[2021] UKFTT 0061 (TC)

TC08046

Corporation Tax – Exchange of shares – Whether the restriction set out in s 137(1) TCGA 1992 applies – No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2019/01157V

BETIEN

EUROMONEY INSTITUTIONAL INVESTOR PLC **Appellant**

-and-

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

TRIBUNAL: JUDGE KIM SUKUL

The hearing took place on 19 to 22 May 2020. With the consent of the parties, the form of the hearing was video attended by both parties, observers and transcribers using the Microsoft Teams platform. A face-to-face hearing was not held because of the COVID-19 pandemic restrictions. Having considered the nature of the case and the position of the parties, I decided a remote hearing was appropriate. The documents to which I was referred were contain in an electronic bundle comprising of 1166 pages.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings and the hearing was transcribed. As such, the hearing was held in public.

Kevin Prosser QC, counsel, for the Appellant

Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Euromoney Institutional Investor PLC ("Euromoney") appeals against an amendment made by Her Majesty's Revenue and Customs ("HMRC") to its corporation tax return for the accounting period ended 30 September 2015 following a closure notice dated 21 September 2018.

2. The amendment increased the amount of corporation tax payable by Euromoney for that accounting period by £10,483,731.87.

3. The amendment concerns a transaction between Euromoney and a company called Diamond Topco Limited ("DTL"), whereby Euromoney exchanged its shareholding in Capital Data Limited ("CDL") for ordinary and preference shares in DTL ("the exchange").

4. The amendment was made on the basis that Euromoney is liable to corporation tax on the disposal of its shares because the exchange took place as part of a scheme or arrangements of which one of the main purposes was the avoidance of a liability to corporation tax on chargeable gains, with the result that s 135 of the Taxation of Chargeable Gains Act 1992 ("TCGA") was disapplied by s 137(1) TCGA.

5. For the reasons as set out from [70] below, I have found that s 137(1) TCGA does not apply in respect of the exchange and the appeal is therefore allowed.

6. In this decision, the legislation and case law is cited so far as relevant to the issues in dispute.

FACTS

7. To a large extent, the parties were in agreement on the relevant facts. Based on the evidence summarised below, I make the following findings of fact, none of which was in dispute. I make further findings of fact at [51-56] below.

8. Euromoney is a UK registered and tax resident company that provides news, data, analysis etc. to financial services, commodities and other business markets. It is listed on the London Stock Exchange and is a member of the FTSE 250 share index. Until 2017 it was a subsidiary of Daily Mail and General Trust PLC ("DMGT") and at the material time DMGT held approximately 63% of Euromoney's shares.

9. CDL and Capital Net Ltd ("CNL") were both UK registered and tax resident companies, which were joint ventures between Euromoney, Dealogic Ltd ("DL"), which was previously called Computasoft Limited, and others. Dealogic Holdings PLC ("DHPLC"), another UK registered and tax resident company, indirectly held 100% of DL.

10. CDL was established in 1996 to carry on a business of electronic publication of bond issuance data. Euromoney licensed CDL to use its data in return for annual royalties ("the Licence") and DL was involved with the IT side.

11. DL held 50% of CDL's issued share capital as "B" shares, which entitled DL to a dividend. Euromoney held 50% of the issued share capital in CDL in "A" shares and also received a royalty of approximately 28% of CDL's turnover under the Licence. The "A" shares did not entitle Euromoney to any dividends unless the Licence was terminated.

12. CNL was established as a joint venture between Euromoney, DL and a number of individual shareholders. Euromoney's CNL shares carried a right to receive dividends in the usual way and qualified for the Substantial Shareholding Exemption ("SSE"), which allows, if certain criteria are met, disposals of substantial shareholdings to be effectively exempt from

corporation tax. Both Euromoney and DL also held 48.4% each of the ordinary share capital in CNL with the remaining 3.2% owned by individual investors.

13. In September 2014, the Carlyle Group ("Carlyle"), an unconnected private equity group of companies, commenced negotiations for the purchase of DHPLC, including its shares in CDL and CNL.

14. Euromoney attached great importance to acquiring the maximum equity stake in DL because the equity stake was projected to increase greatly in value, to as much as $186 million (all values are in US dollars) in 5 years' time, and because Euromoney saw the equity stake as an opportunity to position itself as a possible future acquirer of DL.

15. Carlyle's initial offer to purchase Euromoney's shares in CDL and CNL was for cash of $80 million, which was later increased to $90 million, or $60 million cash plus equity worth $20 million in a new UK registered and tax resident company set up in order to facilitate this acquisition. Euromoney rejected Carlyle's cash offer and made Carlyle a counter-offer to dispose of its holdings in return for a minimum 20% stake in DL, with any balance of consideration to be paid in cash. Euromoney's counter-offer was rejected and following further negotiations, Euromoney agreed in principle to dispose of its holdings for $85 million to be satisfied by a 15.5% equity holding in DL (via DTL) and $26 million in cash.

16. On 17 October 2014, Mr Will Flint, DMGT's Director of Tax, received an email advising him that commercial negotiations had been concluded. Mr Flint replied on the same date: "I've been thinking: would it be feasible for DL to issue us with US$26m of fixed rate pref shares instead of cash? That way all the capital gain on the CD shares is rolled over into the 16% ords and $26m prefs; once a year has passed we can redeem/sell the prefs to Carlyle, and get SSE on the prefs by virtue of us holding the 16% prefs, ie tax free as the rolled over gain is washed away". Subsequently, Euromoney asked Carlyle if preference shares could be issued instead of cash, and Carlyle agreed.

17. In an email dated 4 November 2014, Mr Fordham stated: "The preference shares are the mechanism to avoid paying tax on the capital gain for the cash element of the transaction. In 18 months we convert the preference shares into cash and avoid paying 20% tax on the gain".

18. On 5 November 2014, DTL agreed to acquire Euromoney's CDL shares for $80.44 million, to be satisfied by the issue of 4,902,083 "B" $0.01 ordinary shares and 21,214,992 $1 redeemable preference shares. DTL's articles of association provided that the "B" ordinary shares carried the right to receive a proportionate share (15.5%) of the profits distributable to ordinary shareholders, and 20% of the total voting rights, together with a seat on the board. The articles also provided that the preference shares carried no dividend or voting rights but were redeemable at par at any time on or after 17 January 2016. By the framework deed DTL also agreed to make, and Euromoney agreed to accept, a takeover offer to acquire the shares in CNL, including Euromoney's shares for $4.56 million in cash.

19. Also on 5 November 2014, Mr Flint, acting on behalf of CDL and DTL, applied to HMRC for clearance in respect of the exchange under s 138 TCGA.

20. By letter dated 9 December 2014, HMRC asked Mr Flint, amongst other things, to "advise the purpose of issuing preference shares as well as ordinary shares as opposed to, say, an exchange for ordinary shares alone". Mr Flint replied by letter of the same day, explaining that if Euromoney were to receive only ordinary shares it would hold over 20% which was not acceptable to Carlyle.

21. The exchange was completed on 18 December 2014.

22. On 19 December 2014, HMRC gave notice that they were not satisfied that the exchange did not form part of a scheme or arrangements as mentioned in s 137(1) TCGA.

23. On 17 January 2016, Euromoney's preference shares in CDL were redeemed for $21,214,992 in cash. The redemption was treated as exempt from corporation tax as the disposal qualified for SSE (by virtue of Euromoney's ordinary shareholding in CDL).

24. On 8 September 2016, Euromoney filed its company tax return for the accounting period ended 30 September 2015 with supporting tax computations. The tax computations were prepared on the basis that there was no chargeable gain on the disposal of the CDL shares because this was a share-for-share exchange in accordance with s. 135 TCGA.

25. HMRC opened an enquiry into the return on 2 November 2016.

26. On 21 September 2018, HMRC issued a closure notice and an amendment giving rise to liability to corporation tax of £10,483,731.87.

27. Euromoney lodged an appeal against the amendment with HMRC on 6 October 2018 and on 17 January 2019, HMRC's review officer upheld the amendment.

28. On 15 February 2019, Euromoney appealed to this Tribunal.

THE EVIDENCE

29. The bundle of documents prepared by the parties for the hearing comprised of:

(1) Appeal documents

(2) Witness statement of William Flint dated 5 September 2019

(3) Witness statement of Christopher Fordham dated 6 September 2019

(4) Exhibits to witness statement of William Flint

(5) Exhibits to witness statement of Christopher Fordham

(6) Documents from lists of documents not exhibited to witness statements

(7) Transaction documents

(8) Internal Euromoney documentation and approvals

(9) Internal/transaction email correspondence

30. I heard witness evidence from Mr Fordham and from Mr Flint. I found them both to be credible witnesses and I accept their evidence.

Evidence of Mr Fordham

31. Mr Fordham was Euromoney's Group Managing Director at the relevant time. His evidence, which I accept, covered the background and details of the transactions, highlighting that Euromoney wanted a big equity stake and were trying to maximise their equity stake because that was the way to create value out of this transaction. They were trying to position themselves to try and acquire DL as a business. They wanted as large an equity stake as they could because a report showed there was a valuation of about $186 million in four or five years. That was the prize that they had their eyes on, not whether they would get $80 million or $90 million of cash straightaway.

32. As Group Managing Director at the time, Mr Fordham had other duties and matters to attend to in addition to the Capital Data transaction. While this project was important for Euromoney, he could not give it his undivided attention as he had to focus on running the rest of Euromoney's business too. Mr Fordham estimates that he spent about 10% of his time on this transaction from start to finish, which was from August 2014 to December 2014. Others on the Euromoney team were involved in the day-to-day negotiations and communications with Carlyle and the lawyers more intensely; they fed back to Mr Fordham on a regular basis and sought his input on key commercial points.

33. Mr Fordham said that the preference shares had no significance, other than the fact that they would enable Euromoney to realise a "tax saving". It was the tax structuring as part of the overall deal. He was broadly aware of the amount of the potential tax saving at the time but was not aware of all the details of how it was going to work; they were relying on Mr Flint for that.

34. Mr Fordham considered that everything that he was doing was "trying to get the deal done" and he was "obsessing on the big points". He viewed the type of shares received as "immaterial in the context of getting the transaction through" and the potential tax saving as not important in the context and "wholly subsidiary to the commercial imperatives".

35. Mr Fordham was unaware of any tax disadvantages from taking preference shares. When asked if he knew how the legislation works, in the sense that it is all or nothing, he said "that was new, and at the time I did not know anything about that. Perhaps I ought to have done, but I didn't". If he had been aware of that at the time, he said "I think the choice I would have made would have been to not try to complicate things. I was always after the simplification. The simplification and speed were the two things I was after. So, I think I would have dropped the £2.8 million tax saving because I guess the possibility, if we'd known about it, of losing the £10 million would have been a bigger decision. So, I think I would have recommended that we dropped it straightaway".

36. Mr Fordham was not aware of any downside to Carlyle in agreeing to provide part of the consideration in the form of these preference shares.

Evidence of Mr Flint

37. Mr Flint is the Director of Tax at Euromoney's parent company (DMGT). His evidence, which I accept, is that DMGT was at all material times a controlling shareholder of Euromoney and at the time of the Capital Data transaction, it held approximately 63% of the share capital of Euromoney. DMGT subsequently sold its entire stake in Euromoney in April 2019.

38. Whilst Euromoney was a subsidiary of DMGT, it was separately listed, and so acted more or less independently from DMGT. However, there was an extent to which Euromoney, being a subsidiary and a smaller company, relied on logistical support from DMGT. For instance, Euromoney did not, until May 2018, have a global head of tax, and so, as head of tax of its parent company, Mr Flint was involved in advising on Euromoney's tax affairs at the time of the Capital Data transaction.

39. He was consulted only at a very late stage and suggested the replacement of the cash element of the consideration with preference shares. He did not give the matter a great deal of thought at that time but believed it would be possible to claim the SSE in respect of the preference shares when they were disposed of. The fact that the consideration had already been structured as part shares, and the benefit of this against the backdrop of the SSE, caused him to consider whether there was anything that could be done with the remaining cash element to obtain the same tax efficiency that would apply to the ordinary share element. It is this that prompted Mr Flint to suggest the use of preference shares, if this could easily be negotiated with Carlyle.

40. His initial view was that the receipt of both ordinary and preference shares would not crystallise a liability to corporation tax on Euromoney's chargeable gain on its holding in Capital Data shares because reconstruction relief should have been available under ss 127-131 and 135 TCGA. This seemed to be a straightforward way of putting the transaction on the same footing as would have been the case if SSE were available.

41. Mr Flint was not, and Euromoney was not to his knowledge, aware of any downside risks to the use of preference shares in this way. In particular, he did not think that the use of

preference shares instead of the cash element of the consideration would jeopardise the availability of reconstruction relief in respect of the ordinary shares that Euromoney were being issued. The two elements were, as he saw it, separate, and did not fall to be "lumped together". If he had considered that there might be a potential downside risk in using preference shares, such as a risk that the whole consideration would fall to be taxable, he would have ensured that all the angles were fully explored. That he did not do so, he says, demonstrates two things: first, that he did not consider there to be a downside risk, and second, that tax was not important in the context of the transaction.

42. The team were very keen to simply ensure that the deal went through smoothly without any delay, so if tax considerations were to be taken into account at all, this would only happen on the condition that there were no downsides to getting the deal done.

43. Mr Flint did not know the Carlyle team, so was not sure whether his suggestion of using preference shares would be readily acceptable to them. If Carlyle, or indeed the transaction team at Euromoney, had said no to his suggestion, he would have dropped it. Similarly, if Carlyle had asked for something in return for the use of preference shares, he would not have proposed it. He was well aware of the commercial deal and would not have pressed the point. As it was, however, it seemed to be readily accepted by Carlyle with a minimum of discussion.

44. Mr Flint sought independent tax advice on the transaction on 22 October 2014 and he informed the advisors by email on 23 October 2014 that Euromoney were going to proceed with the transaction whatever the tax treatment; his precise words were, "Euromoney are going to do this transaction anyway, so tax is not a driver of whether the transaction takes place".

45. Whilst Mr Flint had identified that it could be beneficial to replace the cash element of the consideration with preference shares, he only suggested it to see whether it was possible within the confines of the terms that had been commercially agreed. It was no more than "nice to have". It was not, in any sense, an essential (or even an important) element of the deal. He certainly would not have pushed for the inclusion of the preference shares had this risked delaying or upsetting the transaction as a whole.

46. To put this into context, the deal was signed before clearance was obtained from HMRC. This was on the basis that (i) the potential tax saving was not in any sense an important part of the transaction and (ii) even if a clearance were eventually refused, given that tax was not a deal breaker they could address it at a later date. Euromoney did not re-work the structure as a result of the denial of the clearance, it was far more important to Euromoney to get the deal over the line. By comparison to the deal itself, the tax was unimportant to the parties.

47. Mr Flint had a brief conference call (scheduled for 30 minutes) with Carlyle and their advisor on 22 October 2014. It was pretty high-level; He was not pushed for detail on the use of preference shares.

48. Mr Flint personally spent less time than he normally would have, from a tax perspective, on this transaction. Looking back at the email correspondence, he can see that he spent no more than a day or two in total on the tax elements of this transaction and this can be contrasted with the substantial amount of time he would normally spend on a transaction where the tax treatment was a feature which would in whole or in part determine whether the deal proceeded.

49. Mr Flint considered his time spent, from a tax perspective, was de minimis by comparison with the very substantial number of hours, and figurative blood, sweat and tears, which he understands was put in by the deal team for this transaction.

FINDINGS OF FACT

50. On the basis of the documentary and witness evidence before me, I make the following additional findings of fact.

51. The potential tax saving from their preference share request was not important to Euromoney, who regarded it as no more than a bonus.

52. Tax was not a main driver of the transaction, which would have gone ahead whether or not tax could be saved.

53. It was Euromoney's intention, if Carlyle had refused the preference share request, to proceed with the cash deal.

54. Euromoney devoted limited resources to the tax aspects of the transaction. Mr Flint spent no more than 1-2 days in total on the tax elements of the transaction.

55. The clearance application made to HMRC did not hold up the transaction timetable. The exchange had already been agreed when the clearance was applied for.

56. Euromoney believed that there was no tax downside to the exchange, and it was therefore completed without waiting for HMRC's formal response, even though Euromoney knew that there was a risk that the tax saving would not be obtained.

ISSUES

57. Where s 135 TCGA applies, an exchange of shares is treated as resulting in neither a gain nor a loss. However, s 135 will not apply, by virtue of s 137(1) TCGA, unless the exchange is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.

58. There is no dispute between the parties that the same treatment must apply to all the shares as s 137(1) is an all-or-nothing provision. Accordingly, if the s 137(1) restriction applies then none of the shares will qualify for treatment under s 135.

59. There is also no dispute that the exchange of shares was effected for bona fide commercial reasons.

60. The only point at issue is whether s 137(1) TCGA applies because the exchange formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax.

LEGISLATION

61. There is no dispute between the parties as to the legislation relevant to this appeal.

62. Section 127 TCGA provides:

> Subject to sections 128 to 130, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired.

63. Section 128(3) TCGA provides:

> Where on a reorganisation a person receives (or is deemed to receive), or becomes entitled to receive, any consideration, other than the new holding, for the disposal of an interest in the original shares… he shall be treated as if the new holding resulted from his having for that consideration disposed of an interest in the original shares (but without prejudice to the original shares

> and the new holding being treated in accordance with section 127 as the same asset).

64. Section 135 TCGA provides:

> (1) This section applies in the following circumstances where a company ("company B") issues shares or debentures to a person in exchange for shares in or debentures of another company ("company A").
>
> (2) The circumstances are:
>
> … Where company B holds, or in consequence of the exchange will hold, more than 25% of the ordinary share capital of company A…
>
> (3) Where this section applies, sections 127 to 131 (share reorganisations etc) apply with the necessary adaptations as if company A and company B were the same company and the exchange were a reorganisation of its share capital….
>
> (6) This section has effect subject to section 137(1) (exchange must be for bona fide commercial reasons and not part of tax avoidance scheme).

65. Section 137(1) TCGA provides:

> … neither section 135 nor section 136 shall apply to any issue by a company of shares in or debentures of that company in exchange for or in respect of shares in or debentures of another company unless the exchange or scheme of reconstruction in question is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax.

THE BURDEN OF PROOF

66. The burden of proof rests with Euromoney to show that s 137(1) TCGA does not apply and therefore the amendment made by HMRC was wrong.

67. The standard of proof is the civil standard, namely on the balance of probabilities.

HMRC'S ARGUMENTS

68. HMRC contended that the exchange formed part of a scheme or arrangements of which the main purpose, or one of the main purposes, was avoidance of liability to corporation tax, with the result that s 135 TCGA was disapplied by s 137(1) TCGA.

THE APPELLANT'S ARGUMENTS

69. Euromoney contended that the exchange of shares satisfied the requirements of the relevant legislation at ss 127-131 and s 135 TCGA, resulting in neither a gain nor a loss and that the restriction set out in s 137(1) TCGA does not apply to the exchange.

DISCUSSION

70. The issued to be determined is whether the restriction set out in s 137(1) TCGA applies because the main purpose or one of the main purposes of the arrangements entered into by Euromoney was the avoidance of a liability to tax.

The Statutory Test

71. In considering the application of s 137(1) TCGA in this appeal, I adopt the approach taken by the High Court in *Snell v HMRC* [2007] STC 1279 ("*Snell*") at [13]:

> "The statutory test… involves the following issues of fact: (1) was the exchange part of a scheme or arrangements and if so what were they? (2) did the purposes of such scheme or arrangements include the purpose of avoiding a liability to capital gains tax and if so was it a main purpose?"

Was the exchange part of a scheme or arrangements and if so what were they?

72. The parties agreed that the exchange formed part of the arrangements, but they did not agree on what constituted the arrangements in this appeal.

73. HMRC submitted that the arrangements are those in relation to the preference shares only, namely the arrangements under which the cash consideration payable for the CDL shares was replaced with the preference shares in DTL with the intention of holding the preference shares until such time as they could be disposed of subject to SSE so that no tax charge would arise on that disposal.

74. Euromoney submitted that HMRC's description of the arrangements was far too narrow as it failed to have regard to the arrangements as a whole, namely: (1) Euromoney's arm's length disposal of its shareholdings in CDL and CNL; (2) Euromoney's receipt of (i) the equity holding in DTL, (ii) the preference shares in DTL, and (iii) $4.56 million cash; (3) Euromoney's plan to retain its equity holding in DTL with a view to obtaining the benefit of the projected increase in value and (4) Euromoney's plan to hold the preference shares for over 12 months, until they qualified for SSE, and then dispose of them for a further $21.2 million cash.

75. HMRC is not obliged to identify the scheme or arrangements for the purposes of s 137(1), rather it is for the taxpayer to prove there is no scheme or arrangements (see *Coll & anor v HMRC* [2010] UKUT 114 ("*Coll*") at [8]).

76. In determining the question of what amounts to the arrangements, I take the statutory words to have their ordinary meanings: "scheme" means "a plan of action devised in order to attain some end", and "arrangements" means "a combination of things for a purpose" (see *Snell* at [28]).

77. Both descriptions of the arrangements offered by the parties amount to "a combination of things for a purpose". That does not settle the question of whether the arrangements should be taken as a whole or the arrangements should be considered in relation to the preference shares only.

78. It is common ground between the parties that the exchange forming part of arrangements means the entire exchange, namely the transfer of shares on the one hand and the issue of all the shares in exchange on the other. The Upper Tribunal considered the separate treatment of shares must not apply in the context of reorganisation of a company's share capital in *Coll* at [10]:

> "… if there is a reorganisation of a company's share capital within s 126 then by s 127 the original shares and the new holding are treated as a single asset. Either there is a reorganisation of the share capital of a company or there is not; if there is, the same treatment must apply to all the shares. Section 135(3) applies the same approach to a share exchange by treating both companies involved as a single company and the exchange as a reorganisation of the share capital of that deemed single company. Again, this treatment must apply to all the shares if it applies to any of them…"

79. Euromoney contended, in support of their argument that the arrangements must be considered as a whole, that s 137(1) TCGA requires that the exchange must not form part of arrangements, and that logically, as a matter of language, it inevitably follows that the arrangements in question must include the entire exchange. The reference to the exchange forming part of arrangements must mean that it is the entire exchange which is within the arrangements, not just part of the exchange. In this respect, Euromoney submitted that whilst you cannot simply equate the arrangements with the exchange it is wrong to say that the arrangements are something less than the entire exchange. This means that HMRC's

description of the arrangements in question in this case, as consisting only of the preference shares instead of cash coupled with the plan to hold the shares for 12 months, must be rejected as far too narrow, taking no account of the other elements of the exchange, such as Euromoney's plans for the ordinary shares, to hold those shares with a view to obtaining both the financial and strategic benefits in the future.

80. I agree with Euromoney's submission that the correct interpretation of s 137(1) requires consideration of the entire exchange as the words of the statute state "unless the exchange… does not form part of a scheme or arrangements" and I agree with the parties that the exchange means the entire exchange.

81. I also agree with Euromoney's submission that the House of Lords decision in in *IRC v Brebner* [1967] 2 AC 18 ("*Brebner*") supports the view that the scheme or arrangements must be considered as a whole, rather than considering one element in isolation from the other elements.

82. In *Brebner* the House of Lords took a wider view of the arrangements when considering tax advantages and bona fides commercial transactions for the purposes of s 28(1) of the Finance Act 1960. In their judgment, it was necessary to have regard to the scheme or arrangements as a whole, rather than considering one element in isolation from the other elements. Lord Pearce's remarks were, at [p.27B-C]:

> "It would be quite lacking in reality to draw a line between the first part of the arrangement, namely, the purchase of the shares on a short-term overdraft, and the second part of the arrangement whereby the overdraft was repaid, as initially arranged, largely out of the surplus assets of the company. The first part of the arrangement had committed them to the second part whereby the whole original scheme was to be implemented. Unless they abandoned the whole scheme (by selling the shares to somebody who would probably wind up the company) they had to go on with it."

Lord Upjohn commented, at [pp.29G-30A]:

> "…the argument proceeds, while the first chapter was carried out for purely bona fide commercial reasons without having as a main object the gain of a tax advantage, it must be regarded as purely introductory to the all-important second chapter two years later when the scheme was devised to extract the cash by a reduction rather than the declaration of a dividend, so that it became plain that one of the main objects of the transaction was to enable a tax advantage to be obtained. Accordingly, the transaction fell within section 28(1)(b). Counsel for the respondent has, in my view, wisely conceded that the Special Commissioners could have found that there were two separate chapters, one of which was purely commercial, the other of which had as its main object the obtaining of a tax advantage. But this, he has urged, is a matter which must be entirely one for the commissioners."

83. HMRC accepted the proposition as set out in *Brebner,* that you must have regard to the scheme or arrangements as a whole rather than considering one element in isolation from the other elements, but contended that the circumstances of this appeal are different from *Brebner* and the decision should therefore not be followed. The distinguishing features that HMRC referred to are:

> (1) *Brebner* concerns s 28(1) of the Finance Act 1960 transaction and securities provision, which is concerned with an object of obtaining a tax advantage and has slightly different wording from the s 137(1) provision in this case. The legislation is narrower because it does not refer to a scheme or arrangements but instead about whether or not a person has an object of obtaining a tax advantage.

(2) The transaction in *Brebner* was described, in particular by Lord Upjohn, as having two chapters: that is, the acquisition of the shares using an overdraft; and then the repayment of that overdraft out of the company's assets with the cash which was thus extracted, not being liable to tax. The tax advantage was said to arise only in relation to the second step. There is no tax advantage attached to the first step. The first part of the arrangement had committed them to the second part, by which the whole original scheme had to be implemented, and unless they abandoned the whole scheme, they had to go on with the second part. HMRC submitted there is a distinction here; although it might just be a very fine distinction. But the preference shares in this appeal are a feature of the arrangements from the outset, and in a sense, taint the whole transaction, because they enable Euromoney to claim SSE in respect of that element of the consideration, where it could not otherwise have done so.

(3) There is discussion in *Brebner*, as well as in other cases, about the difference between objects and effects; in this particular case, it was an object or purpose of the arrangements to claim SSE where it would not otherwise have been available; it is not just an effect or consequence of them.

(4) Unlike *Brebner*, the arrangement involving the preference shares could have been separated from the rest of the transaction without affecting it, because Euromoney say the preference share tax plan was a "bonus" and the consideration could have been provided in the form of cash. This differs from *Brebner*, where the two halves almost made a complete whole, whereas this is something separate, which has been tacked on, but forms part of these arrangements right from the outset.

84. I accept HMRC's submission that there are differences between *Brebner* and this appeal but, in my view, there is a clear parallel between the cases, in that it would be equally "lacking in reality to draw a line between" the preference shares and the rest of the exchange in this appeal as it was to draw a line between the first and second "chapters" in *Brebner*.

85. I do not accept HMRC's submission that the distinguishable features in *Brebner* are sufficiently significant to make it inappropriate to rely on the proposition set out by the House of Lords in the circumstances of this appeal.

86. HMRC argued that the correct approach was adopted by the High Court in *Snell*, which concerned the receipt of three classes of loan stock in exchange for shares as part of an agreement to sell a company before leaving the United Kingdom. Similarly, in *Coll*, which also concerned non-resident redemption of loan notes following a sale of a company, the Upper Tribunal commented, at [8], "it is obvious that the scheme was the issue of loan notes with the purpose of Mr Coll becoming non-resident and redeeming them while non-resident".

87. In *Snell*, the basic facts were:

> "[1] The appellant, Mr Vincent Snell, was the beneficial owner of 91% of the issued capital in Sovereign Rubber plc ('the Company'). On 21 December 1996 he entered into an agreement ('the Sale Agreement') with Inhoco 564 Ltd for the sale of his shares for a total consideration of £7,317,000 payable as to £6,580,000 in loan stock of three separate classes, £537,000 in deferred consideration and £200,000 in payment of his costs. Mr Snell left the United Kingdom on 2 April 1997. Initially he went to live in the Isle of Man. At the end of that year he moved to the Cayman Islands where he has lived ever since. On 8 July 1997 Mr Snell redeemed £5,630,000 of the ordinary loan stock."

88. The arrangements were identified, at [13], as “the issue of each of the loan stocks with the purpose of becoming non-resident and redeeming them while non-resident”. The question of purpose was considered to be relevant in determining what were the arrangements. Both parties agree that Euromoney’s purpose to hold the preference shares until they qualified for SSE is a relevant part of the arrangements.

89. Euromoney submitted that the words “form part of” mean that the arrangements in question must also include something else, other than the exchange, and in *Snell* and *Coll*, the “something else” was the plans to go non-resident and redeem the loan notes at that time. With regard to this point, I do not see any significant difference for these purposes between the plans to go non-resident in *Snell* and *Coll* and the plan to hold the shares for 12 months in this appeal.

90. I do however accept Euromoney’s submission that the approach taken in *Snell,* which demonstrates a narrower view of the arrangements, is not appropriate in the circumstances of this appeal. The total consideration for the sale of the shares in *Snell* was £7,317,000, of which the £6,580,000 payable in loan stock was identified as being the arrangements. The loan stock in *Snell* represented the fundamental part of the arrangements as a whole. The circumstances of this appeal are very different, where the total consideration was $85 million, of which the preference shares in CDL were redeemed for $21,214,992. To identify the arrangements in this appeal as those concerning only the preference shares would give a wholly distorted view of the circumstances and would again be lacking in reality.

91. I do not, therefore, accept HMRC’s submission that this appeal is on all fours with *Snell*, nor do I accept that the approach taken in *Snell* supports the separation of the preference shares to be considered in isolation from the arrangements as a whole.

92. It is my finding, taking into consideration the specific circumstances of this appeal, that, in order to reflect the reality of the position, and in accordance with the wording of the statute, the arrangements must be taken as a whole and not limited to the arrangements that concern only the preference shares.

Did the purposes of such scheme or arrangements include the purpose of avoiding a liability to capital gains tax and if so was it a main purpose?

93. Having found that the appropriate arrangements to be considered are, as Euromoney submitted, with regard to the arrangements as a whole, I find avoiding liability to tax to be a purpose of those arrangements, but not a main purpose.

94. If I am wrong in my view expressed at [92] above, and the appropriate arrangements to be considered are, as HMRC submitted, the arrangements involving the preference shares only, then it is accepted by both parties that those arrangements were for tax purposes and I find that avoiding liability to tax was a main purpose of those arrangements.

‘The purpose’

95. I have considered that the purpose or purposes of arrangements is not necessarily to be equated to the known and inevitable consequences of carrying them out (see *Versteegh v HMRC* [2013] UKFTT 642 at [150-153]) and that the purpose or purposes of arrangements is not necessarily to be equated to the chosen means of carrying them out (see *Brebner* per Lord Upjohn at [p30E-G]).

96. I do not accept Euromoney’s submission that the purposes of the arrangements were exclusively commercial, namely, to obtain the maximum equity stake in DTL, plus the maximum additional consideration and that Euromoney was merely seeking to give effect to its commercial purposes in a tax-efficient way. I find, as part of the arrangements as a whole, Euromoney’s advisers proposed that the transaction be restructured so that an element of

consideration payable in cash was replaced with the issue of preference shares for tax purposes. The transaction subsequently proceeded according to that advice.

97. My finding, based on the evidence, is that there was no other commercial purpose for receiving consideration in that form other than the tax advantage of being able to utilise SSE and, therefore, in addition to the commercial purpose, the avoiding of a liability to capital gains tax was also one of the purposes of the arrangements as a whole.

'Main purpose'

98. I do, however, agree with Euromoney's submission that, considering the arrangements as a whole, obtaining a tax advantage was not one of the main purposes of those arrangements.

99. I accept that even if a transaction has a genuine commercial purpose, it does not follow that there is not also a main tax avoidance purpose (see *HMRC v Lloyds TSB Equipment Leasing (No 1) Limited* [2014] EWCA Civ 1062, at [65]) and I have considered the remarks made in *Conegate Ltd v HMRC* [2018] UKFTT 82 (TC) at [95]:

> "We agree with the Appellant that the overarching reason for the transactions taking place was for the Appellant to provide funds to the football club. However, we agree with the Respondents that Section 16A refers to "one of the main purposes" and not "the main purpose", and so we should look at the underlying factors which caused the transactions to take place in the way that they did, as well as the overall reason for the arrangements. It is clear from our findings of fact that there was more than one way to provide funding to the football club and that one of the reasons that Mr Sullivan chose to provide funds to the football club in the specific way that transpired was so that the Appellant could claim a capital loss. Therefore we consider securing a tax advantage to have been "one of the main purposes" of the arrangements."

100. However, I also accept that a more than trivial purpose is not necessarily a 'main' purpose. A main purpose will always be a more than trivial one, but the converse is not the case. A purpose can be more than trivial without being a main purpose. 'Main' has a connotation of importance (see *Travel Document Service & anor v HMRC* [2018] EWCA Civ 549 ("*TDS*") at [48]).

101. Whether a tax purpose is one of the 'main' purposes of the arrangements is a matter of subjective intention, involving a careful analysis of all the reasons the taxpayer had for carrying them out (see *Versteegh & Ors v HMRC* [2014] SFTD 547 at [155] and *Brebner*, per Lord Upjohn at [p32]).

102. The witness evidence in this appeal, which I accept, is that Euromoney's main subjective purposes were commercial and the tax considerations were not important in this context.

103. HMRC argued that the company's subjective intention should be taken into account but all the other evidence in the case must be taken into account as well. In *TDS* the Court of Appeal upheld a finding of an unallowable main purpose against the unchallenged witness evidence of the company's subjective intention. In that case, at [46], the judgment states, "the hoped-for gain was large both in absolute terms (more than £70m) and relative to the apparent value of TDS (some £280m). That being so… the inescapable inference was that securing the advantage had become a main purpose of holding the shares. The prospective advantage was of such significance in the context that gaining it must have become a main purpose of holding the shares".

104. In this appeal the tax advantage was £2.8 million. Although this amount is significant in absolute terms, and it was significant enough that Euromoney sought to renegotiate the basis of the transaction after most of the conditions had been agreed, in relative terms, it represents less than 5% of the total sale consideration. The prospective tax advantage in this appeal was not "of such significance in the context that gaining it must have become a main purpose".

105. In addition to the witness evidence of the company's intentions and the relative insignificance of the amount of the tax saving, I have also considered Mr Flint's testimony that had he considered that there might be a potential downside risk in using preference shares, such as a risk that the whole consideration would fall to be taxable, he would have ensured that all the angles were fully explored. I accept that the company did not explore the tax implications and were not aware of the considerable downside risk of the preference shares arrangements. The natural inference I draw from this evidence is that Euromoney did not consider the tax advantage to be significant in the context of the arrangements as a whole.

106. I accept HMRC submission that both parties invested time, effort and expense, including through their legal and professional advisers, to substitute the preference shares in DTL for the cash consideration previously offered for no other reason than to avoid the tax liability that would have otherwise arisen. However, the evidence regarding the overall investment of time, effort and expense by Euromoney with regard to the preference shares arrangements is that this was not significant in the context of the arrangements as a whole.

107. My finding, based on the witness evidence and all the other evidence in this appeal, is that Euromoney's subjective intention was focused on the commercial purpose, which was a main purpose, and the company considered the tax advantage to be no more than a bonus and not important in the context of the transaction as a whole. I find that avoiding a liability to capital gains tax was a purpose of the arrangements as a whole but not one of the main purposes.

'Avoiding a liability'

108. With regard to whether the purposes of the tax arrangements included the purpose of avoiding a liability, Euromoney submitted that obtaining the tax advantage was not for the purpose of avoiding liability to tax because to dispose of shares in return for a substantial shareholding in a qualifying company, rather than cash, with the intention of holding the shares until they qualified for SSE, is not "avoidance". This is because the word "avoidance" means a course of conduct designed to conflict with or defeat the evident intention of Parliament, as distinct from the acceptance of an offer of freedom from tax which Parliament has deliberately made: *IRC v Willoughby* [1997] STC 995 ("*Willoughby*") per Lord Nolan at [1004]. Euromoney argued that by acquiring the preference shares, which represented an investment at risk, Euromoney was accepting an offer of freedom from tax which Parliament deliberately made.

109. Euromoney also submitted that the judgment in *Snell* did not cast any doubt on the application of this meaning of "avoidance" to s 137(1) and that it is clear from *Snell* that to dispose of shares in exchange for loan notes rather than cash is legitimate to defer tax liability, but not as part of a scheme or arrangements to avoid it altogether by going non-resident.

110. HMRC's submissions on this issue were that by receiving preference shares as opposed to cash, Euromoney deferred receipt of $21 million for 15 months until those shares were disposed of, with no recompense for the time value of that money and while bearing the associated credit risk. This was purely driven by tax reasons. Euromoney's decision-makers understood that the preference shares were the mechanism by which tax could be "avoided" not just "saved" and the overall transaction could have been undertaken and achieved the

same economic outcome (absent the avoided tax) if the arrangements had not been entered into. This is illustrated by the fact that the consideration for the sale of CNL's shares was also to be in the form of preference shares until Mr Flint became aware of this and asked for the consideration for those shares to be in the form of cash instead. HMRC submitted that, absent the tax avoidance purpose, cash was Euromoney's preferred form of consideration from a commercial point of view.

111. With regard to Euromoney's reference to SSE as being an acceptance of an offer of freedom from tax which Parliament has deliberately made (and therefore not tax avoidance according to *Willoughby*), HMRC disagreed and argued that becoming non-resident and no longer subject to UK capital gains tax could also be described in the same way and that this example illustrates that the present appeal is on all fours with *Snell*.

112. Having considered these submissions, I accept that the law may allow for shares to be sold in exchange for loan notes and for gains to be realised during a period of non-residence. However, the relevant factor that determined whether this amounted to a "scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax" in *Snell* was the subjective intention of Mr Snell at the time of the sale.

113. Similarly, I accept that the law may allow for the sale of shares in exchange for a substantial shareholding in a company to qualify for SSE. The relevant factor that determines whether this amounts to a "scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax" in this appeal is the subjective intention of Euromoney at the time of the sale.

114. It is my finding, based on the evidence, and in particular, Mr Flint's evidence that he suggested cash consideration when preference shares would not have qualified for SSE, that Euromoney's intention in respect of the preference shares arrangements at the time of sale was not simply for the commercial purpose of an investment at risk in a qualifying company but for the purpose of avoiding a liability to tax.

115. I do not accept that acquiring the preference shares in these circumstances amounted to an investment at risk that allowed Euromoney to accept an offer of freedom from tax which Parliament deliberately made.

116. I therefore consider the arrangements in this appeal to have included the purpose of avoiding a liability to capital gains tax.

DECISION

117. I find that the exchange in this appeal was part of a scheme or arrangements where one of the purposes of effecting those arrangements was avoidance of capital gains tax but that purpose was not a main purpose or one of the main purposes of the arrangements.

118. I therefore find that the exchange satisfied the requirements of ss 127-131 and s 135 TCGA, resulting in neither a gain nor a loss, and that the restriction set out in s 137(1) TCGA does not apply to the exchange.

119. Accordingly, and for the reasons I have set out above, I allow this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

120. 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.

KIM SUKUL
TRIBUNAL JUDGE

RELEASE DATE: 04 MARCH 2021