TC03562

Appeal number: TC/2012/05582

Income tax – tax avoidance scheme involving "gifts to charity" relief – s 587B ICTA – pre-existing option arrangements, secured by charges, for securities in question to be acquired from charity for 1% of value following charity's receipt of them – whether Appellant had disposed of whole of the beneficial interest in the securities to the charity – held no – effect of composite transaction was that the disposal was, as to 99% of the value, to the Appellant's own family trust – additionally, any disposal to the charity was "by way of a bargain made at arm's length" – s587B(1) therefore not satisfied – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILLIAM FERGUSON **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MRS SHAHWAR SADEQUE

Sitting in public at 45 Bedford Square, London on 2, 3 and 4 December 2013

David Ewart QC and Charles Bradley of counsel, instructed by NT Advisers 2009 LLP for the Appellant

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

DECISION

Introduction

1. This appeal concerns the effectiveness, for tax purposes, of a pure tax avoidance scheme known (for reasons which were not explained to us) as the "Blue Box" scheme.

2. The Appellant had earnings from employment in the tax year 2003-04 of over £800,000, and wished to avoid paying any income tax on £500,000 of those earnings. He (along with a number of other individuals of similar mind) decided to use a scheme promoted to them by Mr Matthew Jenner of NT Advisers LLP ("NT") with a view to achieving this objective.

3. The essence of the scheme was to exploit the "gifts to charities" rules, under which (in broad terms) charitable giving is encouraged by allowing individuals to deduct from their income for tax purposes the market value of any shares or similar assets they give to charities. On advice from Mr Jenner and/or his business, a complex set of arrangements was sculpted in a way which was intended to give rise to the relief under those rules whilst passing on 99% of the value of the assets supposedly "given" to the charity to a family trust for the benefit of the Appellant and his family.

The facts

4. The parties had agreed a statement of facts, as follows:

> "1. Mr Ferguson is the rule 18 lead appellant and the facts below are those pertaining to his case.
>
> 2. Dates are all 2004 unless otherwise stated.
>
> 3. On 23 March, Dominion Fiduciary Trust Ltd ('Dominion') declared two trusts of £10 called respectively the Metitec JJJ Life Interest Trust ('the Metitec JJJ Trust') and the Longfield JJJ Life Interest Trust ('the Longfield JJJ Trust').
>
> 4. Except as mentioned below, and except that the initial Principal Beneficiaries of them were different, the Metitec JJJ Trust and the Longfield JJJ Trust were both in the same terms:
>
> > (1) the trust funds were held on trust to pay the income to the 'Principal Beneficiary' during his lifetime or such shorter period as the trustees should declare, with a power to advance capital, remainder to his issue. *[The Principal Beneficiary of the Metitec JJJ Trust was Bryan Craig Melville and the Principal Beneficiary of the Longfield JJJ Trust was Peter Stuart Langton. Neither of them was connected with Mr Ferguson.]*

(2) The trust funds were subject to an overriding power of appointment. The beneficiaries included (in the case of the Metitec JJJ Trust) the Principal Beneficiary's issue, (in the case of the Longfield JJJ Trust) certain named persons (together 'the Original Beneficiaries') and charity.

(3) The trustees had discretion to appoint and to exclude beneficiaries.

(4) There was a 'long-stop' trust for charity, within the meaning of the proper law of the trusts, which was Jersey law.

5. On 23 March, the trustee of the Metitec Trust and the trustee of the Longfield Trust (being trusts of which the Principal Beneficiaries of the Metitec JJJ and Longfield JJJ Trusts respectively were settlors) appointed £500 to be held on the trusts of the Metitec JJJ and Longfield JJJ Trusts respectively.

6. On or around 24 March, Mr Ferguson engaged NT Advisors LLP to provide him and others with services related to the tax planning arrangement that is the subject of this appeal. NT Advisors LLP was to receive fees for these services. Mr Ferguson's intention in entering into this arrangement was to obtain relief from income tax and he would neither have entered into it nor have had any reason to do so but for the possibility of obtaining such relief.

7. The following steps then took place:

(1) On 29 March, Mr Ferguson purchased the income interests of the Principal Beneficiaries of the Metitec JJJ and Longfield JJJ Trusts for consideration of £1,000 and £735 respectively.

(2) Also on 29 March, the trustee of the Metitec JJJ Trust and the trustee of the Longfield JJJ Trust appointed Mr Ferguson as a beneficiary of the respective trusts.

(3) Also on 29 March, the Principal Beneficiaries disclaimed their interests in the trusts save for their right to income (which they had sold to Mr Ferguson).

(4) On 30 March, the trustees executed deeds excluding the Principal Beneficiaries from benefit save for their right to income and excluding the Original Beneficiaries from benefit entirely.

(5) Also on 30 March, Dominion retired as trustee of the Metitec JJJ and Longfield JJJ Trusts in favour of SG Hambros Trust Company (Guernsey) Ltd ('SG Hambros Trust').

(6) Also on 30 March, the trustee of the Metitec JJJ Trust and the trustee of Longfield JJJ Trust (now SG Hambros Trust) appointed Mr Ferguson's spouse and issue and a named charity as discretionary objects and, in the case of his spouse and issue, as

contingent beneficiaries of the trusts. The named charity was the Tax Advisers' Benevolent Fund.

(7) Also on 30 March the trustee of the Metitec JJJ Trust and the trustee of Longfield JJJ Trust executed deeds amending the terms of their respective trusts so as to provide:

(a) that at the end of Mr Ferguson's income interest the capital and income of the trust funds should be held on discretionary trusts for the benefit of all or any one or more of Mr Ferguson, his spouse, his issue and general charity (within the meaning of Jersey law) for a trust period which might be shortened by the trustees; subject thereto at the end of that trust period for Mr Ferguson, if then living; if not, for his spouse if then living; if not, for his issue then living;

(b) that the power to add beneficiaries was subject to Mr Ferguson's consent; and

(c) that the trustees had the administrative power to enter into and perform options.

8. In summary, the overall result was that, in respect of each of the Metitec and Longfield JJJ Trusts, Mr Ferguson was entitled to the income of the trust during the lifetime of the Principal Beneficiary, but subject to a power in the trustees to shorten that period of entitlement. Subject thereto and to an overriding power of appointment, the trust's assets were held on discretionary trusts for a trust period, which might be shortened by the trustees, for the benefit of all or any one or more of Mr Ferguson, his spouse and issue and charity (within the meaning of Jersey law); and subject thereto at the end of that trust period for Mr Ferguson, if then living; if not, for his spouse if then living; if not, for his issue then living; with a 'long stop' trust in favour of charity (within the meaning of Jersey law).

9. On 31 March, the trustee of the Metitec JJJ Trust and the trustee of the Longfield JJJ Trust each entered into agreements with the trustee of the Somerton Charitable Trust ('the SCT') in the following terms:

(1) In consideration of £350 the trustee of the SCT granted the trustee of the Metitec JJJ/Longfield JJJ Trust an option to acquire certain 'Gilts' at 1% of market value.

(2) The 'Gilts' were defined as all of the 5% Treasury 2004 with SEDOL number 0-668-657 which 'are gifted to the Grantor [the trustee of the SCT] by William Ferguson in the 60 days following the date of this Agreement which are designated by William Ferguson as "Fund 47 Gift" and which are held in account number 415332 under the name of the trustee of The Somerton Charitable Trust with SG Hambros Bank & Trust (Jersey) Limited'.

(3) The option was exercisable by service of a valid exercise notice on the trustee of the SCT. Such a notice would be valid if it was served on the trustee of the SCT on or after the 8th day after the 'Receipt Date' (defined as the earliest date on or after the date of the agreement on which the trustee of the SCT received the Gilts from the Appellant) at a time when the option had not lapsed.

(4) The agreement with the trustee of the Metitec JJJ Trust provided that the option would lapse at the earliest of the following times:

> '(a) at 11.59 pm (GMT) on 2 April 2004 if the level of the FTSE-100 Index at the close of business on such date (or, if the Exchange is closed on that date, the first preceding Business Day on which it was open) is more than 3% above the level of the FTSE-100 Index at the opening of business on the date of this Agreement (or, if the exchange is closed on that date, the first preceding Business Day on which it was open);
>
> (b) at 11:59 pm (GMT) on the seventh day after the Receipt Date if the level of the FTSE-100 Index at the close of business on such date (or, if the Exchange is closed on that date, the first preceding Business Day on which it was open) is <u>less than</u> the level of the FTSE-100 Index at the close of business on the Receipt Date (or, if the Exchange is closed on such date, the first preceding Business Day upon which it was open);
>
> (c) at 11:59 pm (GMT) on the 61st day after the date of this Agreement'.

(5) The agreement with the trustee of the Longfield JJJ Trust differed in that the option would lapse if:

> '…
>
> (b) at 11:59 pm (GMT) on the seventh day after the Receipt Date if the level of the FTSE-100 Index at the close of business on such date (or, if the Exchange is closed on that date, the first preceding Business Day on which it was open) is <u>more than or equal to</u> the level of the FTSE-100 Index at the close of business on the Receipt Date (or, if the Exchange is closed on such date, the first preceding Business Day upon which it was open)
>
> …' *[emphasis added]*

(6) The trustee of the SCT was entitled within three business days of receipt of a valid exercise notice to make a 'Cash Cancellation Election'. If such an election was made, then the trustee of the SCT would become obliged to pay the trustee of the Metitec

JJJ/Longfield JJJ Trust 99% of the market value of the gilts (plus notional dealing costs) in cash rather than having to transfer the Gilts themselves.

10. Also on 31 March, the trustee of the SCT entered into deeds of charge with the trustees of the Metitec JJJ and Longfield JJJ Trusts charging the Gilts with the discharge of its obligations under the option agreements.

11. By powers of attorney of 1 April, the trustee of the SCT appointed SG Hambros Trust in its respective capacities as trustee of the Metitec and Longfield Trusts to be its attorney to act and exercise all rights deriving from the Gilts from time to time to, amongst other things, transfer and/or procure the transfer of the Gilts as provided for in the option agreements.

12. The SCT was at all relevant times a 'charity' for the purposes of section 506 of the Income and Corporation Taxes Act 1988.

13. On or around 2 April:

(1) SG Hambros Bank & Trust (Jersey) Limited ('the Bank') granted Mr Ferguson a loan facility of up to £492,375 for the purpose of his purchasing the Gilts.

(2) Mr Ferguson requested the Bank to use as much as possible of the £500,000 (approximately) which was held by him in a specified account with the Bank (being the loan monies and at least £7,625 of monies transferred by him to his account at the Bank from other sources) to purchase 5% Treasury 2004 with SEDOL number 0-668-657 and the Bank effected a purchase on his behalf of £491,300.00 nominal of such stock.

(3) Mr Ferguson entered into a deed of charge with the Bank charging the Gilts with the discharge of his obligations under the loan facility.

(4) The trustee of the Metitec JJJ Trust and the trustee of the Longfield JJJ Trust each entered into agreements with the Bank guaranteeing Mr Ferguson's obligations under the loan facility and charged their rights under their options with performance of their obligations under the guarantees.

14. At 11.59 pm (GMT) on 2 April the level of the FTSE-100 Index at the close of business on such date was not more than 3% above the level of the FTSE-100 Index at the opening of business on 31 March 2004 (being the date of the option agreements).

15. On 5 April:

(1) The Bank released its charge over Mr Ferguson's Gilts.

(2) On Mr Ferguson's instruction, the Bank transferred £491,300 nominal of the Gilts to the trustee of the SCT.

(3) Mr Ferguson wrote in a letter to the trustee of the SCT that he had transferred the Gilts by way of gift and that the trustee was free to deal with the Gilts as it saw fit.

(4) The trustee of the SCT made a written acknowledgement of receipt confirming its understanding that the gift of the Gilts was unconditional.

(5) The trustee of the SCT wrote to the trustees of the Metitec JJJ and Longfield JJJ Trusts informing them that it had received £491,299 nominal of the Gilts and that the Receipt Date for the purposes of the option agreements was 5 April 2004.

16. The market value of the Gilts on 5 April was £500,157. The Gilts were 'qualifying investments' for the purposes of section 587B of the Income and Corporation Taxes Act 1988.

17. Mr Ferguson was aware at the time of transferring the Gilts of the existence and nature of the options held by the trustee of the Metitec JJJ Trust and the trustee of the Longfield JJJ trust.

18. At 11:59 pm (GMT) on 12 April 2004, being the 7th day after the Receipt Date, the level of the FTSE-100 Index at the close of business on such date was greater than or equal to the level of the FTSE-100 Index at the close of business on the Receipt Date, with the result that the Longfield JJJ Trust's option lapsed, but the Metitec JJJ Trust's option remained exercisable.

19. On 13 April, the trustee of the Longfield JJJ Trust entered into a deed with the trustee of the SCT releasing its charge.

20. Also on 13 April, the trustee of the Metitec JJJ trust served a valid exercise notice on the trustee of the SCT.

21. By a facility letter dated 19 April, the Bank offered the trustee of the Metitec JJJ Trust an overdraft facility of up to £7,625 to enable it to complete the exercise of the option, which the trustee resolved to accept.

22. On 19 April 2004, pursuant to its obligations under the exercised option, the trustee of the SCT transferred or procured the transfer of the Gilts or of a beneficial interest in them to the trustee of the Metitec JJJ Trust.

23. On 21 April, the trustee of the Metitec JJJ Trust entered into a deed with the trustee of the SCT releasing its charge.

24. On 6 May, the Bank sold the Gilts for £491,606.06 plus accrued interest of £10,201.84 and credited the Metitec JJJ Trust's account with

£501,182.90, being the sum of the above two figures less a Bank commission of £625.

25. On 27 July, the trustee of the Metitec JJJ Trust entered into an agreement with Mr Ferguson under which it made him an interest-free loan of £399,992, repayable on demand, for the purpose of reducing his debt to the Bank.

26. The trustee of the Metitec JJJ Trust made Mr Ferguson two smaller loans in later years.

27. As of 10 June 2013 all loans owed by Mr Ferguson (as described in 25 and 26 above) remain outstanding in full.

28. Mr Ferguson made a claim for relief from income tax pursuant to section 587B(2) of the Income and Corporation Taxes Act 1988."

5. We also received a large bundle of documents, largely comprising the various documents used to implement the scheme, but also including copies of emails and other documents recording the negotiations that had taken place between Mr Jenner of NT and SCT.

6. It was apparent from the latter material that the negotiations with SCT had been hard-fought. SCT had sought to negotiate what it described as a "2% turn", plus an uplift of 40% by way of "tax provision", plus any legal costs incurred as a result of its participation. This proposal, in its words, "provides the Trust with sufficient return from the Transactions to justify its participation". In reply, Mr Jenner had offered a "turn" of 0.75%, observing that "should the charity price itself out of the market then no monies will be made". The final confirmation letter from SCT to Mr Jenner set out "the terms on which we have agreed that the Trust will participate".

7. Finally, we received a witness statement and heard oral testimony from Brian Patrick Watson, a consultant to Foster & Cranfield Limited, auctioneers and valuers of financial interests (especially life assurance policies). Mr Watson is a Fellow of the Institute of Actuaries. He gave expert evidence, which was not materially disputed, as to the market value of the various interests in the Metitec JJJ Life Interest Trust ("the M Trust").

8. Mr Watson's evidence was essentially that, whether taken individually or together, the market value of the interests in the M Trust of the Appellant, his wife and his three infant children as at 19 April 2004 (the date on which the M Trust acquired a beneficial interest in the Gilts) was nil. This was the case even if the prospect of the M Trust trustee exercising the overriding power of appointment referred to at paragraph 4(2) of the Statement of Facts were disregarded; essentially there still remained sufficient discretion in the trustee of the M Trust which could be exercised for the benefit of none of the Ferguson family so that an arm's length purchaser of their interests under the M Trust would have no certainty of receiving any benefit by virtue of those interests.

9. In cross examination, Mr Watson confirmed that a nil market value could also be ascribed to the interest of any unborn issue of Mr Ferguson, the Tax Advisers' Benevolent Fund and also any charity that might obtain an interest under the longstop provision. The reason was again the same, namely that the interest of any potential beneficiary could be defeated by the exercise of the trustee's discretion.

10. Finally, he accepted as a matter of principle that if all the potential beneficiaries under the M Trust could "get together" and sell their combined interests, the combined interests would be worth "essentially the total value of the trust fund, less a few expenses".

The law

11. The relief claimed by the Appellant arises from s 587B Income and Corporation Taxes Act 1988 ("ICTA"), as inserted by Finance Act 2000 with effect from the 2000-01 tax year. Extracts from that section, as in force at the time of the transactions the subject of this appeal, are included in the schedule to this Decision, along with extracts from other provisions of ICTA which are relevant to their interpretation.

12. Both parties agreed that the law of England and Wales in relation to trusts was the same as Jersey law, for the purposes of considering all trust law issues arising in connection with the M Trust.

13. Both parties agreed (and we concur) that the judgment of Lewison J in *Berry v HMRC* [2011] UKUT 81 (TCC) at [31] provided a very useful summary of the present position on what has become known as the *Ramsay* principle (after the House of Lords decision in *WT Ramsay v IRC* [1981] STC 174) as follows:

> "(i) The Ramsay principle is a general principle of statutory construction (Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46 at [35], 6 ITLR 454 at [35]; Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [36], [2005] 1 AC 684 at [36]).
>
> (ii) The principle is two-fold; and it applies to the interpretation of any statutory provision:
>
> > (a) To decide on a purposive construction exactly what transaction will answer to the statutory description; and
> >
> > (b) To decide whether the transaction in question does so (Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [36], [2005] 1 AC 684 at [36]).
>
> (iii) It does not matter in which order these two steps are taken; and it may be that the whole process is an iterative process (Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [32], [2005] 1 AC 684 at [32]; Astall v Revenue and Customs Comrs [2010] STC 137 at [44], 80 TC 22 at [44]).

(iv) Although the interpreter should assume that a statutory provision has some purpose, the purpose must be found in the words of the statute itself. The court must not infer a purpose without a proper foundation for doing so (Astall v Revenue and Customs Comrs [2010] STC 137 at [44], 80 TC 22 at [44]).

(v) In seeking the purpose of a statutory provision, the interpreter is not confined to a literal interpretation of the words, but must have regard to the context and scheme of the relevant Act as a whole (WT Ramsay Ltd v IRC [1981] STC 174 at 179, [1982] AC 300 at 323; Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [29], [2005] 1 AC 684 at [29]).

(vi) However, the more comprehensively Parliament sets out the scope of a statutory provision or description, the less room there will be for an appeal to a purpose which is not the literal meaning of the words. (This, I think, is what Arden LJ meant in Astall v Revenue and Customs Comrs [2010] STC 137 at [34], 80 TC 22 at [34]. As Lord Hoffmann put it in an article on 'Tax Avoidance' ([2005] BTR 197): 'It is one thing to give the statute a purposive construction. It is another to rectify the terms of highly prescriptive legislation in order to include provisions which might have been included but are not actually there': see Mayes v Revenue and Customs Comrs [2009] EWHC 2443 (Ch) at [30], [2010] STC 1 at [30].)

(vii) In looking at particular words that Parliament uses what the interpreter is looking for is the relevant fiscal concept: MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6 at [48], [49], [2001] STC 237 at [48], [49], [2003] 1 AC 311.

(viii) Although one cannot classify all concepts a priori as 'commercial' or 'legal', it is not an unreasonable generalisation to say that if Parliament refers to some commercial concept such as a gain or loss it is likely to mean a real gain or a real loss rather than one that is illusory in the sense of not changing the overall economic position of the parties to a transaction: WT Ramsay Ltd v IRC [1981] STC 174 at 182, [1982] AC 300 at 326; IRC v Burmah Oil Co Ltd [1982] STC 30 at 38, 54 TC 200 at 221; Ensign Tankers (Leasing) Ltd v Stokes (Inspector of Taxes) [1992] STC 226 at 238, 240–241, 246, [1992] 1 AC 655 at 673, 676, 683; MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] STC 237 at [5], [32], [2003] 1 AC 311 at [5], [32]; Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [38], [2005] 1 AC 684 at [38].

(ix) A provision granting relief from tax is generally (though not universally) to be taken to refer to transactions undertaken for a commercial purpose and not solely for the purpose of complying with the statutory requirements of tax relief: see Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 ITLR 454 at [149]. However, even if a transaction is carried out in order to avoid tax it may still be one that answers the statutory description: Barclays Mercantile Business Finance

Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [37], [2005] 1 AC 684. In other words, tax avoidance schemes sometimes work.

(x) In approaching the factual question whether the transaction in question answers the statutory description the facts must be viewed realistically: Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [36], [2005] 1 AC 684.

(xi) A realistic view of the facts includes looking at the overall effect of a composite transaction, rather than considering each step individually: (WT Ramsay Ltd v IRC [1981] STC 174 at 180, [1982] AC 300 at 324; Stamp Comr v Carreras Group Ltd [2004] UKPC 16 at [8], [2004] STC 1377 at [8]; Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2005] STC 1 at [35], [2005] 1 AC 684.

(xii) A series of transactions may be viewed as a composite transaction where the series of transactions is expected to be carried through as a whole, either because there is an obligation to do so, or because there is an expectation that they will be carried through as a whole and no likelihood in practice that they will not: WT Ramsay Ltd v IRC [1981] STC 174 at 180, [1982] AC 300 at 324.

(xiii) In considering the facts the fact-finding tribunal should not be distracted by any peripheral steps inserted by the actors that are in fact irrelevant to the way in which the scheme was intended to operate: (Astall v Revenue and Customs Comrs [2009] EWCA Civ 1010 at [34], [2010] STC 137 at [34], 80 TC 22).

(xiv) In considering whether there is no practical likelihood that the whole series of transactions will be carried out, it is legitimate to ignore commercially irrelevant contingencies and to consider it without regard to the possibility that, contrary to the intention and expectation of the parties it might not work as planned: IRC v Scottish Provident Institution [2005] STC 15 at [23], [2004] 1 WLR 3172 at [23]. Even if the contingency is a real commercial possibility it may be disregarded if the parties proceeded on the basis that it should be disregarded: Astall v Revenue and Customs Comrs [2010] STC 137 at [34], 80 TC 22 at [34]."

14. Whilst the above is clearly a very broad and useful statement of the current state of the law, we would observe that in one respect it may require adaptation to meet a case such as the present. This is in relation to paragraph (ix), which was clearly drafted with what might be called "commercial" tax reliefs in mind, that is to say reliefs designed to encourage particular types of commercial transaction. In the context of a relief designed to encourage charitable bounty, it would perhaps be more appropriate to substitute the word "charitable" for the word "commercial" in paragraph (ix).

15. We would also observe that, since the hearing of this appeal, the judgment of the Court of Appeal in *HMRC v UBS AG; DB Group Services (UK) Limited v HMRC* [2014] EWCA Civ 452 has also been handed down. In that case, HMRC failed in

their *Ramsey* challenges to a tax avoidance scheme which was based on the "restricted securities" provisions in ICTA, essentially on the basis that the companies in question had engineered structures which took advantage of specific exemptions contained within the "detailed and highly prescriptive code for dealing with restricted securities"; there was no general underlying principle that an admitted tax avoidance motive would disqualify a taxpayer from relying on a statutory relief, and in that particular case no underlying rationale could be discerned for the (complex) relevant exempting provisions from which such a principle could be inferred.

The issues and the arguments

16. It is common ground that the gilts ("the Gilts") purchased and transferred to the trustee of the Somerton Charitable Trust ("SCT") were a "qualifying investment" within the meaning of that phrase in s 587B(9) ICTA (see paragraph 16 of the Agreed Statement of Facts).

17. It is also common ground that SCT was a "charity" for the purposes of s 587B ICTA (see paragraph 12 of the Agreed Statement of Facts).

18. In his skeleton argument, Mr Ewart therefore summarised the matters to be determined by the Tribunal as being the following:

> (1) Did Mr Ferguson 'dispose of the whole of the beneficial interest in the Gilts to the Charity' for the purposes of s 587B(1)?
>
> (2) If he did, was the disposal 'otherwise than by way of a bargain made at arm's length' for the purposes of the same provision?
>
> (3) If it was, was it a 'gift' or a 'disposal at an undervalue'?
>
> (4) Did Mr Ferguson or persons connected with him receive a benefit or benefits in consequence of the disposal within the meaning of s 587B(5)?
>
> (5) If he or they did, what was 'the value of that benefit or… the aggregate value of those benefits' for the purpose of that subsection?

19. Mr Henderson, it is fair to say, whilst being prepared to engage with the detailed argument on each of these individual points, had a much larger point to make, which was encapsulated in the following passage from his skeleton argument:

> "It was always intended that 99% of the £500,000 odd value of the Gilts would end up, as it did, in a private trust of which the taxpayer and his family were beneficiaries, and that the charity would end up, as it did, with only 1% of the Gilts or 1% of their value, yet it is sought to be argued by Mr Ferguson that he can obtain a £200,000 odd reduction in his income tax bill on the basis of a "*gift*" to the charity of £500,000 of gilts. However cleverly the argument may be dressed up, that is what it boils down to, and it is submitted that it only has to be stated in those terms for its falsity to be apparent."

20. In effect, Mr Henderson was saying that a microscopic legal analysis of each link in the chain was only part of the picture, it was also necessary to stand back and look at the facts as a whole in the light of the Ramsey principles of statutory construction.

21. The main dispute between them was whether the Appellant had indeed disposed of the whole of the beneficial interest in the Gilts to SCT, and we summarise the arguments of the parties on that point as follows.

Did the Appellant dispose of the whole of the beneficial interest in the Gilts to SCT?

22. Mr Ewart submitted that he did. There did not appear to be any dispute that the Appellant owned the entire beneficial interest in the Gilts when they were first acquired on his behalf by the Bank. Mr Ewart submitted that the actions summarised in paragraphs 15(2) to (4) of the Agreed Statement of Facts amounted to an unconditional transfer by the Appellant of the whole of his beneficial interest to SCT on 5 April 2004, and that from that time until SCT transferred its beneficial interest in the Gilts to the M Trust on 19 April 2004, "no-one but the Charity was beneficially entitled to the Gilts". It followed that the Appellant had disposed of the whole of the beneficial interest in the Gilts to SCT.

23. In Mr Ewart's submission, the existence of the option agreements did not affect this analysis. In particular, the certainty that one or other of the options would lapse and the possibility of cash cancellation of the options (see paragraphs 9(4) to (6) of the Agreed Statement of Facts) meant that there could be no right to specific performance of the option agreements (and accordingly the beneficial interest in the Gilts must remain with SCT until it actually transferred that beneficial interest to the M Trust following the exercise of the relevant option, without exercising the cash cancellation right). Further, under the principles enunciated in *J Sainsbury Plc v O'Connor (Inspector of Taxes)* [1991] STC 318 at 325-6, as the M Trust could not have exercised its option to acquire the Gilts until eight days after the Appellant's transfer of them to SCT, no order for specific performance of the option could have been made during that period even if there had been no cash cancellation alternative and so SCT would have been beneficially entitled to the Gilts until at least that time.

24. Equally, the existence of the charges over SCT's beneficial interest in the Gilts (to secure its obligations under the two option agreements) did not mean that SCT owned less than the full beneficial interest.

25. Mr Henderson attacked Mr Ewart's approach in, broadly, three (quite closely interrelated) ways.

26. His primary contention was that, on an overall purposive construction of s 587B ICTA, it was intended "to encourage charitable giving by providing tax relief on the provision of bounty or benefit to charity by means of transfers of particular kinds of assets. In the present case the benefit provided by the taxpayer to the charity was no more than 1% or thereabouts of the value of the Gilts."

27. He also submitted that, even without applying an overall purposive construction, Mr Ewart's approach was wrong for two broad reasons. First, he said, it ignored the fact that the combined effect of the pre-existing option (and associated security) arrangements was such that what was actually transferred to SCT was only 1% of the value of the Gilts. Second, the essential nature of a "gift" involved both a transmission and a receipt; there could be no gift where there was no "donative intent" to an element of the disposal because of the arrangements that were in place which were designed to ensure that it would "pass through" the immediate recipient (SCT) to the intended ultimate recipient (which turned out to be the M Trust).

28. We summarise Mr Henderson's three broad lines of attack under this heading, and Mr Ewart's response to them, in turn.

(a) Overall purposive approach to s 587B

29. Mr Henderson pointed to what he submitted was the general purpose underlying the relief in s 587B. In his submission, it was as stated at [26] above. He pointed to the fact that the heading of the section was "Gifts of shares and securities to charities, etc." That heading could, by reference to the House of Lords decision in *R V Montila* [2004] UKHL 50 at [31] to [37], be taken into account in interpreting the section and discerning its purpose. Bearing in mind the approach to "composite transactions" mentioned in paragraphs (x) to (xiv) of Lewison J's analysis in *Berry* set out at [13] above, it was clear that the overall effect of the complex preordained series of transactions was (as it was always intended to be) to provide, at most, "bounty or benefit" of only 1% of the value of the Gilts to SCT, the remaining 99% being passed on to the Appellant's family trust. Accordingly any suggestion that a taxpayer should receive relief greater than the 1% received by SCT would clearly conflict with the underlying purpose of the legislation.

30. On the other hand, Mr Ewart's approach to applying the *Berry* analysis to the present case was as follows. It was not sufficient to say that the purpose of s 587B was to "encourage charitable giving" or some similar generalised formulation; it laid down a particular way of doing so, as specified in the section. The section required a disposal of "the whole of the beneficial interest" in the relevant assets to a charity. The term "beneficial interest" had a particular legal meaning, and the option and charge arrangements did not, in law, have the effect of taking anything away from the totality of the beneficial interest that was transferred to and vested in SCT by the Appellant. Thus the transaction fell within the terms of s 587B and it therefore followed that it satisfied the purpose of that section. In short, to establish whether the purpose of the section was satisfied by a transaction, the technical legal nature of that transaction needed to be tested against the technical legal concepts embodied in the section.

(b) What was transferred to SCT was only 1% of the value of the Gilts, due to the pre-existing option and security arrangements

31. Mr Henderson argued that even if we accepted that there had been a disposal of the Gilts by the Appellant, it could not be said that he had disposed of the whole

beneficial interest in them to SCT for the purposes of s 587B(1) ICTA. He referred us to *Vandervell v IRC* [1966] Ch 261 and [1967] 2 AC 291, where a gift of shares to the Royal College of Surgeons was combined with the grant back by the Royal College of an option to purchase the shares for £5,000. The central issue was whether the donor had "divested himself absolutely" of the shares. In considering this question, the judges in the Court of Appeal all approached the transaction by finding that the option represented something "subtracted" from the gift or was an integral condition of it. This approach was not disapproved by the House of Lords.

32. Mr Henderson submitted that in the present case, in view of the option arrangements (and associated charges) having been put in place before the Appellant gave instructions for the beneficial interest in the Gilts to be transferred to SCT, there was no moment in time when SCT was the holder of the Gilts free of the burden of those arrangements. He referred to what he called the "disposal of the *scintilla temporis* theory" (i.e. the suggestion that there might have been a brief moment in time after SCT's acquisition of the beneficial interest before the burden of the option and charge arrangements attached to it, when SCT held that interest free from all encumbrances) by the House of Lords in *Abbey National Building Society v Cann* [1991] 1 AC 56 and in *Ingram v IRC* [2001] 2 AC 293. He submitted that HMRC's case in the present appeal was even stronger than in those cases, as the option agreements and associated charges had been entered into by SCT before the Appellant had given instructions to transfer the beneficial ownership of the Gilts to SCT.

33. Mr Ewart was effectively maintaining that this was all irrelevant, as the Appellant had parted with his entire beneficial interest to SCT and that was what the section required. This was entirely unaffected by the existence of the option and charge arrangements, neither of which, as a matter of law, affected the fact that SCT owned the entire beneficial interest in the Gilts until the option was exercised.

34. In relation to the option arrangements, he relied on *J Sainsbury Plc v O'Connor (Inspector of Taxes)* [1991] STC 318 at 325-6 as authority for the proposition that the option arrangements in this case would not prevent SCT from being regarded as the full beneficial owner of the Gilts to which they related.

35. There was some dispute at a technical level as to whether the very existence of the charge (given by SCT to secure its obligations under the option arrangements) must, as a matter of law, mean that there had been no disposal of the entire beneficial interest to SCT. It was common ground that the existence of a charge implied "some deduction from the right of ownership in the property" (see *Fisher & Lightwood's Law of Mortgage* para 1.5 note 1) but the question was whether the existence of the charge in the present case was sufficient for it to be properly said that the Appellant had not "disposed of the whole beneficial interest" in the Gilts to SCT.

36. Mr Ewart's main argument on this point was that the charge did not really "bite" (in the sense of having any impact on SCT's beneficial ownership of the Gilts) until at least eight days after the Gilts had been received, when the option became exercisable. In the meantime, following the same basic logic as the *Sainsbury* decision, SCT enjoyed full beneficial ownership of the Gilts unaffected by the charge.

37. Mr Henderson, on the contrary, referred us to various comments made by Buckley LJ in the Court of Appeal in *Swiss Bank Corporation v Lloyds Bank Ltd and others* [1982] AC 584. Those comments suggested (at p 597 B-D) that if there was an obligation to pay out of a particular fund a debt due by one party to a transaction to the other, "the fund belonging to or being due to the debtor", that obligation would amount to "an equitable assignment pro tanto of the fund". Applying that approach to the present case, SCT ought to be regarded as having never received 99% of the beneficial interest in the Gilts transferred to it which became subject to the charge as it received them. To the extent there were comments in the *Swiss Bank* case which appeared to point in the other direction, this was easily explicable by the fact that the actual phrase under consideration in that case was "change of beneficial ownership" in the particular context of exchange control legislation.

(c) No "donative intent"

38. Mr Henderson's line of argument here seemed to us to be almost indistinguishable in principle from that summarised in the previous few paragraphs. His starting point was that a "gift" involved two elements, namely an intention to give and a transfer to the donee pursuant to that intention, as stated by Lord Hobhouse in *R v Hinks* [2001] 2 AC 241 at 266G:

> "The making of a gift …. involves the donor in forming the intention to give and then acting on that intention by doing whatever is necessary for him to do to transfer the relevant property to the donee."

39. In the present case, the effect of the option and charge arrangements was that SCT only received, as the Appellant always intended, at most 1% of the value of the Gilts. In terms of *Vandervell*, there was something subtracted from the property actually transferred to SCT; it was clear that the Appellant's intention was that SCT should only benefit to the tune of the 1%, and that negated any suggestion that he had made a gift of any greater amount.

40. Indeed, Mr Henderson went further and suggested that it was inappropriate to think of even the 1% in terms of a gift. The course of the negotiation with SCT made it clear that it was more akin to a fee for services rendered, namely permitting the charity to be used as one element of Mr Ferguson's tax avoidance scheme. The Appellant was well aware of this negotiation. It is also clear that this was the essential reason why the Appellant chose SCT rather than some other charity – Mr Jenner of NT had effectively "found" them and negotiated what was described in the correspondence with them as a "turn"; SCT (which had "no substantial funds" at the time) saw an opportunity to receive a total net payment of some £670,000 from the Appellant and the other users of the Blue Box tax avoidance scheme, which it could use to make significant grants to other charities (SCT having been set up essentially for that purpose many years before).

41. In passing, it can be seen that this net payment implies a total of somewhere around £60 million to £70 million being passed through SCT in respect of all users of the scheme, implying intended tax savings around £25 million.

Did Mr Ferguson or persons connected with him receive a benefit or benefits in consequence of the disposal within the meaning of s 587B(5)?

42. The parties agreed that if it is found that section 587B(1) is satisfied following an examination of the arguments summarised above, section 587B(5) must then be considered, to see whether any "benefits" had been received by the Appellant or persons connected with him in consequence of his disposal. If they had, then the value of those benefits needed to be subtracted from the value of the Gilts at the time of the disposal in arriving at the deduction from the Appellant's total income arising from the gift.

43. The argument here revolved around two issues. The first was whether the Appellant (or any person connected with him) had received any benefit at all in consequence of the disposal. The second was the value to be taken into account if any benefit was so received.

44. Mr Henderson argued that both the trustee of the two trusts and Mr Ferguson's wife and family were connected with him for the purposes of section 587B(5). Mr Ewart accepted that Mr Ferguson's wife and family were so connected, but did not agree that the trustee of the two trusts was so connected.

45. Mr Henderson's argument in relation to the trustee of the two trusts was that by transferring the Gilts to SCT the Appellant had, directly or indirectly, provided funds to them, thereby becoming a settlor in relation to both of them pursuant to section 660G ICTA. Section 839(3)(a) ICTA therefore gave rise to a connection between the Appellant and the two trusts. Mr Ewart objected that the wording of section 587B(5) did not extend to cover persons who had no prior connection but became connected by virtue of the transaction in question. Were it otherwise, he argued, the effect would be to undermine the intended effect of section 587B altogether because any donor would become connected to every charity he gave to and therefore the full amount of the gift would be deducted under section 587B(5).

46. Whilst accepting that the Appellant and his family were all connected, Mr Ewart referred to the evidence of Mr Watson in support of his contention that the amount of the value to be deducted under s 587B(5) was nil. Mr Henderson on the other hand contended that "a broad approach to value" was required for this purpose, as it was in *Leedale v Lewis* [1982] 2 All ER 644; he equated the aggregate of the "value" of the benefits received by all the Ferguson family as being approximately equal to 99% of the value of the Gilts, effectively because in practice there was no real likelihood of the value in the trust being distributed to anyone else. He sought to persuade us that the evidence of Mr Watson in relation to the "market value" of the various trust interests related to something much narrower than the simple "value" of such interests to which s 587B(5) needed to be applied.

Discussion and conclusion

Preliminary points

47. We consider it appropriate to follow the guidance provided in *Berry* and set out at [13] above in interpreting s 587B ICTA and testing the transactions involved in this appeal against it.

48. There is little doubt in our minds that the purpose of the section as a whole is to encourage charitable giving, and this purpose is put into effect by affording relief against income tax where a taxpayer disposes of his entire beneficial interest in a relevant asset to a charity.

49. It is evident, both from the terms of subsection (1) itself and from the heading of the section, that the main method contemplated for such a disposal is by way of gift, however disposals at an undervalue are also expressly envisaged. Where the taxpayer (or a person connected with him) gains a benefit in consequence of the disposal, there is specific provision for his relief to be reduced by reference to the value of the benefit, but the relief itself remains available in such situations (subject to that reduction).

50. We do not consider that the wording of s 587B(1), or the phrase "disposes of the whole of the beneficial interest" in it, brings the provision within the purview of paragraph (vi) of the *Berry* guidance, whether viewed in isolation or in the context of s 587B as a whole. This is not a provision in which Parliament has resorted to lengthy detailed definitions or arithmetical formulae which remove any scope for purposive interpretation. It is not "highly prescriptive legislation" of the type referred to by Lord Hoffman, as quoted in that paragraph, or a "detailed and prescriptive code" such as the "restricted securities" rules considered in *UBS*.

Discussion

51. The main essential dispute between the parties is whether, in the circumstances of this case, the Appellant disposed of the whole of the beneficial interest in the Gilts to SCT.

52. If we considered only steps 15(1) to (4) of the Agreed Statement of Facts at [4] above without taking account of the other facts, it seems to us that this point would be arguable.

53. However, it is quite clear that by the time those steps took place, matters had been so arranged that there was "an expectation" that one or other of the two options would be exercised and there was "no likelihood in practice" that this would not happen. The consequence of this is that there was, we find, an "expectation" that SCT would end up with only 1% of the value of the Gilts (by way of the exercise price due under one of the options) and there was "no likelihood in practice" of any other result. (The existence of two alternative options and of the cash cancellation options are, in our view, peripheral steps which were in fact irrelevant to the way in which the

scheme was intended to operate, and those matters can therefore be ignored under paragraph (xiii) of the *Berry* guidance.)

54. Accordingly, following paragraph (xii) of the *Berry* guidance, the series of transactions (including in particular the exercise of the option as well as the original transfer of the beneficial interest in the Gilts to SCT by the Appellant) should be regarded as a composite transaction.

55. Thus, in considering whether the "statutory description" has been "answered" by the transactions with which we are concerned, we should consider the overall effect of the composite transaction, and not that of any individual step in it (see paragraphs (x) and (xi) of the *Berry* guidance).

56. It follows from our finding at [53] above that 99% of the disposal made by the Appellant was to the M Trust via SCT, and not to SCT itself.

57. In relation to the remaining 1%, from the documents referred to at [6] above, we find that the transaction between the Appellant and SCT, far from involving any kind of gift or other gratuitous transfer of assets, was a fiercely-negotiated arm's length transaction. In exchange for the agreed 1% "turn" and other payment, SCT agreed to participate in the Appellant's tax avoidance arrangements, allowing its charitable status to be used as the crucial heart of those arrangements. This may well open up other issues for SCT, but such matters are beyond the scope of this appeal.

58. In conclusion, we find that the overall effect of the composite transaction was that:

> (1) the Appellant transferred 99% of the Gilts to the M Trust, his family trust, via SCT, and
>
> (2) in exchange for SCT agreeing to participate in Mr Ferguson's tax avoidance scheme by receiving and, when so required, passing on the Gilts to one of Mr Ferguson's family trusts, SCT received a fee or "turn" equal to 1% of the value of the Gilts which passed through its hands plus a further cash payment. This transaction was, we find, negotiated at arm's length between NT (on behalf of the Appellant) and SCT.

59. The question then arises as to whether that composite transaction answers the description of the relief set out in section 587B.

Conclusion

60. It will come as no surprise that we consider it does not.

61. First, as we have found, the effect of the composite transaction was that 99% of the Appellant's disposal was made to the M Trust and not to SCT. This means that the composite transaction fails to meet the requirement for a disposal of "the whole of the beneficial interest… to a charity" in ss 587B(1) and therefore no relief is available in respect of any part of the Appellant's disposal (even the remaining 1%).

62. Second, if (contrary to our view) the Appellant is regarded as having made a disposal of the whole of the beneficial interest in the Gilts to SCT, that disposal was made very much by way of bargain at arm's length, on tightly agreed terms as to the option and charge arrangements that would apply to the Gilts in question and as to the turn that SCT would obtain for participating. This would mean that such disposal would not satisfy the "otherwise than by way of a bargain made at arm's length" requirement of ss 587B(1).

63. It follows that we consider no relief is available to the Appellant under section 587B in respect of any part of the value of the Gilts.

64. Standing back and looking at the purpose of s 587B as a whole, we do not find it a surprising result that, in the circumstances, the Appellant should have transferred 1% of the value of the Gilts to SCT without qualifying for any relief under that section. This 1% represents a fee paid to SCT for its participation in the Appellant's attempt to avoid tax and it should be no surprise that relief is not available for such a fee.

65. Having reached a decision on the above alternative bases, it is not necessary for us to decide the other arguments put to us.

66. The appeal is therefore dismissed.

67. 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: 9 May 2014

SCHEDULE

Extracts from s 587B ICTA

"587B Gifts of shares, securities and real property to charities, etc

(1) Subsections (2) and (3) below apply where, otherwise than by way of a bargain made at arm's length, an individual, or a company which is not itself a charity, disposes of the whole of the beneficial interest in a qualifying investment to a charity.

(2) On a claim made in that behalf to an officer of the Board–

(a) the relevant amount shall be allowed–

(i) in the case of a disposal by an individual, as a deduction in calculating his total income for the purposes of income tax for the year of assessment in which the disposal is made;

(ii) in the case of a disposal by a company, as a charge on income for the purposes of corporation tax for the accounting period in which the disposal is made; and

(b) no relief in respect of the disposal shall be given under section 83A or any other provision of the Income Tax Acts;

but paragraph (a)(i) above shall not apply for the purposes of any computation under section 550(2)(a) or (b).

(3) The consideration for which the charity's acquisition of the qualifying investment is treated by virtue of section 257(2) of the 1992 Act as having been made–

(a) shall be reduced by the relevant amount; or

(b) where that consideration is less than that amount, shall be reduced to nil.

(4) Subject to subsections (5) to (7) below, the relevant amount is an amount equal to–

(a) where the disposal is a gift, the market value of the qualifying investment at the time when the disposal is made;

(b) where the disposal is at an undervalue, the difference between that market value and the amount or value of the consideration for the disposal.

(5) Where there are one or more benefits received in consequence of making the disposal which are received by the person making the disposal or a person connected with him, the relevant amount shall be reduced by the value of that benefit or, as the case may be, the aggregate value of those benefits; and section 839 applies for the purposes of this subsection.

(6) Where the disposal is a gift, the relevant amount shall be increased by the amount of the incidental costs of making the disposal to the person making it.

(7) Where the disposal is at an undervalue–

(a) to the extent that the consideration for the disposal is less than that for which the disposal is treated as made by virtue of section 257(2)(a) of the 1992 Act, the relevant amount shall be increased by the amount of the incidental costs of making the disposal to the person making it; and

(b) section 48 of that Act (consideration due after time of disposal) shall apply in relation to the computation of the relevant amount as it applies in relation to the computation of a gain.

….

(9) In this section–

….

"charity" has the same meaning as in section 506 and includes each of the bodies mentioned in section 507(1);

….

"qualifying investment" means any of the following–

(a) shares or securities which are listed in or dealt in on a recognised stock exchange;

….

(10) Subject to subsection (11) below, the market value of any qualifying investment shall be determined for the purposes of this section as for the purposes of the 1992 Act."

Extracts from section 839 ICTA

839 Connected persons

(1) For the purposes of, and subject to, the provisions of the Tax Acts which apply this section, any question whether a person is connected with another shall be determined in accordance with the following provisions of this section (any provision that one person is connected with another being taken to mean that they are connected with one another).

(2) A person is connected with an individual if that person is the individual's wife or husband, or is a relative, or the wife or husband of a relative, of the individual or of the individual's wife or husband.

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

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

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

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

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

Extracts from section 660G ICTA

660G Meaning of "settlement" and related expressions

(1) In this Chapter –

"settlement" includes any disposition, trust, covenant, agreement, arrangement or transfer of assets, and

"settlor", in relation to a settlement, means any person by whom the settlement was made.

(2) A person shall be deemed for the purposes of this Chapter to have made a settlement if he has made or entered into the settlement directly or indirectly, and, in particular, but without prejudice to the generality of the preceding words, if he has provided or undertaken to provide funds directly or indirectly for the purpose of the settlement, or has made with any other person a reciprocal arrangement for that other person to make or enter into the settlement.