TC03322

Appeal number: TC/2012/03385

Corporation tax – corporate underwriter at Lloyd's – application of anti-loss buying restriction in s227A Finance Act 1994 – taxpayer owned by consortium during period of "group-relief continuity condition" in s227A(5), subsequently acquired as wholly-owned subsidiary of one of the consortium members – then seeking to surrender in later period, by way of group claim, underwriting losses which had been effectively deferred to that period by successive elections under s107(4) Finance Act 2000 – whether the losses sought to be surrendered (or some part of them) could be regarded as "losses of the last active underwriting year" – held yes, some part of them – whether existence of consortium relief relationship between companies during the relevant period satisfied the "group-relief continuity condition" in s227A(5), in spite of later surrender being purportedly made pursuant to a group (and not consortium) claim – held yes – whether commencement provision, properly interpreted, applied s227A to the present facts – held no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

STANDFAST CORPORATE UNDERWRITERS LIMITED — **Appellant**

-and-

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

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public at 45 Bedford Square, London on 16 & 17 December 2013

Kevin Prosser QC, instructed by Ernst & Young LLP, for the Appellant

Richard Vallat of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns a tightly focused point on the eligibility for group relief of underwriting losses of a corporate underwriter at Lloyd's, notwithstanding the restrictions contained in section 227A Finance Act 1994 ("FA94"), a provision designed to prevent "loss buying".

The facts

2. I received a bundle of documents (largely comprising accounts of the Appellant and of the Lloyd's syndicate in which it had a share) and a short witness statement (confirmed in oral evidence) from Barbara Barnes, Tax Operations Manager of QBE Insurance Group Limited, a member of the Australian-based worldwide QBE insurance group which has owned the Appellant since 31 July 2007.

Introduction – the Lloyd's market

3. The Lloyd's insurance market operates under its own particular tax rules, which are closely tied in with the market's own rules. The Lloyd's market is made up of underwriting syndicates, which provide the actual insurance cover. Each syndicate is run by a managing agent. A typical syndicate will comprise a number of members, each of whom participates in a particular share of the profits and losses of the syndicate as a whole.

4. The underwriting activities of a syndicate technically last just one year – the Lloyd's market period of account coincides with calendar years. But in practice a syndicate may continue from year to year, with the same members participating in successive years or with only slight adjustments to their respective shares. Historically, unlimited personal liability was an underlying principle of membership of Lloyd's, but in 1994 companies were allowed to become underwriting members. This has resulted in many of the traditional insurance companies becoming involved, through subsidiaries, in the Lloyd's market.

Summary of relevant tax rules

5. Because of the particular nature of the insurance industry, the final profits or losses of a particular year of operation can take a long time – sometimes many years – to become clear. Thus under the rules of Lloyd's, each syndicate only declares its results for a particular calendar after a further two years have elapsed. So the profit or loss for the calendar year 2000, for example, would only be determined as at the end of 2002 and declared early in 2003. If any further losses were expected, the syndicate would either seek to close the year finally by re-insuring those losses (so-called "re-insurance to close") or, if it was simply unable to obtain such re-insurance, it would carry forward estimated provisions to the following year. In the following years, any further necessary adjustments would be made by the recognition of further profits or losses (as the case may be) in successive years until the original underwriting year was finally closed off by obtaining re-insurance to close.

6. The recognition of profit or loss for corporation tax purposes basically follows the same regime. Sections 219 and 220 FA94 provide that:

> "**219** (1) Corporation tax for any accounting period on the profits arising from a corporate member's underwriting business shall be computed on the profits of that accounting period.
>
> ….
>
> **220** (1) For the purposes of section 219 above and all other purposes of the Corporation Tax Acts, the profits or losses arising to a corporate member in any accounting period directly from its membership of one or more syndicates… shall be taken to be –
>
> > (a) if two underwriting years each fall partly within that period, the aggregate of the apportioned parts of those profits or losses in those years; and
> >
> > (b) if a single underwriting year falls wholly or partly within that period, those profits or losses or (as the case may be) the apportioned part of those profits or losses in that year.
>
> (2) Subject to the provisions of this Chapter, for the purposes of sub-section (1) above and all other purposes of the Corporation Tax Acts –
>
> > (a) the profits or losses arising to a corporate member in any underwriting year directly from its membership of one or more syndicates shall be taken to be those of any previous year or years which are declared in that year;"

7. Thus, a company with calendar year accounting periods which is a corporate member of an underwriting syndicate in the calendar year 2000 would normally first recognise its share of the syndicate's profit or loss of the 2000 underwriting year (which would be declared in April or May 2003, following the 2002 year end) in its 2003 accounts, and would be taxed accordingly.

8. Continuing with the same example, the corporate underwriter's 2003 accounts would normally include either the cost of a premium paid for re-insurance to close, or a provision for future liabilities arising out of the 2000 underwriting year. Until 2007, the legislation (s107(4) Finance Act 2000 ("FA00")) allowed the taxpayer to make an election to exclude any of those expenses in the tax calculations for that year, with a corresponding uplift in the taxable profit of that year and reduction of the taxable profit in the subsequent year. It is common ground between the parties that such elections could be made year after year in relation to the same expenses, allowing in effect an indefinite deferral of losses for tax purposes.

9. The final feature of the overall taxation of corporate underwriters' Lloyd's profits which needs to be mentioned at this stage is the anti-avoidance provision which is at the core of the present appeal, s227A FA94 (inserted by s33 Finance Act

2007 ("FA07")). This was a provision intended to prevent the perceived abuse of "loss buying".

10. It can readily be seen from the broad picture given above that the special scheme for taxation of corporate underwriting members of Lloyd's gave rise to some potential opportunities, arising from the fact that the net outcome of any particular underwriting year (in terms of the broad level of total profits or losses) would become reasonably clear well before those profits or losses fell into charge to tax. If large losses were expected, the opportunity arose for the lossmaking company to be effectively shut down (i.e. cease any underwriting business) and transferred into a profitable group before those losses were recognised for tax purposes, with the result that the losses would then become available to shelter the profits of its new owners by way of group relief.

11. The new s227A FA94 ("s227A") was introduced in 2007 to forestall such activity, and the heart of this appeal is whether s227A applies to the facts of the present case. Its provisions will therefore be examined in greater detail below.

12. The amounts of the losses made available in this way could potentially also be increased by using elections under s107(4) FA00 ("s107(4) elections") to delay the recognition for tax purposes of losses until after the lossmaking company had been acquired by the profitable group (though the efficacy of this device is also one of the main issues in this appeal).

Agreed statement of facts

13. Included in the bundle was a document entitled "Agreed Statement of Facts". Although neither party referred to it at the hearing, I take it to be agreed by virtue of its inclusion in the bundle, and in any event it provides a short summary of the salient facts which emerge from the rest of the material before me. It reads as follows:

> "**Business of SCUL**
>
> 1. The appellant company, Standfast Corporate Underwriters Limited ("SCUL"), is a UK resident and incorporated company which at all material times until 31st December 2000 carried on a business of writing direct insurance business in accident fire and health, fire and other damage to property and third party liability along with reinsurance, as a corporate member of Lloyd's, through Syndicate 991.
>
> 2. SCUL had different percentages of participation in Syndicate 991 at different times. In the period 1 January 2000 to 31 December 2000, SCUL was the sole corporate member of Syndicate 991, holding 97% of the Syndicate capacity.
>
> 3. Syndicate 991 had years of account (also called "underwriting years"), running from 1st January to 31st December, relating to business written in that calendar year. SCUL's own accounts were drawn up to 31st December until 31st December 2005 and then changed to 30th June,

having a long accounting period of 18 months to 30th June 2007 and has remained at 30th June thereafter.

4. As was normal at Lloyd's, Syndicate 991's 1997 year of account "closed" after 3 years, on 31st December 1999 by it entering into a re-insurance to close ("RITC") contract at that point, and then the results of the 1997 year of account were "declared", i.e. notified to Lloyd's, during the 4th calendar year, i.e. in 2000.

5. However, Syndicate 991 made substantial losses in its 1998, 1999 and 2000 years of account, and it stopped writing new business as at 31st December 2000, with the result it was not possible to "close" those years of account by entering into RITC contracts at the normal time ie at the end of the 3rd year. Instead, therefore, those years of account remained "open" until RITC contracts could be entered into, which for those years of account was not until 31st December 2009.

6. Given that those years of account remained open, the results were not declared as normal in the 4th calendar year. Instead, Syndicate 991 moved onto a calendar year basis. For example, in relation to the 1998 year of account, a loss was declared at the end of the 3rd year, ie 31st December 2001 *[sic]*, and then a result (either a profit or a loss, based inter alia on downward or upward adjustments to the amount of provisions for unpaid liabilities) was declared annually for each subsequent year until 31st December 2009. Likewise in relation to the 1999 and 2000 years of account.

7. SCUL made successive elections under section 107(4) Finance Act 2000 to disclaim the amounts of technical provisions to each subsequent year. The effect of such an election was that the taxable profits of the period for which the disclaimer was made were increased by the amount disclaimed. For periods of account ending after 19 July 2007, however, paragraphs 4 and 5 of Schedule 11 Finance Act 2007 prevented any further section 107(4) elections. As a result, the technical provisions for the 1998 to 2000 years of accounts could not be disclaimed any further. A final 107(4) election [w]as made in the return for the 18 month period ended 30 June 2007.

8. A tax loss of £20,081,387 arose in the period ended 30 June 2008 most of which related to the reversal of the section 107(4) election made in the return for the period ended 30 June 2007. Of that amount £18,407,939 was claimed as group relief by QBE UK subsidiaries.

9. Both parties have agreed that only that part of the group relief claim that relates to the 2000 year of account is potentially subject to the restriction that is the subject of this hearing.

Shareholdings in SCUL

10. At all material times until 31st July 2007, all of the shares in SCUL were owned by a UK resident and incorporated company called Standfast Holdings Limited ("SHL"). The shares in SHL were held by

a consortium of companies including Merkel Insurance Incorporated, Sheldon Mutual and Limit Plc (now called "QBE Holdings (Europe) Limited") which had a 23.34% holding.

11. In August 2000, all of the shares in Limit Plc were acquired by QBE International Holdings (UK) Plc (now called QBE European Operations Plc – "QBE UK"), a UK resident and incorporated member of the QBE group, a group listed in Australia carrying on business as a specialist insurer and reinsurer through offices in 52 countries across the world.

12. Substantial losses were made within the syndicate in the 1998, 1999 and 2000 year of accounts. The syndicate was compelled to make a cash call on its members. Limit Plc met its share of the liability by making a loan to the Appellant. The other shareholders in SHL did not meet their liabilities and the shortfall was made up by Lloyd's Central Fund. The arrangement became subject to the agreement between QBE and Lloyds dated 31 July 2007, which is included in the Appellant's list of documents.

13. On 24th January 2003 SHL went into member's voluntary liquidation. At that date it was deemed for tax purposes to have lost beneficial ownership of its shares in the Appellant and as a result the Consortium Relationship between QBE UK and SCUL had come to an end.

14. On 31st July 2007 QBE acquired all the shares in SCUL for £80,000."

The Appellant's tax losses

14. As can be seen from the statement of facts, a separate running account is maintained by a syndicate for each year of its operation. Those running accounts for each year are aggregated to establish the overall profit or loss of the syndicate for that year.

15. I was provided with summary calculations showing the Appellant's share of the successive years' declared accounting losses of Syndicate 991 for the three underwriting years (starting with the 2002 year-end figures). These showed the following (subject to some "other tax adjustments" which were not explained):

Syndicate period of account (underwriting year)	**Appellant's share of 1998 & 1999 (loss)/profit (£'000s)**	**Appellant's share of 2000 (loss)/profit (£'000s)**	**Appellant's total share of (loss)/profit for the year (£'000s)**
Brought forward from 2001 and earlier	(16,840)	-	(16,840)
Calendar year 2002	(3,235)	(18,935)	(22,170)

Calendar year 2003	(1,795)	(4,462)	(6,257)
Calendar year 2004	(1,996)	(1,505)	(3,501)
Calendar year 2005	(668)	989	321
Calendar year 2006	176	865	1,041
Calendar year 2007	622	1,000	1,622
Totals	(23,736)	(22,048)	(45,784)

16. It was agreed that, by virtue of the undisputed operation of the rules summarised above, a loss for corporation tax purposes of £20,081,388 arose to the Appellant in respect of its accounting period 1 July 2007 to 30 June 2008. The bulk of this loss arose, in very broad summary, from the cumulative effect of the s107(4) elections in relation to the earlier years (totalling some £37.5 million), less:

(1) a £1.3 million reported profit during the year and

(2) a £16.3 million profit arising under the loan relationship rules as a result of the release of the debt owed by the Appellant in respect of the cash contributions made on its behalf in relation to the losses.

(There were, of course, other items but they are not relevant for the purposes of this decision). Whilst it is not crucial for the purposes of this decision, I understand the difference between the £37.5 million of deferred technical provisions and the total losses of some £45.8 million (i.e. £8.3 million) incurred over the entire period is largely made up of the net "in year" excess of claims over premiums, combined with the aggregate of other "in year" expenses, income and gains

17. The Appellant claims to make 11/12ths of the £20,081,388 loss (i.e. £18,407,939) available by way of surrender of group relief to other members of the UK QBE group in the accounting period 1 July 2007 to 30 June 2008. It only claims 11/12 because, having joined the QBE group on 31 July 2007, it was only a member of that group for 11/12ths of its accounting period.

The disputed issues – submissions of the parties

Introduction

18. There are three disputed issues between the parties. If I find in favour of the Appellant on any one of these issues, then the appeal must succeed.

19. Relevant extracts from the legislation are set out in the Appendix to this decision for ease of reference.

20. The first disputed issue is whether any part of the Appellant's 2008 losses sought to be surrendered can properly be described as "losses of the last active underwriting year" of the Appellant, within the meaning of that phrase as used in

s227A. Mr Prosser (on behalf of the Appellant) contends that no part of them can properly be so described and Mr Vallat (on behalf of HMRC) contends that they can, or at least some part of them can.

21. The second disputed issue is whether the "group-relief continuity condition" in s227A(5) is satisfied. Mr Vallat asserts it is not, because the nature of the group relationship during the period referred to in s227A(5) was a "consortium" relationship, whereas the nature of the relationship on which the Appellant relies in order to surrender the losses in 2008 is a full "group" relationship. On a proper interpretation of s227A, he says, it requires the nature of the relationship during the period set out in s227A(5) to be of the <u>same type</u> (i.e. group or consortium) as the relationship pursuant to which the losses are later sought to be surrendered. Mr Prosser disagrees, saying that the wording of s227A is clear and straightforward and requires no "interpretation" of the type contended for by Mr Vallat; a relationship of either type, in short, will do.

22. The third disputed issue is whether the commencement provision in s33 FA07 (which applies s227A only to specified situations) in fact applies it to this case. The reasoning underlying this disputed issue is largely similar to the reasoning underlying the second disputed issue.

23. I summarise the submissions of the parties in relation to each of these three issues in turn.

Issue 1 – Can any part of the losses sought to be surrendered properly be regarded as "losses of the last active underwriting year"?

24. It is common ground that the Appellant's "last active underwriting year" for these purposes is the calendar year 2000.

25. Mr Prosser argued that, given the general structure of taxation for Lloyd's corporate underwriting summarised above, it is clear that the profits or losses "of" any particular underwriting year ("year 1") are those profits or losses reported in the underwriting accounts struck two years after the end of year 1 (i.e. in respect of "year 3"), which are reported during the following year ("year 4"). In addition, if it has not been possible to close year 1, then any further profits or losses reported in subsequent years (years 5 and later) in respect of year 1 will also be profits or losses "of" year 1.

26. Turning now to the facts of the present case, he pointed out that the Appellant was seeking to surrender tax losses that had arisen in the accounting period 1 July 2007 to 30 June 2008. They had admittedly arisen, at least in part, because of the eventual belated recognition in 2007-08 (by reason of successive s107(4) elections) of expenses that had been incurred in relation to the 2000 underwriting year in the intervening years; however it had to be remembered that s107(4) operated to defer expenses and not losses – by deferring expenses, the effect of the election was to fix the profit or loss "of" 2000 in year 4 (and/or later years, as relevant) without regard to those expenses, and merely carry forward the expenses for later relief. The fact that the taxable profits which might otherwise have been reported for the 2007-08 year

were converted into a large loss by reason of the brought forward expenses (some of which had their origin in the 2000 underwriting year) did not mean that any part of the 2007-08 losses could be regarded as losses "of" 2000 for the purposes of s227A.

27. On Mr Vallat's submission, however, the losses reported in the 2007-08 computations (or at least a proportion of them) could be clearly traced back to the 2000 underwriting year. They undoubtedly had their origin then and on any sensible interpretation any losses which could be traced back to 2000 should be regarded as losses "of" that year. He submitted that I should read the phrase "losses of the last active underwriting year" to mean "the actual underwriting losses of that year, regardless of when they are calculated or declared, and regardless of any subsequent adjustments for tax (whether under s107(4) or otherwise)." He submitted that this interpretation was "consistent with the scheme of the legislation".

28. He pointed to the fact that s220(2) FA94 provides that:

> "… the profits or losses arising to a corporate member in any underwriting year directly from its membership of one or more syndicates shall be taken to be those **<u>of</u>** any previous year or years which are declared in that year…" *[emphasis added]*

This, he submitted, highlighted the fact that the year in which profits or losses "arose" was explicitly linked to the fact that those profits or losses were "of" an earlier year or years. This effectively provided a warrant to investigate any particular figure of profit or loss that had <u>arisen</u> (in the sense of being "declared") in a particular year, in order to ascertain the earlier year or years <u>of</u> which it was the profit or loss. This in turn implied a two stage process in which, for the purposes of ascertaining the amount of profit or loss "arising" in any particular year, one first identified the profits or losses "of" the individual previous years that made up that profit/loss, and only then aggregated them to form an overall profit/loss "arising" in the later year. He asserted that s107(4) FA00 took effect, if an election under it was made, as an adjustment at the second stage of this process; as a result of this approach, it was still perfectly possible to discern the individual years' profits or losses that formed part of the aggregation, so that s227A could apply to any losses that could be so discerned as being "of" the last underwriting year.

29. He pointed out that if Mr Prosser's argument were followed to its natural conclusion, the result would be that the obviously intended purpose of s227A could be sidestepped almost at will, simply by making a s107(4) election in respect of the technical provisions for the last year of underwriting, thus supposedly rolling that part of the loss forward so that it became, for the purposes of s227A, the losses of a later year rather than of the last year of underwriting.

30. He accepted that his approach might lead to some problems in actually quantifying the "losses of the last active underwriting year" which were included in an overall loss figure, but he considered those problems were not insuperable.

31. In the present case, for example, it was agreed that there were technical provisions of £37,563,242 carried forward to the accounting period 1 July 2007 to 30

June 2008. That figure represented an aggregation of all technical provisions for the three underwriting years 1998, 1999 and 2000. However, it was possible to identify the amounts of technical provisions from the three years in question that made up the overall figure. 35.1% (approximately) of the total technical provisions brought forward to the 2007-08 accounting period originated from the 2000 year of account and therefore it was arguably appropriate to allocate 35.1% of the total losses as originating from the 2000 year of account (and therefore ineligible for surrender under s227A). He acknowledged that there were other arguable ways of determining what part of the losses were losses of the last underwriting year and asked that if I was with him in principle I should say so, permitting the parties to reach agreement on an appropriate method if possible.

32. Mr Prosser pointed out that even if his main argument failed and we did therefore have to ascertain the quantum of the "losses of" 2000 for the purposes of s227A, the approach suggested by Mr Vallat was just one of a number of possible ways of doing so. He submitted that any approach suggested by HMRC would have to be capable of rational operation in all situations. He illustrated by a short example that HMRC's proposed approach would not, indeed he questioned whether (in the absence of specific guidance in the statute) any approach would. As he put it:

> "Suppose, for example, that losses are declared for the last active underwriting year of 10, and an element in the computation of those losses is technical provisions of 15; and there are tax losses otherwise eligible for surrender of 20, an element in the computation of which is 5 of the technical provisions. Is the tax loss ineligible for surrender (i) 5, (ii) 10, (iii) 15, or (iv) 20?"

33. He suggested an alternative approach, following the principle applied in *The Sterling Trust Limited v IRC* [1925] 12 TC 868 and approved in later cases. In *Sterling* the company had mixed two funds, one of which had borne tax whilst the other had not. It had then made a payment out of the mixed fund. The Court of Appeal rejected the Revenue's argument that the payment should be treated for tax purposes as having been paid rateably out of the two funds, holding instead that the company was entitled to say it had made the payment "out of the fund which is most favourable to the company". Transferring that principle to the present case, it should be open to the Appellant to say that the 2008 tax losses were comprised entirely of 1998 and 1999 underwriting year losses, and its surrender of those losses represented its election (if any were necessary) that they were so comprised.

34. Mr Prosser did not explore all the details and implications of this suggested alternative approach; rather he used it to illustrate a wider point, namely that if HMRC were correct in their argument that we should effectively "look past" the s107(4) elections and seek to identify what HMRC argued to be the real "losses of" 2000, that would only be the beginning of a far more complex exercise of navigation across open territory for which no hint of a map was provided in the legislation. Any attempt on the part of the Tribunal to draw up such a map was bound to cross the line from "interpretation" to "legislation".

Issue 2 – Is the "group-relief continuity condition" satisfied?

35. Mr Prosser's approach to this question was simple. There was agreement that the period we were concerned with under s227A(5) was the period from 31 December 2000 to 1 January 2003. There was agreement that throughout that period, the Appellant (as the surrendering company) and each relevant QBE group company (as the claimant company) met the conditions in s402(3) Income & Corporation Taxes Act 1988 ("ICTA") (the "consortium claim" conditions). The language of s227A(5) simply required that throughout the relevant period, the eventual surrendering and claimant companies met "the conditions in section 402(2) or (3)". By meeting the conditions in s402(3), this requirement was satisfied. Because the "group-relief continuity condition" was therefore satisfied, the restriction in s227A(1) had no application. One is tempted to add "QED".

36. If it were necessary to provide any explanation for the clear language used by Parliament, such explanation was to be found in the Explanatory Notes ("the ENs") which accompanied the Finance Bill 2007 through Parliament. The ENs made it clear that the anti-avoidance rule was directed to a situation in which the parties with "no previous economic relationship" were seeking to exploit the Lloyd's taxation rules to sell losses. In the present case, the parties clearly had such a previous economic relationship, so it could be assumed that the anti-avoidance provisions were not intended to apply to them.

37. In any event, he pointed out, if Parliament had intended to require the same <u>type</u> of relationship, it would have been very easy to say so – as was already done in s403A(10) ICTA for other purposes:

> "(a) if… the claim is a group claim…, whenever the conditions in paragraphs (a) to (c) of section 402(2) are satisfied;
>
> …
>
> (b) if … the claim is a consortium claim…, whenever the conditions specified in section 402(3)… are satisfied.."

38. Mr Vallat submitted things were a little less black and white. He submitted that it was appropriate, in construing s227A(5), to give it what he described as "a natural and obvious interpretation" by implying into it a requirement that "the companies must satisfy whichever conditions are relevant to the relief being claimed". Thus, since the companies were making a group claim (rather than a consortium claim) for group relief, they must demonstrate that, during the relevant period, they satisfied the conditions for a group claim – which they did not. He submitted that reference to the ENs was not necessary as this interpretation was clear from the language of the section itself; but in any event, the ENs did not really add anything because they only referred to the most blatant example of the mischief to which the provision was being aimed.

39. Mr Prosser pointed out that if Mr Vallat was correct in his argument, it would disqualify companies from relief in a situation where they had been within a 100%

group during the s227A(5) period but were only seeking the less valuable consortium claim relief in the later period. There was no logic to this, and no indication in the ENs that it was perceived to be a mischief that was being attacked by s227A. Why should relief be denied altogether in such a situation on the basis that the previous economic relationship had been "too close"?

40. Mr Vallat's only answer to this was that such a situation was extremely unlikely and would only arise if the parties chose for some reason to "downgrade" the group relationship to a consortium relationship – and in doing so, they would obviously include the loss of the relief as part of their overall decision. In any event, he submitted, it was a lot less surprising to lose relief in that situation than it was to gain it simply because of the historical accident of owning as little as 5% of the surrendering company during the relevant historical period.

Issue 3 – Does the commencement provision in s 33(2) FA07 apply to this case?

41. Section 33(2) FA07 provides that the anti-avoidance provisions in s227A only have effect where the two companies "first meet the conditions in section 402(2) or (3) of ICTA on or after 21st March 2007".

42. On Mr Prosser's interpretation of the phrase "meet the conditions in section 402(2) or (3)" identified in issue 2 above, it was self-evident that in the present case (where the companies were in a consortium relationship as far back as August 2000), the facts fell outside s33(2) FA07 and therefore s227A (whatever its true meaning) did not even apply to the later group relief claim.

43. It is equally self-evident that on Mr Vallat's interpretation of the same phrase as identified in issue 2 above, the full 100% group relief relationship between the companies only arose on 31 July 2007, well after the 21 March 2007 cut-off.

44. Mr Prosser had a further point to make in relation to issue 3. As he put it in his skeleton argument:

> "In any event, and as an entirely separate submission,… Parliament cannot possibly have intended s.227A to apply in circumstances where, as in the present case, the period relevant to the group-relief continuity condition had already expired before 21/3/07. After all, it is logically impossible to satisfy that condition in those circumstances.
>
> This result is avoided if s.33 is read as a whole, and in particular if s.33(2) is read together with s.227A(5). So read, s.227A applies only if the conditions in s.402(2) or (3) are first met on or after 21/3/07 <u>and the period mentioned in s. 227A(5) has not ended before that date.</u>"

45. He only spent a few seconds on this point in argument, and described it as his "last throw of the dice". If I have understood his argument correctly, it is this. In the case of a corporate underwriter whose last active underwriting year was 2000 (such as the Appellant), it was common ground that the relevant period during which the "group-relief continuity condition" would be required to be satisfied under s227A(5)

in order to avoid falling foul of the anti-avoidance provision (if it applied at all) was from 31 December 2000 to 1 January 2003. This period had ended long before 21 March 2007. In those circumstances, on a straight reading of s33(2) FA07 (the commencement provision), it was impossible for the group-relief continuity condition to be "first" met on or after 21 March 2007; thus the commencement provision could, on its face, never take effect in that situation. To remedy this perceived problem, some wording along the lines of the last sentence of [44] above needed to be read into the commencement provision.

46. Mr Vallat acknowledged it was logically impossible for such a company to "first" meet the group-relief continuity condition on or after 21 March 2007, but said that did not matter, essentially because Mr Prosser's argument was based on a fundamental misunderstanding of the proper interaction between the commencement and substantive provisions. He pointed out that the legislation was structured on a two-stage basis. First, it was necessary to consider whether s227A applied at all, and this was done by reference to s33(2) FA07 – on the basis of whether the group/consortium relationship was first formed on or after the commencement date (Budget Day 2007). Only if that hurdle was cleared by HMRC was it then necessary to consider whether, in order to sidestep the restriction, the taxpayer had established the existence of the necessary group/consortium relationship during the entire period from the last day of its last active underwriting year to the first day of the year in which the losses were declared. Obviously, that would be an unnecessary exercise if HMRC had failed to clear the first hurdle.

Discussion

Issue 1

47. At first sight, the reference in s227A(1) to "losses of the last active underwriting year" must be to losses as computed for tax purposes, as it is only such losses that are potentially "eligible for surrender" as contemplated by s227A(1).

48. But on considering even a simplified example, it is not immediately clear how the tax losses "of" an underwriting year can be identified in practice for these purposes.

(a) Consideration of a simplified example

49. Let us take three possible examples of a declaration of underwriting results made in 2003 on the basis of the 31 December 2002 syndicate accounts, for a syndicate which at the end of 2002 still had three "open" years (as in the present appeal). Let us assume that in 2003, a corporate underwriter's share of the declared results for the year ended 31 December 2002 is as follows and no adjustment is required to the profits/losses for tax purposes (and in particular, no s107(4) elections have been made):

Scenario	Underwriting year 1998 profit/(loss) £	Underwriting year 1999 profit/(loss) £	Underwriting year 2000 profit/loss £	Total profit/(loss) £
A	(15)	10	(20)	(25)
B	(10)	15	(20)	(15)
C	(15)	15	(20)	(20)

50. Assuming for the moment that 2000 was the last active underwriting year, and that the company wishes to surrender the maximum possible group relief in its 2003 calendar year accounting period, in spite of s227A admittedly applying, how does one assess the restriction imposed by s227A in each of the above three scenarios? It seems to me that unless a rational answer can be supplied to this question, a workable way of operating s227A cannot be identified and there would be a gap which could only be filled by stepping beyond judicial interpretation and into judicial legislation. Mr Prosser would, I think, urge me to that conclusion.

51. I consider first scenario A.

52. On one view (which I will call the "draconian" approach), the company has overall available losses of £25, and £20 of those losses are clearly referable to the 2000 underwriting year therefore the s.227A restriction should prevent it from surrendering £20 of its losses, leaving £5 eligible for surrender.

53. An alternative view (which I will call the "middle way") is that it has £25 of total losses, made up in the proportion 15:20 by the 1998 and 2000 losses, thus 20/35ths of the total available losses of 25 (i.e. £14.29) should be regarded as ineligible, with the remaining 15/35ths (£10.71) eligible for surrender.

54. A third approach (which I will call the "liberal" approach) would be to say that of the potentially available £25 of losses, £15 can clearly be attributed to 1998, therefore only the remaining £10 should be regarded as attributable to 2000. It would follow that only £10 would be ineligible for surrender, with the remaining £15 being eligible.

55. I turn now to scenario B.

56. Here, the company has potentially available losses of just £15. Since the loss arising from its last year of underwriting exceeds that amount, the draconian approach would be to say that therefore the s227A restriction prevents the surrender of any of the net loss of £15.

57. The middle way would say that 20/30ths of the total net loss of £15 should be apportioned to 2000, thus disallowing surrender in relation to £10 of the overall loss and leaving £5 eligible for surrender.

58. The liberal approach would say that of the potentially available loss of £15, £10 can clearly be attributed to 1998, thus allowing the surrender of that £10 (thereby restricting only £5 from surrender under s227A).

59. Finally, I consider scenario C.

60. Here, the company has potentially available losses of £20. Since the loss arising from its last year of underwriting is exactly that amount, the draconian view would be to say that the whole £20 is rendered ineligible for surrender by s227A.

61. The middle way would say that 20/35ths of the net loss should be apportioned to 2000, thus disallowing surrender in relation to 20/35 x £20 = £11.43, leaving £8.56 eligible for surrender.

62. The liberal approach would say that, of the potentially available loss of £20, £15 can clearly be attributed to 1998, thus allowing the surrender of that £15 (thereby restricting surrender of the remaining £5 under s227A).

63. The above examples and the various outcomes are summarised in the following table (it being remembered that in each case, the losses "of" the underwriting year 2000 are £20):

Scenario	**Total available loss**	**Ineligible under draconian approach**	**Ineligible under middle way**	**Ineligible under liberal approach**
A	£25	£20	£14.29	£10
B	£15	£15	£10	£5
C	£20	£20	£11.43	£5

64. Which of these three basic approaches is correct? Or is some other interpretation appropriate? It was clearly the intention of Parliament to prevent <u>some</u> element of the losses from being eligible for surrender, so it is incumbent upon me, if at all possible, to try to give some meaning to the provision (rather than simply say that it is so ambiguous that it cannot be given any practical meaning).

65. Mr Prosser's submissions would point me towards the liberal approach. Mr Vallat's argument was that the approach to be adopted should depend on the context, and in particular care should be taken in mapping across a liberal approach from cases which were not concerned with anti-avoidance provisions. In a case such as the present, he was arguing that the "middle way" of some kind of apportionment was most appropriate (though he acknowledged that the existence of the s107(4) elections complicated matters somewhat). He was not arguing for the draconian approach.

(b) The case law relevant to apportionment/seggregation

66. A brief summary of the main cases cited to me is appropriate at this point.

67. In *Sterling*, the taxpayer company had received and commingled two sources of income, and it had paid out certain sums from the commingled fund. Its liability to tax depended on the source out of which the payments were made. It was held that in the circumstances, there was no binding authority that required the sum to be regarded as paid proportionately out of the two sources of income. The Court of Appeal held that:

> "…[the company was] entitled to assume and deem that it has paid the money that it ought to pay according to the most businesslike way of appropriating the revenue to the expenses; further, that even though that has not been done in fact by any separate allocation of the money…..you are still entitled to treat the money as having been paid out of the fund which is most favourable to the company…" (per Lord Justice Pollock MR);
>
> "… we ought to hold that there is no principle of law by which apportionment can be introduced, and that it was open to the Company to pay as they pleased; that it was more advantageous to them to pay it out of assessable income, therefore they must be taken to have so paid it." (per Warrington LJ); and
>
> "… inasmuch as it was a business-like thing to do, and the advantageous thing for the Company to do, to pay those annuities out of the tax-paid income they must be deemed to have so paid it…." (per Atkin LJ).

68. The limits of this principle have been explored in other cases. In *Bowater Paper Corporation Limited v Murgatroyd* [1969] 46 TC 37, the House of Lords considered the potential application of the *Sterling* principle in a different situation:

> "The claim to relief arises from the fact that the appellant, a United Kingdom company, has a subsidiary, a Canadian company, Bowater Corporation of North America Ltd., which in turn has a number of subsidiaries in the United States of America and in Canada. Dividends from these subsidiaries are paid to the Canadian parent and by that company to the appellant and become liable to United Kingdom income tax. It is not disputed that some allowance against that tax has to be made in respect of United States and Canadian taxes on the profits of the (sub)-subsidiaries. The dispute relates to the amount and large sums are involved.
>
> The difference between the appellant and the revenue arises by reason of the fact that the profits of the sub-subsidiaries as computed for the purposes of the relevant United States or Canadian taxes differ from these profits as shown in the sub-subsidiaries' profit and loss accounts. The reason for this lies in a difference between the amount or rate of depreciation charged by the companies in their accounts and that which

> is allowed by the foreign revenue authorities for tax purposes, the latter amounts being, in the relevant years, greater than the former. Under the relevant enactment, the lower the amount of profits which has to be brought into the calculation, the greater the relief: hence the appellant's claim that the calculation is to be based on the profits computed for tax purposes, rather than on the profits as shown in the accounts.
>
> One illustration may help to explain the difference. The accounts of Bowaters Mersey Paper Co. Ltd., a Canadian company, show in its profit and loss account for the year ended December 31, 1959, a profit of $2,359,151. But after adjustments have been made to take account of capital cost allowances and other matters, tax is payable only on $1,298,166. On this latter figure the tax charge is $641,833. The company contends that the rate of foreign tax to be credited is 641,833/1,298,166, namely, 49.44 per cent. The revenue contends that it is 641,833/2,359,151, namely, 27.21 per cent. - the larger figure being, obviously, more favorable for the appellant. The question, therefore, resolves itself into this: which is the correct denominator of the fraction, the numerator being the same? This, translated into legal terms, means which are the relevant profits - the profits computed for the foreign tax, or the profits as shown in the company's profit and loss account?" (per Lord Wilberforce at p56 C-G)

69. After deciding that, on the wording of the relevant statutory provisions, the better interpretation was that contended for by the revenue, Lord Wilberforce went on to consider an "alternative contention" put forward by the taxpayer:

> "This was to invoke a principle which has some place in the law of taxation according to which if a payment may be made out of either of two funds, the taxpayer may, in his dealings with the revenue, claim to be dealt with on the basis that it was made out of whichever fund produces the more favorable result. The appellant invoked for this the case of [*Sterling*]. Accepting that this principle may be invoked in a proper case, I think that in any event it is not available to the taxpayer here. I cannot do better than adopt the passage in which Cross J., dealt with the argument ....:
>
>> "There are not, as I see it, two funds of profit here, the accounts profits, only part of which are taxed, and the assessed profits, all of which bear tax. What are taxed are, I think, the company's profits for the year, whatever they may be; but they are taxed according to a yardstick which may compute them at less or more than they appear in the company's accounts.""

70. In *Collard v Mining and Industrial Holdings Limited* [1989] 62 TC 448, the House of Lords was again considering an argument that a particular disagreement (this time as to allocation of advance corporation tax between different tranches of income for the purposes of calculating overseas tax relief) should be settled by a simple apportionment pro rata between all the tranches. They refused to follow that approach, on the basis that the proper interpretation of the relevant provisions showed that no such apportionment was necessary or appropriate. As to the propriety of

reading in an implied requirement for an apportionment (which would have the effect of increasing the company's tax liability) Lord Oliver (with whom the other Law Lords agreed), after stating that it was not a legitimate use of the purposive approach to interpretation "for the purpose of imposing a tax which the legislature has not sought to enact in express terms…", went on to say:

> "I can… see no rational or practical justification for the scheme of the Act for which the Crown so strenuously contends, beyond a desire to extract the maximum amount of tax…. I can see no logical or rational justification for imposing in the absence of compelling statutory words, an additional tax burden on a company simply because it has made distributions on which it has paid tax in advance."

(c) Applying the principles from the case law

71. So how can these various statements of higher authority be interpreted as applying in the "simple" examples set out at [49] above, remembering that we are still at this stage considering a situation which has not been complicated by the operation of s107(4) elections?

72. In none of the authorities cited to me was an apportionment of any kind actually approved by the Courts. The cases are mainly of assistance in providing guidance as to the sort of considerations which should militate against an apportionment.

73. The main practical assistance I derive from the cases is the indication, from *Collard*, that before any question of an apportionment is considered, it is appropriate to consider the purpose of the relevant provision and the overall scheme of the legislation within which it sits. In the present case, we are dealing with an anti-avoidance provision designed to prevent the "buying" of losses arising from the last year of active underwriting and it seems to me that in such a case one should be wary of applying it in a way that might significantly limit its effectiveness. On that basis alone, I would discount the "liberal" approach set out in [54], [58] and [62], which might be likened to the *Sterling* approach. It can readily be seen from the table at [63] that the "liberal" approach results in restrictions of either 25% or 50% of the actual losses incurred in 2000, and that seems an illogical result for an anti-avoidance provision.

74. At the other extreme, the "draconian" approach has a certain hard-edged simplicity, and it does also seem to align the amounts disallowed much more closely with the underlying purpose of s.227A when the table at [63] is considered.

75. It seems to me that the chief benefit of the "middle way" approach is that denoted by its name: it involves a middle course between the obvious laxness of the liberal approach and the apparent harshness of the draconian approach.

(d) The additional complication caused by s.107(4) elections

76. If that is my starting point for a greatly-simplified example, how might it apply in a situation which has been complicated by s107(4) elections?

77. Mr Prosser argued strongly that by the operation of basic concepts of tax law, the effect of the 107(4) elections was that in the 2007-08 accounting period (the year in which surrender is being claimed) the losses could not be regarded as being to any extent losses "of" the 2000 underwriting year; rather, they arose as a result of a composite tax computation which involved a great many credits and debits, only two of which (the £37.6 million of expenses arising on reversal of the earlier s107(4) elections and the £932,657 apportioned declared profit deriving from 2000) contained any element which might be considered to arise in any way from the 2000 underwriting year. In that situation, it was quite simply wrong to characterise any particular part of the overall £20,081,387 loss for 2007-08 as being a loss "of" the 2000 underwriting year.

78. It is effectively implicit in this line of argument that s227A could generally be sidestepped in a situation in which s107(4) elections were made (the ability to make such elections having been only prospectively removed in FA07). As Mr Vallat put it, "SCUL's interpretation completely undermines the purpose of s227A. On SCUL's interpretation, any election under s107(4) allows a company with no previous economic relationship with the loss-making underwriter to sidestep the restriction under s227A and purchase known tax losses." I agree; it seems to me that this would be such a massive gap in the intended anti-avoidance purpose that I should only agree with Mr Prosser's proposition if the language of s227A admits of no other interpretation.

79. I am mindful of the guidance in the cases to the effect that "judicial legislation is not an option open to an English judge" (per Scarman LJ in *Western Bank Limited v Schindler* [1977] 1 Ch 1 at 18E); however, I am also mindful of the "duty of giving effect to the intention of Parliament, if it be possible, even though the process requires a strained construction of the language used or the insertion of some words in order to do so" (*ibid* at 18E-F).

(e) Conclusion on issue 1

80. In the circumstances, I do not consider Parliament would have intended the words of s227A to be interpreted so narrowly as to rob them of their intended effect in circumstances such as the present. Attractive though it is at first sight, I therefore reject Mr Prosser's submission referred to at [77] and find that s227A must be interpreted, when it refers to the "losses of" the last active underwriting year, as referring to the losses which ultimately derive from that source, including losses which have effectively been postponed to a later tax year by virtue of s107(4) elections.

81. The task then remains of ascertaining what part of the Appellant's tax losses of £20 million (approximately) in 2007-08 should be regarded as being "losses of" the

2000 underwriting year. Because of the view I have reached on issues 2 and 3 below, and because the parties indicated they would prefer only a decision in principle on this point, I do not propose to lengthen this already long decision by exploring that issue in any more detail. I should only mention that, as a matter of general approach:

(1) I would reject any suggestion that a "liberal" approach should be taken in the task of ascertainment; and

(2) If the "middle way" rather than the "draconian" approach is adopted, an apportionment of the actual losses should be made on a basis that fairly represents the respective contributions to them ultimately deriving from the relevant underwriting years, effectively "looking through" any distortions introduced by s107(4) elections.

Issue 2

82. At first sight, the language of the "group-relief continuity condition" in s227A(5) is clear: if either limb of the condition is satisfied, then the condition as a whole is satisfied. The key question is whether, as Mr Vallat contends, this apparent clarity is a mirage which will rapidly disappear in the face of a purposive construction of the section.

83. In this context, it is insufficient to refer to s227A as an "anti-avoidance" provision and say that it is to be interpreted broadly in line with its intended purpose. The intended purpose must first be discerned with sufficient precision to establish whether the particular facts of this case fall within that purpose.

84. The parties have essentially identified two places to look to discern the underlying purpose of s227A, the language of the section itself (including inferences from the language that it does <u>not</u> contain), and the ENs.

85. So far as the wording of the section itself is concerned, it would clearly have been very straightforward to include provisions, either along the lines of s403A(10)(a) and (b) ICTA, or even (certainly more briefly though perhaps less definitively) by insertion of the words "as the case may be" (or something similar) after the reference to subsections 402(2) or (3). The draftsman did neither of these things, either because he never thought about the point or because he specifically did not wish to "catch" a situation such as the present. I therefore consider that, insofar as the precise purpose of the provision can be discerned from its wording, it was not explicitly intended to apply to the present situation.

86. I consider that this is sufficient to dispose of the point in favour of the Appellant, but I also note that the ENs do not conflict with this view.

87. The only statement of the intended purpose contained within the ENs says that s227A was intended to be:

> "… a narrowly targeted rule designed to prevent companies acquiring tax losses from corporate members of Lloyd's with which they had no previous economic relationship and which are leaving the insurance

> market…. The rule will extend the period during which the claimant and surrendering companies must satisfy relationship tests."

88. It seems to me that this text, to the extent it addresses the issue at all, points both ways. First, the reference to "no previous economic relationship" points towards Mr Prosser's argument (and my view as expressed above) being correct. Second, however, the reference to the concept of "extend[ing] the period" during which relationship tests must be satisfied connotes some aspect of continuity which, it might be argued, implies that we should be looking for a continuation of an existing relationship (as Mr Vallat contends). However, this very ambiguity within the ENs themselves persuades me that they have nothing useful to add to my initial view on the purpose of s227A as derived from the language of the provision itself.

Issue 3

89. The bulk of the argument on this issue simply tracked the argument on issue 2 above. The parties were agreed that the words "meet the conditions in s402(2) or (3)" must have the same meaning where they appear in s227A(5) and in the commencement provision in s33(2) FA07.

90. Because of the view I have taken on issue 2 above, I consider Mr Prosser's argument must also succeed on issue 3.

91. I should however mention that I do not consider there is anything in Mr Prosser's "entirely separate submission" referred to at [44] to [45] above. I accept Mr Vallat's argument in reply to that point as summarised at [46] above.

Summary and conclusion

92. I find in favour of HMRC on issue 1 – that is to say, I find that on a purposive interpretation of the phrase "losses of the last active underwriting year", it is apt to cover the losses ultimately deriving from that year, irrespective of the fact that, by virtue of elections under s107(4) FA00, most of those losses have not crystallised for tax purposes until the 2007-08 accounting period of the Appellant, at which time they have also been commingled with other losses and profits before arriving at a final overall tax loss for the accounting period. See [80] above.

93. It therefore becomes necessary to apply some method to extract, from the overall tax loss figure for 2007-08, an amount which derives from the underwriting year 2000. Whilst noting that a number of different approaches to achieve this have been put forward, I express no decided view on the appropriate method to apply, except that:

(1) I consider it would be incorrect and inappropriate to apply an approach which shelters the maximum amount of losses from the effect of the restriction in s227A in a manner analogous to the approach sanctioned in *Sterling* (see [81(1)] above);

(2) If an apportionment approach is taken, then an apportionment of the actual losses should be made on a basis that fairly represents the respective contributions to them ultimately deriving from the relevant underwriting years, effectively "looking through" any distortions introduced by s107(4) elections (see [81(2)] above). I make no further comment on the appropriate method because:

(a) in view of my findings on the other issues before me, it is unnecessary to do so;

(b) the parties specifically asked me, if I agreed with the broad principle of apportionment, not to decide the point in detail at this stage; and

(c) whilst both parties appeared to tend to the view that an apportionment in proportion to the technical provisions arising in relation to each underwriting year would yield an appropriate result, with the technical provisions offering the nearest proxy for the relevant losses, the point was not fully addressed in argument to the degree required to ensure that all implications of that approach could properly be considered in this decision.

94. I find in favour of the Appellant on issues 2 and 3 – see [86], [87] and [90] above. As the effect of my decision on both issues is that the restriction in s227A does not apply, no decision is required as to any amount of losses to be restricted. As the Appellant only needed to win on one of those two issues, I therefore allow the appeal in full.

95. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 12 February 2014

Appendix
Relevant Statutory Provisions

<u>Section 107(4) Finance Act 2000 (and associated definitions)</u>

(4) A general insurer may, before the end of a prescribed period, elect that any part of the technical provisions made by him for a period of account shall not be taken into account in computing for tax purposes the profits of his trade for that period, and where he does so, the profits of his trade for the next period of account shall be adjusted accordingly for the purposes of any computation for tax purposes.

(7) In this section –

…

"period of account" –

… means an underwriting year in which profits or losses are declared for an earlier underwriting year

…

"technical provisions"… means –

(a) so much of the premiums paid, or treated (in accordance with the rules or practice of Lloyd's) as paid, by him under reinsurance to close contracts; and

(b) so much of any provisions made for the unpaid liabilities of an open syndicate of which he is a member,

as may be determined by or under regulations…"

<u>Section 33 Finance Act 2007</u>

33. **Lloyd's corporate members: restriction of group relief**

(1) In FA 1994, after section 227 insert –

"227A Restriction of group relief

(1) Losses of the last active underwriting year of a corporate member are not eligible for surrender by the corporate member as group relief to another company unless the group-relief continuity condition is satisfied.

(2) In this section, "last active underwriting year", in relation to a corporate member, means –

(a) if the corporate member writes insurance business in only one underwriting year, that underwriting year, and

(b) otherwise, the last underwriting year in which the corporate member writes insurance business.

(3) Where in an underwriting year –

(a) the corporate member writes an amount of insurance business which is insignificant when compared with that written by it in the preceding underwriting year, or

(b) the only insurance business written by the corporate member consists of acceptance of reinsurance to close premiums,

the underwriting year is not to be regarded for the purposes of subsection (2)(b) above as an underwriting year in which the corporate member writes insurance business.

(4) In subsection (3)(b) above "reinsurance to close premium" means a premium or other consideration under a contract in pursuance of which, in accordance with the rules or practice of Lloyd's, one underwriting member agrees with another to meet liabilities arising from the latter's underwriting business in an underwriting year so that the accounts of the business for that year may be closed.

(5) The group-relief continuity condition is satisfied if the corporate member (as the surrendering company) and the other company (as the claimant company) meet the conditions in section 402(2) or (3) of the Taxes Act 1988 throughout the period –

(a) beginning with the last day of the last active underwriting year of the corporate member, and

(b) ending with the first day of the first underwriting year in which losses of the last active underwriting year are declared."

(2) The amendment made by sub-section (1) has effect in relation to any case where the corporate member (as the surrendering company) and the other company (as the claimant company) first meet the conditions in section 402(2) or (3) of ICTA on or after 21st March 2007.