Neutral Citation Number: [2023] EWCA Civ 474

Case No: CA-2022-001869

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MRS JUSTICE FALK AND UPPER TRIBUNAL JUDGE JONATHAN RICHARDS
[2022] UKUT 00185 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 May 2023

Before :

LORD JUSTICE NEWEY
and
LADY JUSTICE WHIPPLE

- -

Between :

(1) Altrad Services Limited (Formerly Cape Industrial Services Limited) **(2) Robert Wiseman and Sons Limited**	**Appellants/ Respondents**
- and -	
The Commissioners for His Majesty's Revenue and Customs	**Appellants/ Respondents**

- -
- -

Jonathan Peacock KC and Edward Hellier (instructed by **KPMG LLP**) for the **Taxpayer Respondents**
Jonathan Davey KC and Barbara Belgrano (instructed by **Solicitor's Office and Legal Services**) for **HMRC as Appellants**

Hearing date : 4 April 2023

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Approved Judgment

Lady Justice Whipple :

Introduction

1. Altrad Services Ltd and Robert Wiseman and Sons Ltd (the "Taxpayers") appealed to the First Tier Tribunal against closure notices issued by the Commissioners for HM Revenue and Customs ("HMRC") restricting the Taxpayers' claims to capital allowances arising out of certain transactions entered into in 2010.

2. The FTT (Judge Harriet Morgan, decision released on 23 March 2020) dismissed the Taxpayers' appeal on what she referred to as Issue 1 (which is now Ground 1 in this appeal, see below), although she was not with HMRC on other issues raised in the appeal before her. The Upper Tribunal (Falk J and UTJ Jonathan Richards, decision released on 12 July 2022 with neutral citation [2022] UKUT 00185 (TCC)) reversed the FTT on Issue 1, and upheld the FTT on other grounds, with the result that the Taxpayers' claims for capital allowances succeeded in full.

3. HMRC has applied for permission to appeal to the Court of Appeal. HMRC's Grounds of Appeal dated 26 September 2022 set out two grounds of challenge to the UT's decision:

    a. Ground 1: the UT erred in law in concluding that the taxpayers ceased to own plant and machinery for the purposes of section 61(1)(a) of the Capital Allowances Act 2001 ("CAA 2001").

    b. Ground 2: the UT erred in law in assuming that the taxpayers incurred qualifying expenditure for the purposes of section 11(4)(a) of CAA 2001.

4. By an order dated 12 December 2022, I granted permission for Ground 1 and no issue now arises in relation to it; there will be a substantive hearing of the appeal in due course. I adjourned the application for permission for Ground 2 to an oral hearing, indicating that I considered Ground 2 to be arguable but there was a dispute as to whether the Court should permit it to be argued at this stage; the dispute turned in large part on whether the point raised was a new point and if so, on whether there would be prejudice to the Taxpayers if HMRC were granted permission to argue it.

5. The oral hearing took place on 4 April 2023 before Newey LJ and me. We reserved judgment. At that hearing, Mr Davey KC (who did not appear below) and Ms Belgrano appeared for HMRC. Mr Peacock KC and Mr Hellier appeared for the Taxpayers. I am grateful to Counsel and their respective legal teams for their considerable assistance.

6. I have concluded that HMRC should have permission to rely on Ground 2 on condition that certain assumptions are made as to the evidence which would have been adduced by the Taxpayers had the point been taken in the FTT.

Law

7. Ground 1 raises issues concerning section 61(1)(a) of the CAA 2001. That provides:

> "**61 Disposal events and disposal values**

> (1) A person who has incurred qualifying expenditure is required to bring the disposal value of the plant or machinery into account for the chargeable period in which –
>
> (a) the person ceases to own the plant or machinery; …"

8. Ground 2 raises issues concerning section 11 of the CAA 2001. That provides, so far as is relevant:

> "**11 General conditions as to availability of plant and machinery allowances**
>
> (1) Allowances are available under this Part if a person carries on a qualifying activity and incurs qualifying expenditure.
>
> …
>
> (4) The general rule is that expenditure is qualifying expenditure if-
>
> (a) it is capital expenditure on the provision of plant or machinery wholly or partly for the purposes of the qualifying activity carried on by the person incurring the expenditure, …"

Background

9. The Taxpayers entered into arrangements which were described by the UT:

> "15. Both [Taxpayers] owned plant and machinery (the "Assets") on which they were entitled to claim capital allowances on the "reducing balance" basis set out in CAA 2001. Like the FTT at [6], we explain the arrangements by assuming that the market value of that plant and machinery was £100 on implementation of the arrangements.
>
> 16. Each [Taxpayer] sold the Assets to a leasing company in the Société Générale banking group ("SGLJ") for their market value of £100 and, as a result, ceased to be the legal or beneficial owner of the Assets.
>
> 17. Immediately following the sale:
>
> (1) SGLJ entered into a short-term finance lease (a "Lease") with each [Taxpayer] for a duration of three or four weeks. Each [Taxpayer] was obliged to pay rentals totalling £5 for the use of the Assets during that period.
>
> (2) Each [Taxpayer] granted SGLJ an option (the "Put Option") entitling SGLJ to sell the Assets back to the [Taxpayer] on termination of the relevant Lease. The price payable by [a Taxpayer] on any exercise of the Put Option

(the "Option Price") was the predicted market value of the Assets on termination of the Lease (£95).

(3) SGLJ granted another company in each [Taxpayer]'s group an option (the "Call Option") entitling that group company to purchase the Assets from SGLJ. The Call Option was exercisable, very broadly, at the same time as the Put Option and for the same Option Price as was payable on exercise of the Put Option.

(4) The ultimate parent company of each [Taxpayer] gave SGLJ a "Parent Guarantee" guaranteeing the payment of all sums due to SGLJ under the Lease, Put Option and related documents.

18. Each [Taxpayer] paid rent and all sums due under the Lease. Each Lease terminated in accordance with its terms a few weeks after it was granted. On that expiry, SGLJ exercised the Put Option, each [Taxpayer] paid SGLJ the £95 Option Price and became legal and beneficial owner of the Assets once more.

19. The [Taxpayers] hoped and intended that the arrangements would be analysed in the following way pursuant to CAA 2001:

(1) On the sale of the Assets to SGLJ, there would be a disposal event for the purposes of s61(1)(a) of CAA 2001 on the basis that they ceased to own the Assets. They would have to bring a disposal of value of £100 into their general capital allowances pool, ostensibly reducing their entitlement to capital allowances because of a reduction in the pool of expenditure.

(2) However, the Lease was a "long funding finance lease" for the purposes of Chapter 6 of Part 2 of CAA 2001. In its capacity as lessee under a long funding finance lease, each [Taxpayer] was entitled to capital allowances under s70A of CAA 2001 by reference to qualifying expenditure treated as incurred on the provision of the Assets. The amount of that capital expenditure was, by s70C and s70YE of CAA 2001, the aggregate of:

(a) £5 - being the present value of the rentals due under the Lease; and

(b) £95 - the Option Price, which represented a guarantee of any residual amount for the purposes of s70YE(1)(a).

This is referred to in the legislation as the "commencement PVMLP".

> (3) Accordingly, the disposal value of £100 brought into the [Taxpayers'] general plant and machinery pool was immediately counteracted by an addition of £100 of qualifying expenditure to that pool under the long funding finance lease regime.
>
> (4) On expiry of the Lease, the [Taxpayers] were required to bring a disposal value into their general plant and machinery pool under s70E of CAA 2001. That disposal value was the difference between:
>
> (a) "QE" in s70YE, which was the amount of each [Taxpayer's] qualifying expenditure treated as incurred under the Lease – namely £100; and
>
> (b) "QA" in s70YE, defined as the aggregate of "the payments made to the lessor by the person under the lease…" (the £5 rent) and "the payments made to the lessor by the person under a guarantee of any residual amount" (the £95 Option Price) - in total £100.
>
> (4) Since both "QE" and "QA" for the purposes were £100, their difference was nil with the result that neither [Taxpayer] was required to bring into account any disposal value on expiry of the Lease.
>
> (5) Finally, on exercise of the Put Option each [Taxpayer] incurred £95 of qualifying expenditure under s11 of CAA 2001 which was "capital expenditure on the provision of plant or machinery" and so qualified for capital allowances.
>
> 20. It can be seen that the [Taxpayers] contend that the overall effect of the arrangements in each case was to "step up" the amount of qualifying expenditure in their general pool that qualified for capital allowances by £95 without any acquisition of new plant and machinery. Moreover, although the [Taxpayers] entered into these arrangements just once, if their analysis is correct, the transactions could (at least in theory) have been repeated multiple times, leading to a potentially limitless increase in their entitlement to capital allowances."

10. HMRC took issue with the Taxpayers' analysis and issued closure notices restricting the Taxpayers' claims to capital allowances. The Taxpayers appealed.

11. At the FTT, HMRC made the overarching argument based on *Ramsay*[1] that the Taxpayers did not cease to own the Assets (as the FTT had defined them) for the purposes of section 61(1)(a) CAA 2001 when they sold them to SGLJ. This was Issue 1 before the FTT and Ground 1 before this Court. HMRC also raised various technical objections to the Taxpayers' claims, which formed the basis of Issues 2, 3 and 4 before

[1] *WT Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300, and the line of cases following it.

the FTT. The FTT found in HMRC's favour on Issue 1, but decided in the Taxpayers' favour on the other issues.

12. As part of the analysis of Issue 1, the FTT made findings of fact, including at [260(2)(c)] that the money "simply went into a loop designed to enable the appellants to claim capital allowances without suffering any economic cost"; and at [259] that:

> "[T]he intended overall effect of this set of transactions was to give the "apparently magic result" that the appellants were entitled to allowances on an additional £95 without actually suffering that cost through having divested themselves of ownership of the assets for three or four weeks only (and without disruption to their use of the assets for the purposes of their trades)."

13. The Taxpayers appealed to the UT on Issue 1. HMRC cross-appealed on two of the technical issues on which they had lost before the FTT, which were for convenience referred to by the UT as Issues 2 and 4 in conformity with the FTT's labels. The UT reversed the FTT on Issue 1 and agreed with the FTT on Issues 2 and 4. That was to decide the case in the Taxpayers' favour and to permit their claim for capital allowances, in full.

14. In the course of their decision, the UT made a number of comments[2] to the effect that HMRC was wrong to have confined its *Ramsay* attack to section 61(1)(a). The UT indicated that the result might have been different if HMRC had argued *Ramsay* differently (see, for example, UT at [96]). The UT did not go into detail, but the gist of their view appears to have been that HMRC had gone wrong in attacking the scheme at the point of purported disposal by the Taxpayers of the Assets, which involved focussing the *Ramsay* arguments on section 61(1)(a); HMRC should instead have attacked the scheme at the point that the Taxpayers purported to reacquire the Assets when SGLJ exercised the Put Option and the Taxpayers paid SGLJ the Option Price; that alternative attack would have involved focussing the *Ramsay* arguments on section 11(4)(a).

15. By an application dated 11 August 2022, HMRC applied to the UT for permission to appeal to the Court of Appeal, advancing the two grounds which I have summarised above at paragraph 2. Ground 1 sought to rehearse the arguments which had already been advanced under Issue 1 before the FTT and the UT. So far as Ground 2 was concerned, HMRC argued at [16] that "in light of the UT's comments on the scope of HMRC's *Ramsay* argument … HMRC seek permission, if indeed necessary, to appeal on the ground that, in relation to section 11 CAA 2001, the Option Price did not constitute "qualifying expenditure"…". HMRC developed those arguments at [16]-[32] of that application.

16. By a decision dated 30 August 2022, the UT refused permission to appeal to the Court of Appeal. In relation to what is now advanced as Ground 2, the UT stated:

[2] HMRC lists the paragraphs as 32, 33, 41, 76, 79, 81, 93, 96 and 108: see HMRC's application to the UT for permission to appeal dated 11 August 2022, para 16.

> "9. By paragraphs 16 to 23, HMRC seek to advance new arguments that were not made before either the FTT or the UT, to the effect that the Option Price did not constitute expenditure incurred wholly or partly for the purposes of the qualifying activity carried on by the Taxpayers.
>
> 10. … In our judgment, HMRC's new arguments … are paradigm examples of arguments that should not be permitted to be advanced for the first time on appeal. The question of the "purpose" of the Taxpayers' expenditure raises factual questions. If HMRC wanted those factual questions to be addressed, they should have raised these arguments before the FTT so that the FTT could make appropriate factual findings. …"

17. It is against that background that HMRC seeks permission from this Court to rely on Ground 2.

Submissions

18. HMRC's application for permission to appeal on Ground 2 is supported by skeleton arguments dated 26 September 2022 and 21 March 2023, which were supplemented by Mr Davey in oral submissions. HMRC say that a taxpayer must meet two tests to qualify under section 11: first, a test of provision (whether the expenditure was incurred on the provision of plant and machinery) and secondly a test of purpose (whether that expenditure was wholly or partly for the purposes of the qualifying activity). HMRC argue that the Taxpayers fail both tests. They say that section 11 was always in issue between the parties, as can be seen from a careful reading of the pleadings and submissions, and that it is not a new point. Further, and in any event, they say that the Taxpayers bore the burden of proving their claim for allowances, and it was always and necessarily an integral part of the Taxpayers' case that the conditions in section 11(4)(a) were met at the point that the Assets were reacquired; the Taxpayers knew or ought to have known that they had to prove that element of their claim, yet they took the decision not to call any evidence to address it before the FTT and they are now fixed with that decision. Alternatively, HMRC argue that if Ground 2 does raise a new point, this Court should permit it to proceed because the FTT made all relevant findings of fact about the scheme, and the point is one of law as to the meaning and effect of section 11(4)(a).

19. The Taxpayers' objections to Ground 2 are contained in the Respondents' Statement dated 12 October 2022 and their skeleton argument dated 28 March 2023; they were advanced orally by Mr Peacock. The Taxpayers say that the UT was correct to refuse permission to appeal on Ground 2, for the reasons the UT gave. Ground 2 is undoubtedly a new ground of appeal. HMRC's *Ramsay* attack on the scheme was confined to section 61. To the extent that section 11 played a part in the arguments before the tribunals, it did so in the context of different arguments which are no longer relied on. The Taxpayers submit that they would be caused prejudice if Ground 2 were now advanced by HMRC, because the Taxpayers have not had the opportunity to call evidence to address it and because the opportunity to put their submissions to the FTT on their purpose for incurring the expenditure has been forgone. Even if that prejudice could in some way be mitigated, the Court should decline to exercise discretion in

HMRC's favour to allow the point to be advanced at this stage because the closure notices under appeal date back many years and finality of litigation should prevail.

Approach in Case Law

20. There is no dispute between the parties as to the approach the Court should take to HMRC's application for permission to appeal on Ground 2. If Ground 2 was live before the FTT, then this Court should consider whether it has a real prospect of success, see *Nadia Zaman v London Borough of Waltham Forest* [2023] EWCA Civ 322 at [82]. If Ground 2 is a new ground of appeal, the Court should take the approach outlined in *Singh v Dass* [2019] EWCA Civ 360 per Lord Justice Haddon-Cave at [15]-[18] (approved in *Notting Hill Finance Ltd v Sheikh* 2019] EWCA Civ 1337; [2019] 4 WLR 146):

> "15. The following legal principles apply where a party seeks to raise a new point on appeal which was not raised below.
>
> 16. First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> 17. Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial (*Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49]).
>
> 18. Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs. (*R (on the application of Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24; [2017] R.T.R. 22 at [29])."

Discussion

New or Existing Ground of Appeal

21. The first issue for determination is whether Ground 2 raises a new point.

22. Mr Davey and Ms Belgrano submitted that section 11 was in issue before the FTT. They made reference to a number of documents prepared for the FTT, including the Taxpayers' own notice of appeal to the FTT, HMRC's Statement of Case for the FTT (in particular, a section entitled "substance and reality"), HMRC's skeleton argument for the FTT, the Taxpayers' skeleton argument before the FTT, and findings made by the FTT as to the Taxpayers' purpose at [75], [253], [260] and [265] in particular. Mr Davey accepted that the focus of HMRC's *Ramsay* argument before the FTT and the UT had been on section 61(1)(a), but he submitted that at no point did HMRC concede

that the Option Price constituted qualifying expenditure for the purposes of section 11(4)(a), and that in consequence the point remained one which the Taxpayers had to prove as a necessary element of their case.

23. Mr Davey drew our attention, specifically, to the way the FTT recorded HMRC's submissions about section 11 (see eg [81(2)(c)]). He also noted the way the FTT recorded the Taxpayers' answer to those submissions at [175]:

> "[Mr Peacock] said that s 11 is similarly concerned with the purposes of the expenditure and any wider purpose the appellant might have had in entering the related transactions is simply irrelevant. In his view, on that basis, the requirements of s 11 were plainly met when the appellants re-acquired the assets on paying the Option Price; their plain purpose was to acquire the assets for use in their trades."

In other words, said Mr Davey, the Taxpayers advanced legal arguments about the meaning of "purpose" in section 11 and on the back of those legal arguments, invited the FTT to draw an inference that the Taxpayers' purpose fell within section 11. They chose not to call evidence to deal with that matter.

24. Mr Davey noted the FTT's finding about the reacquisition of the Assets at [255]:

> "From the outset, there was no real doubt that the [Taxpayers'] respective groups would reacquire the assets at the end of the Lease periods given the Put and Call Option mechanism and the on-going need for the assets for use for the relevant group's trading purposes."

25. He relied on Judge Morgan's rejection of Mr Peacock's submissions on the *Ramsay* argument at [261], noting in particular the reference to section 11 in that paragraph:

> "In my view, the decisions in *BMBF*, *Ensign* or *Tower*[3] do not assist the [Taxpayers'] argument. On the required realistic appraisal of the facts, the circumstances in these appeals are far removed from those which were held to entitle the relevant taxpayers to the relevant capital allowances on some or all of the price paid for the acquisition of the relevant assets in those cases (under s 11 or the corresponding earlier provisions in s 41 FA 1971 or s 24 CAA 1990). Moreover, there is nothing in these cases to suggest that, as is the effect of Mr Peacock's argument, the tribunal is confined to applying a formalistic step by step analysis in assessing the tax effects of these transactions and is required to focus narrowly solely on the legal effects of the sale of ownership rights in respect of the assets and, correspondingly, the re-acquisition of those rights. In *Tower*, Lord Walker

[3] *Barclays Mercantile Business Finance v Mawson (Inspector of Taxes)* [2004] UKHL 1, [2005] AC 684; *Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes)* [1992] AC 655; *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2011] UKSC 19, [2011] 2 AC 457.

> expressly rejected the view that s 11 is resistant to a composite approach."

26. Mr Davey noted the terms of the Taxpayers' application for permission to appeal to the UT, which asserted that "the application of s 11 turns on the reason for payment not the reason for the transaction", and the FTT's reasons for refusing permission to appeal.

27. Mr Peacock asked us to look at a number of references which he said went the other way and showed that Ground 2, as it is now advanced, was not in issue in either Tribunal below.

28. Having considered the various references with care, I conclude that although section 11 was mentioned in HMRC's documents prepared for the FTT and by the FTT in its decision, that was in the context of two particular arguments, neither of which is the same as or even similar to Ground 2:

    a. Under Issue 1, HMRC argued that the reacquisition did not meet the tests in section 11 *in consequence of* the non-disposal for section 61 purposes at the earlier stage: see, for example, FTT at [260]. But HMRC did not seek to argue that the reacquisition failed the tests in section 11 *regardless* of whether the Assets had been disposed of earlier in the chain of transactions (which is the point raised by Ground 2).

    b. Under Issue 4, HMRC argued that the Option Price could not be taken into account for the purposes of QA under section 70E. In that context, HMRC asserted that the better view was that the Option Price was paid for the reacquisition under section 11 (the opposite of the point now advanced as Ground 2), which they argued meant that it could not be taken into account within the section 70E formula: see, for example, FTT at [297(1)].

29. I accept that at no point did HMRC concede that the reacquisition of the Assets amounted to qualifying expenditure for section 11 purposes. I also accept that the burden remained on the Taxpayers to prove their case including that the Option Price was qualifying expenditure for section 11 purposes. But those points are insufficient, in my view, to demonstrate that section 11, in the way it is now argued as part of Ground 2, was in issue before either tribunal. To be persuaded of that, I would need to see some articulation of the point so that I could be satisfied that it was fairly and squarely put by HMRC as a challenge to the Taxpayers' scheme.

30. The most obvious place to verify what was, and was not, in issue in the FTT, is in the pleadings. Specifically, the rules require HMRC to "set out their position" in their statement of case (see rule 25(2)(b) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273). I have not found anything which reflects Ground 2 in HMRC's statement of case (although I have found the two arguments outlined at paragraph 28 above set out). That is not necessarily fatal to the suggestion that the point was live before the FTT, if a summary of it existed in some other document, for example in a skeleton or in the FTT decision, because sometimes the issues shift during the course of an FTT hearing. But despite Mr Davey's best efforts, I have not been able to find such a summary anywhere in the documents before the FTT or in the FTT's decision. Indeed, Ground 2 seems to have arisen in response to the UT's comments,

which themselves were predicated on the UT's observation that the point they had in view, which focussed *Ramsay* on section 11, had not been raised before either tribunal.

31. Taking all the material into account and standing back to arrive at a fair understanding of what was (and was not) in issue before the FTT, I conclude that Ground 2 is a new ground of appeal, raised for the first time in the application for permission to appeal to this Court.

Prejudice

32. That, then, raises the question whether the Taxpayers would be prejudiced if Ground 2 were introduced at this stage, either because they would wish to rely on evidence to deal with the point, or because the hearing would have been conducted differently if the point had been raised before the FTT (see *Singh v Dass* at [17]). If there is no prejudice in these terms, and the point is one of pure law, it is hard to see any good reason why the point should not be run at this stage (noting that the protections suggested in *Singh v Dass* at [18] are or can all be put in place).

33. In their written materials for this Court, the Taxpayers suggested that if they had been aware that Ground 2 was going to arise in the FTT, they would "likely have": (i) called oral evidence from the directors of the relevant companies on their understanding of the purpose of paying the Option Price and their subjective intention when paying the Option Price; (ii) submitted documentary evidence pertaining to the objective purpose of the payment of the Option Price as a specific payment, separate from the overall purpose of the transactions entered into by the parties; and (iii) invited the FTT to make findings of fact reflecting the additional evidence, to the effect that the objective purpose of the payment of the Option Price was acquiring the relevant plant and machinery for the purposes of the Taxpayers' qualifying activities (skeleton argument dated 28 March 2023 at [7(2)]). In oral submissions, Mr Peacock focussed on the evidence which he would or might have called to demonstrate the reason why the Taxpayers paid the Option Price, namely to reacquire the Assets for continued use in the Taxpayers' businesses.

34. Mr Davey did not dispute the proposition that the Taxpayers' subjective intention in paying the Option Price was or might have been to reacquire the legal and beneficial ownership in the Assets, or that the Taxpayers might have called credible evidence to that effect. He accepted that the Taxpayers needed the Assets for their businesses and the arrangements at issue were designed to ensure that the Taxpayers retained those Assets, whether as lessees or as beneficial and legal owners, while qualifying for capital allowances on their value. On questioning by Lord Justice Newey, Mr Peacock accepted that it would be possible to assume in his clients' favour that their subjective intention in paying the Option Price would have been to repurchase the Assets for use in the business, and in that way, any potential prejudice in the terms outlined at (i) of the preceding paragraph could be mitigated.

35. Mr Peacock did not show us any documents which might have been able to cast further light on the issue of the Taxpayers' purpose in paying the Option Price, nor did he take forward the suggestion in his skeleton argument that such documents might exist or might have been adduced before the FTT (see (ii) of para 33 above). Mr Davey reminded us of the extensive documents which were put before the FTT to explain the scheme, and which informed the FTT's findings about the purpose of the scheme

overall; Mr Peacock did not shrink from those findings (see FTT [74] and [75] in particular). I am not persuaded on the information before me that there is real prejudice in the Taxpayers' second expressed concern.

36. There is a dispute of much greater substance in relation to the Taxpayers' third point (see (iii) of para 33 above). Mr Peacock suggested that the issue of the Taxpayers' objective purpose in reacquiring the Assets was an issue of fact within the exclusive province of the FTT. He cited Millett LJ in *Vodafone Cellular Ltd v Shaw (Inspector of Taxes)* [1997] STC 734 at 742:

> "Whether a payment is made exclusively for the purpose of the taxpayer company's trade or partly for that purpose and partly for another is a question of fact for the commissioners."

He argued that the FTT did not make any findings as to the Taxpayers' purpose in incurring the Option Price which was the statutory question for section 11 purposes. He said that the findings which the FTT did make about the tax avoidance purposes of the scheme were insufficient as a basis for determining Ground 2, because they did not address the purpose of the expenditure incurred, as opposed to the purposes of the scheme more generally (about which there were findings). He said it was now too late for the facts specific to Ground 2 to be found; it would render the whole argument redundant to assume such facts in the Taxpayers' favour because that would be in effect to answer the section 11 statutory question in their favour. Mr Peacock therefore submitted that Ground 2 should not proceed, but alternatively, if it did, that it could not succeed.

37. Mr Davey disputed that analysis. He said that the question of the purpose of expenditure within section 11 is one of law, not fact. He relied on the findings of the FTT as to the tax avoidance purpose of the scheme generally, which findings were not challenged. He said that the ultimate question was whether "the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically" to quote Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], quoted by Lord Nicholls in in *BMBF* at [36]. He cited *Tower MCashback LLP 1 v Revenue and Customs Commissioners* [2011] 2 AC 457 as an example of a case where money went into a loop to enable the taxpayers to indulge in a tax avoidance scheme. In that case, Lord Walker said at [80] that the test in section 11 of CAA 2001 was whether, on a "realistic appraisal of the facts", there was:

> "real expenditure for the real purpose of acquiring plant for use in a trade."

The answer in that case was that the money in the loop was not qualifying expenditure for section 11 purposes. Mr Davey argued that it was open to this Court to conclude that on a realistic appraisal of the facts, the Option Price was not "real expenditure" for the "real purpose" of reacquiring the Assets. That was a question of law, or possibly an inference to be drawn by this Court from the primary facts which had been found.

38. The Taxpayers' third point involves a dispute about whether it is open to this Court to apply a *Ramsay* analysis to a part of the arrangements which was not directly challenged before the FTT, in circumstances where the FTT made findings about the purpose and nature of the arrangements considered compositely but did not make findings specific

to the part of the arrangements now under challenge. That is, in my view, a dispute of law, not fact, and it is one which the full Court should determine. This Court would only go on to consider the merits of Ground 2 if satisfied of HMRC's case that it was open, as a matter of law, to this Court to do so.

Conclusion

39. In a different context, Mr Peacock submitted that sections 11 and 61 form the "two bookends" of the capital allowances scheme. The Court would wish to have both of those bookends in view when it determines this appeal substantively. For that and other reasons, it is desirable for the full Court to hear argument on Ground 2.

40. Given its late arrival, however, Ground 2 should not prejudice the Taxpayers. I am not persuaded that there is any prejudice to the Taxpayers in so far as Ground 2 raises issues of law. In so far as it may raise issues of fact:

    a. the prejudice of not having called evidence from witnesses to attest to their subjective purpose in paying the Option Price should be mitigated by this Court assuming that subjective purpose in the Taxpayers' favour;

    b. the asserted prejudice of not having put documents relevant to that issue before the FTT to support the Taxpayers' submissions on purpose has not been pressed before this Court, but if the Taxpayers, on reading this judgment, consider that there are documents which should be before the Court but which were not before the FTT, the Taxpayers can make an application which this Court will consider.

41. I would grant HMRC permission for Ground 2 on terms that the Court will assume the Taxpayers' subjective intention in paying the Option Price was to reacquire the Assets for use in their businesses.

42. I would reserve this matter to Lord Justice Newey and myself (the third member of the Constitution to be allocated closer to the hearing date in the usual way) and I would also increase the time estimate for the appeal from 1.5 days to 2 days.

Lord Justice Newey:

43. I agree.