sch 13, para 2(1), (2) is further reinforced by the statutory mechanism which quantifies a "loss" for these purposes. Firstly, the "loss" is increased by the "relevant costs" incurred by a taxpayer (being the costs incurred "in connection with the acquisition of the [relevant discounted security]' and costs incurred 'in connection with [any] transfer or redemption of the [relevant discount security]': see Sch 13, para 1(4) and para 2(3)(a). Secondly, … the transferor of a relevant discounted security is deemed to receive an amount equal to its market value, when the transfer is to a connected person, even though he may receive no such sum. These factors, while not at all conclusive in themselves, confirm that the term "loss", in the context of para 2(1) and (2), is far removed from any "commercial" sense of the term.'

117. Ms Nathan was counsel to the taxpayer in *Berry*, and Mr Berry's appeal was dismissed by the First-tire Tribunal ('FTT') and Lewison J (as he was then) at the Upper Tribunal ('UT').

Mr Berry's case, as argued for by Ms Nathan, also relied on *Campbell* to construe para 14A of Sch 13. Lewison J's response to the key paragraphs relied on is to say:

> '[43] The ground of the decision [in *Campbell*], as I read it, is that: "There is no room for the *purpose of the holder* of the relevant discounted security to inform the construction of the term "loss".' In other words Mr Campbell's motivation did not automatically deny him his tax relief. They were not saying that the fact-fining tribunal should ignore the reality of the transactions that in fact took place. Moreover, as they went on to point out, the Commissioners' finding of fact that Mr Campbell had a commercial purpose in subscribing for the loan notes meant that HMRC's argument failed on the facts (para 92). At the start Mr Campbell was the holder to the loan notes, for which he had paid in real money borrowed from the bank. At the end, Mr Campbell no longer owned the loan notes; but he still owed the money to the bank. His economic position had changed for the worse. In ordinary terms, he had suffered a loss. The loan notes had not disappeared. They still existed, but they were owned by his wife. They were, therefore, two real events separated by several months which existed in the real world. In his submissions Mr Gammie submitted:
>
> > "Thus, once the Commissioners had decided (or the Revenue had conceded) that no part of the £3.75m was in reality a gift to the company, there was only one possible answer to the statutory question posed by paragraph 2(2)(b) of Schedule 13 – what amount did Mr Campbell pay to subscribe the securities? Similarly, once it had been determined (or conceded) that the reality of the arrangement was that Mr Campbell subscribed the securities and then, as a separate matter, gave them to his wife, paragraph 8 of Schedule 13 supplied the answer to the question – what amount did Mr Campbell receive on transferring the securities? Paragraph 8 directed that this was the market value.
> >
> > The relevant point about *Campbell* is that the provisions of Schedule 13 were too closely articulate *in relation to the reality of the taxpayer's transaction in that case*. It is not that the provisions of Schedule 13 are too closely articulated to exclude the application of the *Ramsay* principle and to prevent one deciding in any other case what is the tax reality of the taxpayer's transactions.' (italics original)

118. Lewison J's conclusion on the construction of para 14 A of Sch 13 rejects the notion that the concept of 'loss' in para 14A is a 'legal' concept of the kind in *Mayes* and *MacNiven*.

> '[51] As I have said, the FTT held that the purpose of para 14A was the general proposition sated in sub-para(1) viz:
>
> > "A person who sustains a loss in the year of assessment from the discount on the strip shall be entitled to relief from income tax on the amount of his income for that year according to the amount of the loss."
>
> [52] In my judgment the FTT were right to identify the purpose of the paragraph in that way. 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 *Ramsey* principle is meant to operate. I thus conclude that the FTT made no error of law in identifying the purpose of the legislation.'

Statutory construction of para 14A Sch 13 FA 1996

The appellant's submissions

119. Ms Nathan is well aware that *Campbell* is concerned with para 2 of Sch 13 to FA 1996, which was repealed by the time the transactions in question were entered into for para 14A relief purposes. To bridge the chasm between the relevant provisions in *Campbell* and the provisions with which this appeal is concerned, Ms Nathan took me through the legislative history of Sch 13 in some great length to establish that there was a direct lineage in the legislative provisions that were para 2 of Sch 13 to FA 1996, and para 14A of Sch 13 to FA 1996 as enacted. I accept the factual aspects of the legislative history of Sch 13 as laid out by Ms Nathan, and will relate this aspect of her submissions insofar as it is necessary to follow her submissions on the meaning of 'loss'.

120. The appellant's supplemental submissions post-hearing in response to HMRC lodging the First-tier Tribunal's decision of *Pitt* by Judge Beare are quite extensive (of 12 pages). *Pitt* was released in July 2022, dismissing the taxpayer's appeal, and held that no loss arose on the basis of a purposive construction of para 2 Sch 13 to FA 1996, and a realistic view of the facts that the taxpayer did not in fact acquire the securities in question. The appellant contends that *Pitt* does not assist the Tribunal in addressing the issues and arguments made by the appellant in this case because:

(1) *Pitt* did not consider the legislative history of Sch 13 FA 1996 in relation to the removal of para 2, Sch 13 and the introduction at the same time of para 14A Sch 13, on which the appellant has made detailed submissions.

(2) The decision in *Pitt* followed the Upper Tribunal in *Berry*, and the appellant contends that *Berry* erred in its understanding and application of *Ramsay* to the interpretation of para 14A Sch 13 FA 1996.

Amendments to Schedule 13 FA 1996

121. Schedule 13 underwent three key stages of amendments since its introduction in FA 1996, and these are central to Ms Nathan's submissions. The details of these amendments as put forward by Ms Nathan are set out in **Annex 3**. The gist of the amendments is as follows:

(1) First: from 27 July 1999, introduction of a targeted anti-avoidance provision into the definition of 'relevant discounted securities' which was not applicable to gilt strips.

(2) Second: from 10 July 2003, the general scheme for 'relevant discounted securities' other than strips was repealed. The provisions of para 2(2), formerly used to calculate losses for relevant discounted securities, were replicated in the newly introduced para 14A in materially identical terms, without the targeted anti-avoidance provision being introduced into para 14A.

(3) Third: from 22 July 2004, Sch 13 was significantly amended to introduce general anti-avoidance provisions that denied loss relief in the case of certain schemes or arrangements with an unallowable purpose.

122. The short points I take from this part of Ms Nathan's lengthy submissions are:

(1) that the amendments to Sch 13 did not make any changes of substance to the tax treatment of gilt strips, especially in relation to the 'A-B' calculation for losses from a discount on gilt strips, even after para 2 (as concerns *Campbell*) was repealed; and

(2) the availability of loss relief for losses on gilt strips was maintained without any anti-avoidance provisions into para 14A as was then 'newly' enacted from 10 July 2003.

Statutory purpose of Sch 13 FA 1996

123. Ms Nathan then took me through parliamentary material behind the amendments to Sch 13 for the submission that the mischief of para 14A as introduced into Sch 13 FA 1996 with effect from 10 July 2003. Section 182 and Schedule 39 to the Finance Act 2003 ('**FA 2003**') was to address tax avoidance by purchasers of relevant discounted securities. The Paymaster General summarised the purpose of Schedule 39 FA 2003 as follows:

> '[Schedule 39] seeks to stop widespread and aggressive exploitation of the relevant discounted securities regime by high net-worth individuals using marketed schemes. The schedule's purpose is to put the taxation of relevant discounted securities on the same footing as the taxation of normal interest-bearing securities, and to ensure European Union capability by extending the special treatment of UK gilt strips to strips of overseas Government securities.' (Standing Committee B debate, 17 June 2003 (Col 611))

124. The Explanatory Notes to the Finance Bill 2003 are brought in to aid statutory construction, and some of the paragraphs in the Explanatory Notes that have been referred to are set out in **Annex 4**. In the appellant's post-hearing submissions on *Pitt*, it is emphasised that the strength of his case is different from that of the taxpayer in *Pitt*, due to the appellant's submissions on (a) the legislative history leading to the introduction of para 14A in Sch 13, and (b) the mischief of para 14A as stated in the Explanatory Notes to the Finance Bill 2003.

125. The main point from this part of the appellant's submission is that the purpose of para 14A did not contain any anti-avoidance element, and it was a 'special treatment' reserved to the gilt strips to retain the availability of loss relief as contained in para 14A, and that this is consistent with the contents of the Explanatory Note which relate to clause 181 and Sch 39 to the Finance Bill 2003:

> '1. The clause and schedule remove relief for losses and expense for most relevant discounted securities ("RDS"). RDS are securities issued at a discount of more than ½% a year. RDS held on 26th March 2003 which are listed on a stock exchange are protected. The special treatment of UK gilt strips, apart from expenses, is retained and extended to strips of other overseas government securities.'

126. It is further submitted that the issue of avoidance or deferral of taxation in relation to gilt strips was specifically considered in the context of the newly introduced para 14A, as explained at paragraph 23 of the Explanatory Note to the Finance Bill 2003:

> 'There are special rules in the RDS legislation for "gilt strips". These are created when the interest coupon on a gilt is detached from the principal, and dealt in separately. The right to receive an interest payment in the future has a present value lower than the amount of interest due, so a gilt strip falls to be treated as a RDS. To avoid people deferring tax on gilt interest, which is payable twice a year, by investing in a strip where the profit would only be taxable on redemption or sale, legislation requires a strip to be treated as if it were transferred each year on 5th April for its market value, and the reacquired.'

The 'composite' term in para 14A for 'loss'

127. As to the statutory wording of para 14A, it is submitted that it does 'three relevant things':

(1) First, para 14A(1) is the relieving provision, which confines the availability of the relief to cases where the taxpayer '*sustains a loss in any year of assessment from the discount on a strip*'.

(2) Secondly, para 14A(2) sets the period within which claims for relief can be made.

(3) Thirdly, para 14A(3) defines where a '*loss from the discount on a strip*' occurs, that term clearly referencing the language of para 14A(1).

(a) Paragraph 14A(3)(a) identifies the triggering event as the transfer or redemption of the strip.

(b) Paragraph 14A(3)(b) then prescribes how the calculation of the quantum of the loss must occur, by reference to two kinds of payment and no others.

(4) It is argued that para 14A(3)(b) is an 'A-B' calculation where both 'A' and 'B' are quantified. Crucially, there is no independent definition of '*a loss in any year of assessment from the discount on a strip*' contained in para 14A(1); it is para 14A(3) which provides the definition of '*a loss from a discount on a strip*'.

(5) In other words, the '*loss from a discount on a strip*' is intended to be a composite term; it is impermissible to dissociate part of the composite term and seek to interpret that dissociated element in isolation. rather than simply a 'loss' to be the relevant statutory concept.

What was the 'amount payable on the transfer'?

128. On the basis that the relevant statutory concept is not simply a 'loss' but a composite term of a '*loss from a discount on a strip*' in para 14A(1), Ms Nathan submits that para 14(3)(b) 'prescribes' that it is to be calculated by the difference between '*the amount paid by [the taxpayer] for the strip*' and '*the amount payable on the transfer or redemption*', with para 14A(3)(b) specifying what costs are to be excluded.

129. The relevant question in this appeal, as put forward for the appellant, is whether the premium paid for the grant of the Option was an '*amount payable on the transfer*'. At the relevant time, 'transfers' of securities were defined in para 4, Sch 13 FA 1996, which reads as follows as in force:

> '(1) Subject to sub-paragraph (2), 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) […]
>
> (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).'

130. Where a transfer is by reference to '*any transfer of the security by way of sale, exchange, gift or otherwise*' (para 4(1) above), Ms Nathan submits that the premium paid for the grant of the Option cannot be an 'amount payable on the transfer' because factually:

(i) The appellant granted the option to the Trustee on 19 November 2003; clause 4.3 of the Option obliged the appellant to sell the gilt strips *to the Trustee*.

(ii) Clause 10.1 contained a power for either party to assign the benefit of the Option; the appellant acknowledged that the benefit of the Option had been assigned from the Trustee to Hambros by an acknowledgement of a notice of assignment, which obliged the appellant to transfer the gilt strips to Hambros on the exercise of the Option.

(iii) The transfer of the gilt strips to Investec '*by way of sale, exchange, gift or otherwise*' was only capable of occurring following the execution of the deed which assigned the benefit of the Option from the Trustee to Investec on 25 November 2003, which was days after the premium for the grant of the Option had been paid.

131. It is 'trite law' that the grant of an option over an asset does not pass any property in the asset but simply gives the holder of the option a right to acquire the asset at some point in the future: *George Wimpey*. It follows that the amount paid on the Grant of the Option is not 'an amount payable on the transfer for para 14A(3)(b) purposes.

132. The appellant contends that the only amount payable on the transfer was the amount paid on the exercise of the Option, namely £150,400, (and did not include the premium of £1,338,749 paid on the grant of the Option).

The statutory context

133. Ms Nathan then addressed the question whether the statutory purpose of para 14A(3)(b) should inform and restrict the meaning of 'loss' so that it applies only where there has been some form of 'commercial' loss to a taxpayer. It is submitted that 'the answer must be "no"'.

134. Ms Nathan refers to *SSE Generation* at [63]-[66] in which the UT recognises that it is permissible to refer to parliamentary debates in order to determine the context of the statute and the mischief at which it is aimed. Further, and by reference to *Bennion on Statutory Interpretation* (8th edition) wherein the authors recognise that the following documents can be relied on as aids to statutory interpretation:

(a) Reports, including consultation papers, which evidence the mischief behind a provision: section 24.9 relying on *Balhaj v DPP* at [22].

(b) Reports of legislative debates, outside the rule in *Pepper v Hart*, to supply the context or identify the mischief at which legislation is aimed: section 24.12 relying on *Presidential Insurance* at [23]-[24].

(c) Explanatory notes may be used to understand the background to and context of the legislation and mischief at which it is aimed: section 24.14 relying on *R (Westminster CC*) at [5].

135. Relying on the Explanatory Notes to the Finance Bill 2003 cited in her submissions, Ms Nathan says that there is no indication that either Sch 13 as originally enacted, or the amendments made in 1999 and 2003, were directed at any mischief which could be remedied by restricting the meaning of '*loss from a discount of a strip*' in para §4A(3)(b) beyond the clearly drawn statutory definition. The statutory context shows that when Parliament took action in 1999 and 2003 to address concerns about avoidance on relevant discounted securities, it left the formula for the calculation of losses for gilt strips unchanged, which can be contrasted with the significant amendments made in 2004 to introduce anti-avoidance provisions.

136. Ms Nathan submits that where the statute identifies a loss by prescribing a formula to determine the amount of loss or gain, it is not appropriate to import into the analysis or computation of such a loss or gain a 'real' word concept of gain or loss. In this respect, Ms Nathan relies on *Scottish Provident* and *Campbell*.

(1) In *Scottish Provident* where the Inner House of Court of Session considered s 155(2) of the Finance Act 1994 which provided for the calculation of a loss on the holding of certain qualifying contracts by stating:

> 'Where, as regards a qualifying contract held by a qualifying company and an accounting period, amount B exceeds amount A, a loss on the contract of an amount equal to the excess accrues to the company for the period …'

(2) Section 155(4) FA 1994 defined amounts A and B by reference to payments becoming due to the company in an accounting period and payments becoming due by the company in an accounting period.

(3) The Inner House held at [42] that where s 155(2) adopted an 'A-B' calculation of losses, it employed a legal concept '*being a construct which has a specific statutory meaning*' and that a commercial meaning did not fall to be given to '*loss*'.

(4) In *Campbell*, the Special Commissioners considered para 2(2)(b) Sch 13 FA 1996, which was expressed in materially similar terms to para 14A(3)(b) of Sch 13 FA 1996, and held at [86] that para 2(2) was:

> '… an entirely mechanistic provision which calculates the "loss" by deducting the subscription price "paid in respect of [the] acquisition of [the Loan Notes]", within para 2(2)(b), from market value deemed by para 8 to be obtained on the "transfer", within para 2(2)(a) …'

(5) The Special Commissioners held at [87] that once the terms contained in para 2(2)(b) had been construed, the loss had been automatically ascertained, and that just as with s 155 in *Scottish Provident*, para 2(2) had a specific statutory meaning which did not indicate that a commercial meaning fell to be given to the term 'loss'.

137. *Campbell* is held to be correct in construing 'loss' in para 2 (and by extension para 14A) of Sch 13 FA 1996 as a 'legal' concept. Extensive submissions are made as to how the UT in *Berry* 'fell into error' by construing 'loss' as a commercial concept. As I understand it, the nub of this contention is a quintessential example of the legal/commercial dichotomy discussed in *MacNiven*; suffice to say that the 'errors' of the UT in *Berry* as argued flow therefrom.

HMRC's submissions

138. The first stage of the *Ramsay* approach involves the ascertainment of the purpose of the key legislative provision in this appeal, namely para 14A Sch 13 FA 1996. To that end, Mr Davey submits that the purpose is that as held in *Berry* by the UT and in *Andrew* by the FTT: the purpose of para 14A is to be derived from para 14A(1): '*a person who sustains a loss ... from the discount on a strip shall be entitled to relief from income tax*' for that loss.

139. Crucially, 'loss' in this statutory context is not '*notional*' but '*real*': it should reflect what Lewison J in *Berry* describes as '*real commercial outcomes*' (at [52]), including having regard to such elucidation of the notion of 'loss' as is provided by para 14A(3) (*Andrew* at [83]).

140. The composite effect of a scheme should be considered as it was intended to operate: *SPI* at [23]. Where there is a series of contacts and in truth one transaction, the contracts may be read together for the purposes of determining their legal effect: *Ingenious Games* at [110]. Taxing statutes draw their '*life-blood from real world transactions with read world economic effects*': *Barclays Mercantile CA* at [66]. Where legislation employs a 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: *Ramsay* at p326.

141. Mr Davey submits that by following the steps involved in the Scheme, the true fiscal position is as follows:

(1) *Hambros/ Appellant*: Hambros had transferred £1.5 million to the appellant; and the appellant had transferred back to Hambros the same or a similar sum.

(2) *Hambros / Trustee*: Hambros transferred £1,338,749 to the Trustee; and the trustee transferred back to Hambros the same or a similar sum.

(3) *Investec /Appellant and Trustee*: Investec had transferred approximately £1.5 million to the appellant and the trustee (£150,400 to appellant, and £1,347,049 to trustee);

Investec had received from the appellant the Gilt Strips which had been purchased for £1.5 million.

(4) *Appellant /Trustee*: the appellant had transferred £150,000 to the Trustee; the Trustee had transferred to the appellant the Interest Free Loan of £128,000, and the appellant remained a life tenant of the trust.

(5) *Grant Thornton /Appellant*: Grant Thornton had advised on and implemented the Scheme; the Appellant had paid Grant Thornton a fee.

(6) *Appellant /HMRC*: the appellant had asserted that he suffered a loss of £1,349,600, being the difference between £1.5 million (the sum for which the Gilt Strips were originally purchased) and £150,400 (the sum transferred by Investec to the Appellant on exercising the option).

142. The second stage of the *Ramsay* enquiry is to view the facts in issue realistically, and Mr Davey submits that:

(1) The starting point is that the pre-planned and co-ordinated nature of the arrangements is clear, with Grant Thornton's material setting out the various steps involved in the self-described '*tax avoidance*' planning, and the supposed fiscal implications of the same. In the circumstances, the arrangements fall to be analysed as a composite transaction.

(2) Analysing the arrangements as a composite transaction, the next step is to consider whether, as contended, the appellant sustained a 'loss' of £1,349,600 for para 14A relief purposes, and this involves taking into account para 14A(3).

(3) In the context of the present case, a loss only has the potential to arise if the appellant has paid a sum ('£X') for the Gilt Strips, then transferred them, and the '*amount payable on the transfer*' (£Y') is less than the sum paid for the Gilt Strips in the first place. That difference is referred to in para 14A(3) as '*the excess*'.

(4) The loss for the purposes of claiming relief is taken to be equal to 'the excess' by para 14A(3): '*The loss shall be taken to be equal to the amount of the excess …*'.

(5) In the present case, £X is £1,500,000, being the sum the appellant paid for the Gilt Strips. The question arises: what constitutes £Y, i.e. '*the sum payable on the transfer*'?

(6) Viewed realistically, £Y is not the £150,400 claimed by the appellant, which is merely the amount transferred by Investec to the appellant on the exercise of the Option, but in addition, the amount paid by Investec for the assignment of the Option: £1,347,049.

(7) Thus, £Y equals £1,497,449 (being £150,400 plus £1,347,049). This is because:

(a) The total consideration paid by Investec to acquire the Gilt Strips was £1,497,449: £150,400 paid to the appellant, and £1,347,049 paid to the Trustee. When the transaction is viewed realistically and with regard to its composite whole, the only proper conclusion is that the foregoing sum was the sum '*payable on the transfer*'.

(b) Further, viewed realistically, the '*transfer*' of the Gilt Strips to Investec required both of the foregoing events (assignment of the Option to Investec + exercise of the Option by Investec) to have occurred.

The 'real loss' quantification

143. Mr Davey refers to the 'fiscal alchemy' arising out of the Scheme purportedly enabled the appellant to claim a loss of £1,349,600 (i.e. the difference between £1.5 million and the

£150,400 paid by Investec to the appellant on the exercise of the option). There is no real economic loss sustained by the appellant in that quantumn: the ordinary meaning of '*to sustain*' is 'to undergo, suffer, or submit to something unpleasant or harmful, as loss, hardship or damage'; 'not something for nothing' as is the fact in the present case.

144. Mr Davey highlights the facts similar to the present case in *Andrew*: (i) concerned a self-confessed composite transaction – 'a *pre-planned tax avoidance scheme*' (at [95]) intended to achieve tax avoidance of more than £1m in the tax year 2003-04 through the purchase and immediate sale of gilt strips; and (ii) involved Investec as the eventual owner of the gilt strips. While not being identical in every single respect, the scheme in *Andrew* and the Scheme in the present case are 'relevantly on all fours' in that the transaction architecture in both cases is such as to split in two the money transferred by Investec to acquire the gilt strips (acquisition price + cash cancellation price in *Andrew*; assignment price + exercise price in the present case).

145. In *Andrew* (at [112]-[118]) Judge Greenbank held that the right analysis of Mr Andrew's real 'loss' was one which factored in both elements of the consideration paid by Investec for the gilt strips, making Mr Andrew's real loss £3,805.94. Mr Davey submits that the same analysis, *mutatis mutandis* applies to the present case, making Mr Watts' real loss just £2,551 (i.e. the difference between '*the amount paid by [the appellant] for the strip*' of £1,500,000 and the '*the amount payable on the transfer*' of £1,497,449).

Intended benefit to the appellant

146. Further or alternatively to the foregoing, the intended and expected operation of the arrangements entered into by the appellant, including the Trust which formed a component element, the appellant would benefit from the arrangements rather than suffer a detriment by virtue of the arrangements. There was never any real likelihood that he Trust would not be operated as intended and expected including as regards the making of a substantial interest free 'loan' on no specific terms of repayment (other than to repay if demanded).

147. The arrangements were precisely in line with the self-described 'tax avoidance' scheme devised and promoted by Grant Thornton. There was no wider commercial, non-fiscal setting, no 'life-blood' for the legislation to draw on, such life-blood being required in circumstances where the legislation in issue in the present case deals not with the '*notional*' but with '*real commercial outcomes*' (*Berry* at [52]; *Andrew* at [83]; *Bretten* at [65] and [87]).

148. At the end of the process the appellant was, in real world terms, in fundamentally the same economic position as he had been at the outset, save for the fees he had paid. If any loss arose it was merely notional. At all events, the appellant's position is not one which was intended by Parliament to be relieved under Sch 13 FA 1996. As Lord Reed stated at [64] in *UBS*, (citing Carnwath LJ in *Barclays Mercantile CA*):

> '… to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic [i.e that tax statutes generally draw their life-blood from real world transactions with real world economic effect].'

Conclusions

149. Lord Nicholls has observed that the two-fold *Ramsay* principle 'does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts': at [32] of *Barclays Mercantile*. Indeed, in the present case, I consider that it is 'more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute'.

150. In relation to Mr Watts as a witness, I have found him a shrewd businessman with a sharp intellect and a rich vocabulary. He has a quick grasp of the essence of matter, as befitting the

chairman of a sizeable and successful business. It would seem that he had made the decision to enter into the Arrangements after grasping the fundamentals as set out in the Janet-and-John version of Grant Thornton's promotional literature, and the details of implementation were left to the oversight of his trusted employee, Mr Hamilton. Mr Watts conveyed his understanding of the Scheme in apt imagery and metaphors: 'the family silver' and the 'Meccano sets', and my findings of fact in relation to each metaphor are as follows.

The 'family silver'

151. The 'the family silver' being 'put on the line' of circa £100,000 was Mr Watts' answer when being cross-examined on the 'economic loss' for entering into the Scheme. In relation to 'the family silver', I make the following findings of fact.

(1) 'The family silver' of circa £100,000 was the outlays for taking part in the Scheme.

(2) The outlays comprised Grant Thornton's fees of £88,125 (£75,000 plus VAT of £13,125), and around £21,565 paid to Hambros, being interest payments of £10,851 (on the appellant's loan account) and £3,214 (on the Trust's loan account), plus Hambros' arrangement fee of £7,500 (see §55(1)). In addition, there was £400 payable to Cobbetts for completing the Trust Return (§15).

(3) It is inferred that the VAT on Grant Thornton's fees would have been reclaimed, by Pertemps, given that the fees were arranged to be paid by Pertemps, making the net outlays £75,000 plus £21,565, a total of £96,565 plus the £400 for the Trust tax return, and the total was the sum understood by Mr Watts as his 'family silver' put on the line.

(4) The 'tax saving' was annotated by Mr Watts in the second table of figures estimated to be £540,000 (§16), and the same figure was confirmed by Grant Thornton in the document on 'Using Gilt Strips' as the 'tax saving' (§26).

(5) In completing the financial questionnaire for Grant Thornton's compliance procedure, Mr Watts described his attitude as 'adventurous' (§32), which was a reference to the risk involved in participating in the Scheme, where the anticipated 'tax saving' might be challenged.

(6) I find as a fact that Mr Watts understood the Arrangements as costing him in outlays circa £100,000 for the chance of obtaining the 'tax saving' quantified at £540,000.

(7) I also find that Mr Watts understood that at the end of the series of transactions, the £1.5m he borrowed from Hambros to purchase the Gilt Strips would be fully repaid by proceeds from a third-party purchaser, and the 'economic loss' would be 'Nil' as annotated in his handwriting against the first table of figures (§16).

(8) In relation to the £150,000 into Cobbetts' client account as 'additional' sum settled into the Trust, Mr Watts received £128,000 as interest-free loan out of the settlement. While the Trust's client account is not produced, it can be inferred that when Mr Watts applied to the Trustee for a loan in January 2004, the Trustee had already paid £13,820 (see §55(1)(e)) into Mr Watts' Call Deposit account with Hambros to cover the majority of the impending interest payments on the appellant's and the Trust's loan accounts of £10,851 and £3,214 respectively.

(9) The Trust would be left with just over £8,000 after the interest payments in December 2003 and the loan advancement in January 2004. The £128,000 interest-free loan was paid into Pertemps' account, in line with the fact that the sum of £150,000 into the Trust had originated from Pertemps; and the 'loan' has not been repaid to date.

(10) Further, Mr Watts was given to understand by Grant Thornton that the money in the Trust was '*yours as of right*' (§23), and that was how in reality the Trustee dealt with

the trust funds, be it the advance of an interest-free loan without any terms for repayment (save that of when being recalled), or the application of the trust fund towards meeting the interest charge on Mr Watts' loan account without any documentation (or not produced if any existed). The *appearance* of independence of the trustee in not advancing the full £130,000 applied for by Mr Watts, as confessed by the Trustee, 'helps to demonstrate the robustness of the planning' (§64).

(11) There was also the £11,500 paid into the Call Deposit account with Hambros, and that would be to meet Hambros' arrangement fee of £7,500 and towards the purchase price of the Gilt Strips which was £1,503,749.79 (see 55(1)(b)), and therefore £3,749.79 over the £1.5m loan advanced, and also towards the interest payment on the loan on 23 December 2003 of £245.59 (i.e. £10,821 plus £3,214 minus £13,820.18 from Trust).

(12) Another way of understanding the family silver put on the line of circa £100,000 would be to consider the sums paid out by Mr Watts / Pertemps, namely the initial sums of £11,500 and £150,000, then the £75,000 (net) of fees to Grant Thornton; a total of £236,500 minus what the Trust advanced as a 'loan' of £128,000 and possibly left in the trust fund of circa £8,500, giving the overall costs of £100,000.

The 'Meccano sets'

152. Mr Watts described the documents that were put to him for attention or signature 'at the appropriate time by the appropriate people' after receiving 'the appropriate advice' as parts of the Meccano sets. In relation to the parts of the Meccano sets, the facts viewed realistically are:

(1) The numerous documents executed to implement the Scheme were inter-related like the interlinking parts of the Meccano sets: the transactions in the Scheme were pre-planned to follow in a prescribed sequence from the purchase of the Gilt Strips by Mr Watts to the transfer of the same to a third-party buyer.

(2) The series of pre-planned transactions took place from 5 November 2003 to 26 November 2003; the flow of funds (at §55) is a clear indication of the movement of monies to implement the preordained steps in a short period spanning three weeks.

(a) On 5 November 2003, £1,503,749.79 to purchase the Gilt Strips, drawing down the loan of £1,500,000 on the same day.

(b) On 19 November 2003, the Trust drew on the loan facility with Hambros of £1,338,749 and Mr Watts' Call Loan account received the same £1,338,749 on the same day which reduced his loan of £1.5m to £161,251.

(c) On 26 November 2003, the Trust received £1,347,049 from Investec, and on the same day, Mr Watts' Call Loan account received £150,400.

(3) In relation to the condition inserted in the Scheme, *viz* the FTSE 100 index reaching beyond 5,101, this contingency to suggest that there was no composite transaction was a part of that composite transaction, chosen not for any commercial reason but solely to enable the Scheme to claim that there was no composite transaction. The composite effect of the Scheme falls to be considered as it was intended to operate, 'without regard to the possibility that, contrary to the intention and expectations of the parties, it might not work as planned': *SPI* at [22]-[23].

(4) In respect of the likelihood that a third-party purchaser might not be identified, the Tribunal is not to be 'distracted by any peripheral steps inserted' which are in fact 'irrelevant to the way the scheme was intended to operate'; 'it can be disregarded if the parties have proceeded on the basis that it should be disregarded': *Astall* at [34].

(5) 'Therefore, where there is in truth one transaction, the tribunal is entitled to read the contracts together for the purpose of determining their legal effect': *Ingenious Games* at [110]. There was, in truth, only one transaction in the present case, pertaining to the transfer of the Gilt Strips from the appellant to Investec, for the purpose of determining the legal effect of the transfer as 'a commercial unity': *Astall* [34].

Purpose of para 14A in the statutory context of Sch 13 FA 1996

153. Turning to the statutory construction of the relevant provision, the Upper Tribunal's decision in *Berry* held at [52] that the purpose of para 14A is not 'to create a notional profit or loss', and that Parliament '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*' on the construction of the purpose of para 14A being that as stated in sub-para (1) *viz*:

> 'A person who sustains a loss in the year of assessment from the discount on a strip shall be entitled to relief from income tax on the amount of his income for that year according to the amount of the loss.'

154. Mr Davey submits that the Oxford English Dictionary meaning for 'to sustain' is to '*undergo or experience [something]; especially suffer (an injury or loss)*'; and for present purposes the relevant dictionary meaning 'to suffer' is to '*undergo, experience, be subjected to (esp. something unpleasant or painful)*; the purpose of para 14A relief is to relieve genuine economic loss with real financial consequences in line with *Berry UT* at [52].

155. Ms Nathan made lengthy submissions on how *Berry UT* has erred in law in failing to construe the concept of 'loss' for para 14A purposes in like manner as in *Campbell*, which held that para 2(2) of Sch 13 was to be construed within '*an artificial framework*' (at [87], §115), and therefore the term 'loss' for para 2(2) Sch 13 'does not indicate that a commercial meaning falls to be given to "loss".'

156. The internal logic of Ms Nathan's submissions has not escaped me; nor the fact that *Campbell* was described as a 'perceptive judgment' by Lord Nicholls at [38] of *Barclays Mercantile*, in the wake of recognising the 'limitations of the *Ramsay* principle' in *MacNiven*. Ms Nathan is emphatic that the concept of loss in para 14A is to be construed as a composite term, namely '*loss … from the discount on a strip*', and that it is not permissible to construe para 14A 'loss' without the attached qualifier '*from the discount on a strip*'. The central tenor of Ms Nathan's submission is that the term 'loss' in para 14A(1) of Sch 13 is the '*artificial (legal) meaning*' as prescribed by the statute, and 'far removed from any "commercial" sense of the term': *Campbell* at [88].

157. The dispute between the parties in their construction of the meaning of 'loss' under sub-para 14A(1) of Sch 13 exemplifies the commercial/legal dichotomy noted in *Campbell*. Notwithstanding the aforesaid, I am bound by the Upper Tribunal in *Berry*, which is concerned directly with para 14A Sch 13 to FA 1996 as relevant to the present case, unlike *Campbell* which was concerned with para 2 of Sch 13, and which had been repealed by the relevant time when the Scheme was implemented. Against the backdrop of *Berry UT*, I now come to the most difficult part of this decision, which is to decide whether the concept of 'loss' in sub-para 14A(1) of Sch 13, nevertheless, has a notional element to it.

158. I conclude that there is a notional element in the meaning of 'loss' in sub-para 14A(1) (and indeed in the meaning of 'profit' in para 14) by reference to the statutory context of Sch 13 in which it was introduced by amendments effective from 10 July 2003. I have special regard to paragraph 23 of the Explanatory Note to the Finance Bill 2003 in respect of the measures introduced for the taxation of gilt strips to avoid the deferral of the taxation on the gilt interest.

> 'To avoid people deferring tax on gilt interest, which is payable twice a year, by investing in a strip where the profit would only be taxable on redemption or sale, legislation requires a strip to be treated as if it were transferred each year on 5th April for its market value, and the reacquired.' (see §126)

159. At the relevant time (i.e. 10 July 2003 to 21 July 2004), and in a scenario where there was neither redemption nor actual disposal, a non-corporate holder of a strip would be deemed to dispose of all unredeemed strips at each 5 April at market value and immediately re-acquire them at the same value. The deemed disposal value at 5 April one tax year would become the 'acquisition value' for the following tax year to calculate the tax charge. In other words, on a rolling basis, the continual holder of a strip would be taxed on the 'excess' of the 5 April market value of the strip in the current tax year over the previous 5 April market value of the strip.

160. The material aspect of para 14 of Sch 13 pointing to the 'notional' nature of the profit that would be subject to tax by the annual deeming of disposal is at sub-para 14(4) as enacted:

> '(4) A person who holds a strip on the 5th April in any year of assessment, and who (apart from this sub-paragraph) does not transfer or redeem it on that day, shall be deemed for the purposes of this Schedule –
>
> (a) to have transferred that strip on that day;
>
> (b) to have received in respect of that transfer an amount equal to the strip's market value on that day; and
>
> (c) to have re-acquired the strip on the next day on payment of an amount equal to the amount for which it is deemed to have been disposed of on the previous day; …'

161. Given that all strips would have been issued at a discount, in normal market conditions, the market value of a strip could be expected to increase over time, (rather than decrease), and a tax charge would arise under para 14 Sch 13 (rather than a claim for relief under para 14A for loss). Nevertheless, where a notional profit arose on account of a deemed disposal, that was a 'legal' concept of profit as defined by the framework of the statute which was the Sch 13 in force at the relevant time. In like manner, where a loss relief under para 14A arose following a deemed disposal on 5th April, that loss would also be a notional loss.

162. The difficulty posed by the commercial/legal dichotomy is noted by the Special Commissioners in *Campbell* at [85], citing Lord Millet in *Arrowtown*:

> 'We acknowledge, however, as we must, that the commercial/legal dichotomy has given rise to problems. Lord Millet (at para 148) said that –
>
> "The supposed dichotomy between legal and commercial concepts has caused great difficulty. In *Barclays Mercantile* neither Peter Gibson LJ nor Carnwath LJ could understand it, and counsel were unable to explain it."
>
> However we consider that such problems arise due to an attempt to elevate that dichotomy to an exhaustive principle which treats all terms as having either an intrinsic "commercial" or "legal" meaning independent of their statutory context rather than accepting that the dichotomy is useful but particular gloss on the concept of the *Ramsay* doctrine as one of statutory construction.'

163. What I take from the Special Commissioners' observations in *Campbell* is that there is no categorical definition to a statutory word as being either intrinsically 'commercial' or 'legal'; so the meaning of 'loss' in any one provision depends on its particular statutory context. The term 'loss' can be a commercial concept in one context, and a legal concept in another.

164. Taking the statutory context of Sch 13 FA 1996 into account, it seems to me that it is more consistent to construe the concept of 'loss' in sub-para 14A(1) as a legal concept. In contrast with an actual disposal, I consider that the annual deeming of a transfer as having taken place on 5 April with an immediate deemed re-acquisition casts into sharper relief the construction of para 14A in two significant respects.

(1) First, there is a notional disposal by reference to a deemed transfer in order to account for the gilt interest accrued in a given tax year, which indicates that the concepts of profit and loss are legal constructs as defined by the statute.

(2) Secondly, the deemed value of transfer is by reference to the market value of a gilt strip at the date of the deemed transfer; the deemed value of transfer is therefore by reference to a 'commercial' concept, which is that of the market value in the real world.

165. Whilst I accept that it is more consistent to construe the term 'loss' in para 14A Sch 13 as a legal concept, (in the sense that it bears legal meaning conferred by the statute), it does not follow that I am with Ms Nathan all the way as regards the construction of '*the amount payable on the transfer*', which is by reference to the market value of a strip. It is common ground that the market value of a strip (or a security exchanged for strips for that matter) means its publicly quoted price in London Stock Exchange Daily Official List: the term '*the amount payable on the transfer*' is a commercial concept and derives its meaning from the real world.

'The amount payable on the transfer' is a commercial concept

166. The relevant question in this appeal is, in my view, not so much whether the meaning of 'loss' in sub-para 14A(1) is a commercial or a legal concept, but whether '*the amount payable on the transfer*' for para 14A(3) purposes is a commercial concept. I conclude that 'the amount payable on the transfer' is a commercial concept for the following reasons:

(1) The statutory wording directs the focus of construction on '*payable*' (as distinct from 'receivable').

(2) In a case of actual disposal, 'the amount payable on the transfer' is referable to the amount payable by the transferee to acquire the gilt strips, (*not* the amount receivable by the transferor on the disposal of the gilt strips).

(3) This is consistent with the concept of using market value as 'the amount payable on the transfer' in a case of deemed transfer (such as for accounting the annual profit or loss on gilt strips, or the transfers between connected parties).

(4) The amount payable on transfer is a commercial concept by reference to market value or a bona fide amount payable by a third-party purchaser.

(5) A commercial concept for 'the amount payable on the transfer' is essential to preserving tax symmetry, since the amount payable by the transferee to acquire the gilt strips would be the acquisition cost for the transferee, either for calculating its deemed disposal charge on the 5th April in the year of acquisition, or indeed on redemption or eventual disposal, if it were to take place in the same tax year as the acquisition.

167. I reject therefore the submission put forward for the appellant, that '*the amount payable on the transfer*' was only the £150,400 paid by Investec to Mr Watts, and did not include the amount paid to the Trust of £1,347,049 by Investec. The facts, which fall to be viewed realistically in accordance with case law principles to determine this appeal are as follows:

(1) The statutory wording requires me to give the term 'transfer' a wide practical meaning as directed in *SPI,* where the short question is whether the Citibank option gave it an entitlement to gilts, and Lord Nicholls observed at [19]:

> '… the language of a taxing statute will often have to be given a wide practical meaning of this sort which allows (and indeed requires) the court to have regard to the whole of a series of transactions which were intended to have a commercial unity. … If the scheme amounted in practice to a single transaction, the court should look at the scheme as a whole. …'

(2) By giving the term 'transfer' in the statutory wording of '*the amount payable on the transfer*' a wide practical meaning: the grant of the Option to the Trust, and the subsequent assignment of the Option by the Trust to Investec are to be viewed as a series of transactions intended to operate as a commercial unity.

(3) In terms of the legal instruments required to effect the '*transfer*', as Mr Davey submits, the 'transfer' of the Gilt Strips required *both* of the events to have occurred: assignment of the Option to Investec and the exercise of the Option by Investec. It follows therefore that the consideration paid at each event, namely the payment of £1,347,049 by Investec to the Trustee fon the assignment of the Option was an essential part of '*the amount payable on the transfer*' for the purposes of para 14A(3)(b).

(4) In terms of tax symmetry, the acquisition cost of the Gilt Strips for Investec should equate to '*the amount payable on the transfer*' for para 14A(3)(b) purposes. Whether it is for accounting or tax purposes, it is inconceivable that Investec would have only used £150,400 as its acquisition cost (as argued for the appellant). For Investec, the acquisition cost for the Gilt Strips must have been the sum of the two parts: £1,347,049 to the Trustee, *and* £150,400 to Mr Watts. Tax symmetry therefore demands '*the amount payable on the transfer*' to encompass £1,347,049, which was over 91% of the total consideration paid by Investec for Gilt Strips, and not just referable to £150,400.

(5) In terms of the appellant's 'family silver', Mr Watts considered that he was out of pocket to the tune of £100,000, not in the sum of £1,347,049, because the consideration paid on the assignment of the Option, being money into the trust was, as confirmed to Mr Watts: '*yours by right*'. The Trust borrowed from Hambros on the grant of the Option to repay 90% of Mr Watts' loan from Hambros, and Investec paid the Trust the £1,347,049 on assignment of the Option to enable the Trust's loan with Hambros to be repaid. It was all designed to come out in the wash, and Mr Watts quite correctly understood the family silver he had put on the line amounted to £100,000 (for entering the Scheme) and not £1,347,049, which falls to be viewed as more than 90% of '*the amount payable on the transfer*' of the Gilt Strips to Investec.

The contentions on 'A-B' formula

168. The *Campbell* decision discusses in some length whether the 'commercial/legal dichotomy' highlighted by Lord Hoffmann in *MacNiven* is 'reconcilable' with the approach in *Arrowtown* and 'consistent' with the application of the *Ramsay* doctrine by the UK courts. *Campbell* at [79] is a dialogue with Lord Hoffmann in this respect:

> 'Lord Hoffmann, in [*MacNiven*] articulated the commercial/legal dichotomy thus (at para 58):
>
> > "The limitations of the *Ramsay* principle therefore arise out of the paramount necessity of giving effect to the statutory language. One cannot elide the first and fundamental step in the process of construction, namely to identify the concept to which the statute refers. I readily accept that many expressions used in tax legislation (and not only in tax legislation) can be construed as referring to commercial concepts and that the courts are today readier to give them such a construction than they were before *Ramsay*. But that is not always the case. Taxing statutes often refer to purely legal concepts. They use

> expressions of which a commercial man, asked what they meant, would say "You had better ask a lawyer". For example, stamp duty is payvale upon a "conveyance or transfer on sale" (see para 1(1) of Sch 13 to the Finance Cat 1999). Although slightly expanded by a definition in para 1(2), the statutory language defines the document subject to duty essentially by reference to *external* [our emphasis added] legal concepts such as "conveyance" and "sale". If a transaction falls within the legal description, it makes no difference that it has no business purpose. Having a business purpose is not part of the relevant concept.'
>
> We take this passage to confirm that the *Ramsay* doctrine is a canon of construction and its application will vary according to the statutory term or phrase under scrutiny and the context of the case before the court which is invited to apply it. Lord Hoffmann's dictum and dichotomy does not suggest that certain terms or phrases have an intrinsic quality which makes them "commercial" (and susceptible to the application of the *Ramsay* doctrine) or "legal" (and invulnerable to such application). Rather Lord Hoffmann observes that certain terms and phrases bear "external" legal meanings. An extreme example would be where a particular term expressly bears the meaning given to it in another statute. In [*MacNiven*] itself, the meaning of the term "payment" had the narrow (legal) meaning of "discharge of a debt", not due to some express statutory reference but because of the context of the relevant provision in s 338 of the Income and Corporation Taxes Act 1988, where such a meaning was required to preserve symmetry between debtor and creditor in relation to interest payments on a loan.'

169. The Special Commissioners in *Campbell* then turned to *Arrowtown*, wherein the deferred shares may be treated as 'shares' for company law purposes, the Hong Kong Court of Final Appeal nevertheless found that the shares were not shares for stamp duty purposes. Lord Millet (at [152]) of *Arrowtown* said of the deferred shares as having 'no commercial content at all', and 'carried no rights to dividends or capital on a winding up'; and if 'shares are considered as a bundle of rights, they had barely even a shadowy existence'. The Special Commissioners in *Campbell* thus found *Arrowtown* to be consistent with the dictum and commercial/legal dichotomy, citing Lord Hoffmann in *MacNiven* at [50] (*Campbell* at [81]), where his Lordship added a note of caution as respects the distinction between commercial and legal concepts:

> 'I would only add by way of caution that although a word may have a "recognised legal meaning", the legislative context may show that it is in fact being used to refer to a broader commercial concept.'

170. The short point I draw from the aforesaid in *Campbell*, which is after all *the* authority most relied on by the appellant, is that although I have accepted that the concept of 'loss' for sub-para 14A(1) purposes is a legal construct, it does not follow, as a matter of statutory construction, that '*the amount payable on the transfer*' for para 14A(3)(b) must also be a legal construct, which I think is the nub of Ms Nathan's submissions.

171. For the avoidance of doubt, even if it is accepted that the concept of 'loss' for para 14A purposes takes on a legal meaning as conferred by the statute, the so-called 'A-B calculation' central to Ms Nathan's submissions is not 'invulnerable' to *Ramsay* application. That is to say, the so-called 'A-B calculation' for establishing the 'excess' for para 14A purposes does not take on the formulaic character identical to the relevant provision in *Mayes* for quantifying the Corresponding Deficiency Relief, which 'does not admit of a purposive interpretation' (at [23] of *Mayes HC*). This is because '*the amount payable on the transfer*' (the figure for 'B') is a commercial concept, and although the word 'transfer' may have a 'recognised legal meaning', the legislative context of Sch 13 does '*show that it is in fact being used to refer to a broader commercial concept*': Lord Hoffmann's caution in *MacNiven* at [50].

172. Finally, I will address briefly the appellant's contention that the grant of an option over an asset does not pass any property in the asset (*George Wimpey*), and therefore the consideration paid in relation to the grant or assignment of the Option cannot be relevant to the meaning of 'transfer' for the purpose of determining '*the amount payable on the transfer*'.

173. There are aspects in the Court of Appeal decision in *Astall* which are pertinent to addressing this contention. In *Astall* the taxpayers' arguments were that para 3 Sch 13 FA 1996 is 'immune from purposive interpretation', because (a) the concept of an RDS is a legal concept and not a commercial concept; (b) the concept of profit or loss is different from deep gain as concerns what may happen on redemption; and (c) that para 3(1C) contains an express direction that some terms should not be ignored in determining whether a security constituted an RDS, and the importance to focus on the terms of issue as at the date of issue.

174. Arden LJ rejected the argument that para 3 Sch 13 FA 1996 is 'immune from purposive interpretation' for several reasons, including how to view the series of transactions:

> '[42] I see no reason to hold that the new approach to statutory interpretation applies only if there is a composite transaction consisting of several elements destined to lead to a particular result. Mr Prosser [for the taxpayers] urged s to accept that the language of practical certainty is derived from the jurisprudence on pre-ordained transactions for the purposes of [*Ramsay*] jurisprudence. This, he submits, that purposive interpretation should be confined to composite transactions, just as the transaction in *SPI* was a composite transaction. In my judgment, the principle is that set out in the first sentence of [32] of Mawson. This principle is not expressed to be limited to which composite transactions. *It can thus apply to a single multi-faceted transaction which on its face operates in a particular way but which when examined against the facts of the case does not operate as a transaction to which the statute was intended to apply.*' (italics added)

175. Even if the analysis of the facts in the present case is to depart from being viewed as composite transactions, *Astall* is the authority to view the arrangements in question as '*a single multi-faceted transaction*'. In Grant Thornton's engagement correspondence, figures were set out for the 'Scenario 2' transaction, whereby the Trustee would exercise the option. Whilst noting that 'technically the loss still arises' in a Scenario 2 transaction, even in Grant Thornton's estimation, 'this is very aggressive and open to serious challenge under the *Ramsey* case' (§38). The Arrangements as implemented are in fact no different from the 'Scenario 2' transaction in terms of how 'technically the loss still arises'. I have no difficulty in finding that the absurd result delivered by the multi-faceted transaction as implemented in this case does not operate as a transaction to which para 14A of Sch 13 was intended to apply.

176. As a concluding remark, it is not just Lord Hoffmann's speech in *MacNiven* that reverberates in the writing up of this decision, but his speech in *Investors Compensation Scheme* ('*ICS*') as concerns the use of extrinsic material to aid the construction of contractual terms. Suffice it to say that I see parallels in Lord Hoffmann's comments (and criticism) in *ICS* when considering the extent and the relevance of extrinsic material being deployed in aiding statutory construction, of which the appellant has supplied me with in ample quantity.

The quantum of loss

177. The last finding of fact that is required to determine this appeal concerns the quantum of loss. HMRC have conceded that the loss in question should be £2,551, being £1,500,000 less the £1,497,449 as 'the amount payable on the transfer' by the third-party purchaser of the Gilt Strips. From Hambros' statement of the appellant's Call Deposit account, £1,503,749.79 was the sum applied in relation to the 'Purchase of UK Treasury Strip 0% 07/12/03' (see §55(1)(b)).

178. I infer that £3,749.79 of the £11,500 the appellant had deposited with Hambros was applied to meet the acquisition cost in addition to drawing down the loan facility of £1,500,000. The acquisition cost to the appellant for the Gilt Strips is therefore £3,749 more than the £1.5m allowed for in reaching the loss of £2,551 conceded by the respondents. The quantum of 'loss' for para 14A relief purposes is to be £6,300, being the aggregate of £3,749 and £2,551.

DISPOSITION

179. The quantum of 'loss' claimed pursuant to paragraph 14A of Schedule 13 to FA 1996 in the appellant's 2003-04 Return is to be revised from £1,349,600 to £6,300. Accordingly, the appeal is allowed in part.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

180. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 07th NOVEMBER 2022

ANNEX 1

LEGISLATION

181. Pursuant to s 102 FA 1996, the provisions of Schedule 13 to FA 1996 had effect from 1 April 1996 (until 6 April 2005)[4]. The provisions relevant to this appeal which are not set out in the body of the decision notice are 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) to be equal to the amount of the excess increased by the amount of any relevant costs; 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 –
>
> […]
>
> **4 Meaning of 'transfer'**

[4] Section 102 FA 1996 was repealed by paragraph 1, Schedule 3, of the Income Tax (Trading and Other Income) Act 2005.

(1) Subject to sub-paragraph (2), 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) […]

(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 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.

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

14 Strips of government securities

(1) Every strip is a relevant discounted security for the purposes of this Schedule.

(2) For the purposes of this Schedule, where a person exchanges a security for strips of that security, the person who receives the strips in the exchange shall be deemed to have paid, in respect of his acquisition of each strip, the amount which bears the same proportion to the market value of the security as is borne by the market value of the strip to the aggregate of the market values of all the strips received in exchange for the security.

(3) For the purposes of this Schedule, where strips are consolidated into a single security by being exchanged by any person for that security, each of the strips shall be deemed to have been redeemed at the time of the exchange by the payment to that person of the amount equal to its market value.

(4) A person who holds a strip on the 5th April in any year of assessment, and who (apart from this sub-paragraph) does not transfer or redeem it on that day, shall be deemed for the purposes of this Schedule –

(a) to have transferred that strip on that day;

(b) to have received in respect of that transfer an amount equal to the strip's market value on that day; and

(c) to have re-acquired the strip on the next day on payment of an amount equal to the amount for which it is deemed to have been diposed of on the previous day; ..'

Section 50(6) TMA

50 Procedure

(6) If, on appeal notified to the tribunal, the tribunal decides –

(a) That the appellant is over charged by a self-assessment;

(b) that any amounts contained in the partnership statements are excessive; or

(c) that the appellant is over charged by an assessment other than a self-assessment,

the assessment will amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

ANNEX 2

AUTHORITIES

The authorities lodged are listed chronologically with their short references emboldened in brackets.

(1) *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 (‘***Snook***’)

(2) *George Wimpey & Co Ltd v IRC* [1975] 1 WLR 995 (‘***Wimpey***’)

(3) *EV Booth (Holdings) Ltd v Buckwell (Inspector of Taxes)* [1980] STC 578 (‘***Booth***’)

(4) *WT Ramsay Ltd v IRC* [1982] AC 300 (‘***Ramsay***’)

(5) *IRC v Willoughby* [1987] 1 WLR (‘***Willoughby***’)

(6) *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL (‘***MacNiven***’)

(7) *R (Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 1 WLR 2956 (‘***R (Westminster CC)***’)

(8) *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2002] EWCA Civ 1853, [2003] STC 66 (‘***Barclays Mercantile CA***’)

(9) *IRC v Scottish Provident Institution* [2003] STC 1035 (‘***SPI - IH***’)

(10) *Collectors of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 (‘***Arrowtown***’)

(11) *Carreras Group Ltd v Stamp Commissioner* [2004] UKPC 16, [2004] STC 1377 (‘***Carreras***’)

(12) *Campbell v IRC* [2004] STC (SCD) (‘***Campbell***’)

(13) *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684 (‘***Barclays Mercantile***’)

(14) *IRC v Scottish Provident Institution* [2004] UKHL 52, [2004] 1 WLR 3172 (‘***SPI***’)

(15) *Mayes v HMRC* [2009] EWHC 2443 (Ch), [2010] STC 1 (‘***Mayes HC***’)

(16) *Astall v HMRC* [2009] EWCA Civ 1010, [2010] STC 137 (‘***Astall***’)

(17) *Berry v HMRC* [2009] UKFTT 386 (TC) (‘***Berry FTT***’)

(18) *Berry v HMRC* [2011] UKUT81 (TCC), [2011] STC 137 (‘***Berry UT***’)

(19) *HMRC v Mayes* [2011] EWCA Civ 407, [2011] STC 1269 (‘***Mayes CA***’)

(20) *Tower MCashback LLP1 v HMRC* [2011] UKSC 19 (‘***Tower MCashback***’)

(21) *Presidential Insurance Co Ltd v Resha St Hill* [2012] UKPC33 (‘***Presidential Insurance***’)

(22) *Bretten v HMRC* [2013] UKFTT 189 (TC), [2013] SFTD 900 (‘***Bretten***’)

(23) *Pollen Estate Trustee Co Ltd v HMRC* [2013] EWCA Civ 753 (‘***Pollen Estate***’)

(24) *UBS AG v HMRC* [2016] UKSC 13, [2016] 1 WLR 1005 (‘***UBS***’)

(25) *Acornwood LLP v HMRC* [2016] UKUT 361 (TCC), [2016] STC 2317 (‘***Acornwood***’)

(26) *RFC 2012 plc v Advocate General for Scotland* [2017] UKSC 45, [2017] 1 WLR 2767 (‘***RFC***’)

(27) *Christianuyi Ltd v HMRC* [2018] UKUT 10 (TCC), [2018] STC 1863 (‘***Christianuyi***’)

(28) *Balhaj v DPP* [2018] UKSC 33, [2019] AC 593 (‘***Balhaj***’)

(29) *Andrew v HMRC* [2019] UKFTT 177 (TC), [2019] SFTD 714 **(‘*Andrew*’)**

(30) *Ingenious Games LLP v HMRC* [2019] UKUT 226 (TCC), [2019] STC 1851 (‘***Ingenious***’)

(31) *HMRC v SSE Generation Ltd* [2019] UKUT 332 (TCC, [2020] STC 107 (‘***SSE Generation***’)

(32) *Ecko Limited (t/a Subway) v HMRC* [2019] UKFTT 715 (TC), [2020] SFTD 335 **(‘*Ecko*’)**

(33) *Good v HMRC* [2020] UKFTT 25 (TC) **(‘*Good*’)**

(34) *Uber BV v Aslam* [2021] ICR 657 (‘***Uber***’)

(35) *Kevin John Pitt v HMRC* [2022] UKFTT 222(TC) **(‘*Pitt*’)**

The following additional authorities are referred to in the Decision

(36) *IRC v Duke of Westminster* [1936] AC 1, 19 TC 490 (‘***Duke of Westminster’***)

(37) *IRC v Burmah Oil Co Ltd* [1982] STC 30, 1982 SC (HL) **(‘*Burmah Oil*’)**

(38) *Furniss (Inspector of Taxes) v Dawson* [1984] STC 153, [1984] AC 474 (‘***Furniss v Dawson***’)

(39) *Astall and another v Revenue and Customs Comrs* [2007] SpC 628, [2008] STC(SCD) 142 (***Astall SpC***)

(40) *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28, [1998] 1 All ER 98, [1998] 1WLR 896 (‘***Investors Compensation Scheme***’)

ANNEX 3

Excerpts of the substance of the amendments in the three key stages

182. In relation to the amendments effective from 27 July 1999, Ms Nathan submits:

(a) Prior to 9 July 2003, gilt strips were specifically addressed by para 14, and ‘*Every gilt strip is a relevant discounted security for the purposes of this Schedule*’.

(b) Paragraph 1 charged profits on all RDS to income tax, and para 2(1) provided for relief where a person ‘sustain[ed] a loss from the discount’ on a RDS.

(c) Para 2(2) then defined the method by which a ‘loss’ was calculated:

> ‘(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.’

(d) Between 29 April 1999 and 26 July 1999, under para 3(1) a ‘relevant discounted security’ was by reference to ‘deep gains’ occurring on redemption (but not transfer); and para 3(1) was expressly subject to para 14(1) which provided that ‘*Every st4rip is a relevant discounted security for the purposes of this Schedule*’.

(e) ‘Deep gains’ were defined by para 3(3)-(4) by reference to a threshold determined the percentage difference between the issue price and the price payable on redemption, adjusted depending on the number of years between the date of issue and the date of redemption.

(f) Gilt strips were exempt from the need to identify a ‘deep gain’ as para 3 was expressly subject to para 14(1).

(g) From 27 July 1999, para 3(1) was amended to define a ‘relevant discounted security’ by reference to a deep gain on any amount payable on redemption on

maturity or '*in the case of a security of which there may be a redemption before maturity, on at least one of the occasions on which it may be redeemed*.'

(h) Paragraph 3(1A) excluded from consideration as an occasion on which there may be redemption before maturity, occasions on which there may be redemption otherwise than at the option of the person who holds the security but where option was unlikely to be exercised.

(i) Paragraph 3(1C) created a carve back into para 3(1A) for occasions on which there may be redemption if '*the obtaining of a tax advantage by any person is the main benefit, or one of the main benefits, that might have been expected to accrue from the provision in accordance with which it may be redeemed on that occasion*.'

(j) Significantly, Ms Nathan submits, para 14 was not amended in July 1999, so that gilt strips were effectively able to sidestep the definitional and anti-avoidance provisions contained in para 3 which determined whether something was a 'relevant discounted security' and move straight to the loss calculation provisions in para 2.

183. In relation to the amendments to Sch 13 effective from 10 July 2003, Ms Nathan submits that those amendments repealed the general scheme for calculating losses on relevant discounted securities, 'but preserved it for gilt strips':

(a) Para 1 continued to provide for profits on RDS to be charged to income tax;

(b) Para 2 dealing with the calculation of losses on RDS was repealed, along with para 3 so that there was no longer a general definition of RDS by reference to deep gains and which took account of avoidance purposes.

(c) Para 14(1) was not amended, so continued to define strips as relevant discounted securities.

(d) Para 14A was introduced, 'substantially replicating the loss definition and calculation provisions which had previously been contained in para 2'.

(e) No targeted anti-avoidance provision was introduced into paras 14, or 14A.

184. The amendments from 22 July 2004 to introduce a suite of anti-avoidance provisions into Sch 13 were made without retrospective effect; pursuant to s 138(10) FA 2004, the effect of the amendments was restricted to '*any transfer of a strip on or after 17th March 2004*'.

(a) Para 14B identified the targeted arrangements as those where the obtaining of a tax advantage was the amin benefit or one of the main benefits expected to accrue from certain arrangements, including para 14B(1)(b) where '*the amount payable to a person on a transfer of a strip by him is less than the market value of the strip at the time of the transfer*.'

(b) Para 14B(3) provided for such persons as having received on transfer an amount equal to the market value of the strip at the time of the transfer.

(c) Para 14C(1) then excluded from the calculation of any losses for the purposes of capital gains tax.

(d) Para 14D contained exclusions from the definition of a '*loss sustained by a person from the discount on a strip*' which were identified by reference to mismatches between the mount brought into account as payable on the transfer and market value of the strip at the time of acquisition.

ANNEX 4

Excerpts of some of the Explanatory Notes to the Financial Bill 2003 relied upon

1. In relation to para 14A(3), the Explanatory Note to the Finance Bill 2003 states:

> '8. New paragraph 14A(3) explains when a loss is incurred. It happens when the amount paid for the strip (which may be the amount deemed to be paid on the 6th April in the year of assessment when the strip is transferred) is bigger than the amount to be received on transfer or redemption of the strip (inclduing amounts deed to be received on 5th April each year). The sub-paragraph makes the point that expenses are disregarded in working out the loss. New paragraph 14A(4) ensures that transfers and payments include the deemed transfer and payment for the deemed reacquisition on each 5th April given by paragraph 14(4).'

2. Paragraph 11 of the Explanatory Note refers to s 102 FA 2002 as 'restricting relief in certain avoidance related cases'. Ms Nathan submits that concerns about such avoidance did not prevent Parliament introducing para 14A to provide relief.

3. The Explanatory Note then summarises the type of avoidance in question s102 FA 2002 was introduced to counter, namely the creation of 'large artificial loss' exploiting 'connected parties' rule (at para 20 of the Note), and continues at paragraph 21 as follows:

> '21. Despite that change [i.e. to the "connected parties" rule], avoidance has continued. It is clear that the mischief is the availability of the loss relief, when any normally behaving discounted security would always produce a profit rather than a loss. Accordingly the Government has decided to withdraw the facility for loss relief, and for expenses, as they were not only being exploited for avoidance, but were also out of kilter with the treatment of securities generally.'

4. Paragraph 19 of the Notes also confirms that the changes to the definition of 'relevant discounted securities' by section 62 FA 1999 were intended to address avoidance.