[2015] UKUT 334 (TCC)
Appeal number: FTC/87/2014

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE
FIRST-TIER TRIBUNAL (TAX CHAMBER)

WINTERSHALL (E&P) LIMITED

Appellant

v.

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: LORD GLENNIE

Sitting in public at George House, 126 George Street, Edinburgh on 16 March 2015

Mr Jonathan Peacock QC, counsel, instructed by Ernst & Young LLP, for the Appellant (Wintershall)
Ms Elizabeth Wilson, counsel, instructed by the Office of the Advocate General for Scotland, for the Respondents (HMRC)

DECISION

LORD GLENNIE

Introduction

[1] The Appellant ("Wintershall") is a company whose principal activity in the period ending 31 December 2008 ("the relevant period") included the development and production of oil and gas from the Broom Field in the UK North Sea. In the relevant period, by virtue of a disposal of its interest in the Broom Field, it realised a chargeable gain of £6,254,935 ("the Gain") in terms of s.179 of the Taxation of Chargeable Gains Act 1992 ("TCGA 1992"). There is no dispute that the amount of the Gain was part of Wintershall's "ring fence profits" subject to corporation tax; the issue in this appeal is whether it was also part of Wintershall's "adjusted ring fence profits" subject to a Supplementary Charge under s.501A(1) of the Income and Corporation Taxes Act 1988 ("ICTA 1988").

The agreed facts

[2] Parties helpfully agreed a number of facts which were attached as an Appendix to the Appellant's Skeleton Argument. These are set out in the following paragraphs with some editorial revisions.

[3] Wintershall was at all material times a company whose principal activity included the development and production of oil and gas from the Broom Field. It was a UK resident company liable to corporation tax on its profits and chargeable gains under ss.6-12 ICTA 1988 and s.8 TCGA 1992. By virtue of its oil exploration and production activities it was liable to "ring fence" corporation tax on its "ring fence profits" ("RFP") (see s.502(1A) ICTA 1988) and, in certain circumstances, to the Supplementary Charge provided for in s.501A ICTA 1988 on its "adjusted ring fence profits" ("ARFP").

[4] On 28 February 2006, Palace Exploration Company ("Palace Exploration"), a US corporation with a UK branch, disposed of its interest in the Broom Field to its then wholly-owned, but indirect, subsidiary, Wintershall (which was then known as Palace Exploration Co (E&P) Limited) ("the Disposal"). This was a "material disposal" under s.197(1)-(2) of the TCGA 1992. But, since Palace Exploration and Wintershall were then part of the same capital gains tax group ("the Palace Group"), the Disposal was an intra-group disposal within s.171 TCGA 1992; and no charge to corporation tax on the "aggregate gain" generated by the Disposal arose at that time.

[5] On 27 February 2008, Palace Exploration Company (UK) Ltd, Wintershall's immediate parent (and the company through which Wintershall was controlled by Palace Exploration), was sold to Revus Energy ASA. Wintershall thereby left the Palace Group; in due course, on 28 March 2008, it became known as Revus Energy (E&P) Limited (it assumed its present name on 20 May 2009). This departure from the Palace Group triggered a "de-grouping" charge under s.179 TCGA 1992, thereby bringing the aggregate gain generated by the Disposal (which amounted to some £6,254,935) into charge to corporation tax. That charge to corporation tax on the aggregate gain was, upon de-grouping, to be borne by Wintershall.

[6] On 9 June 2010 Wintershall submitted an (amended) return to HMRC which included the aggregate gain in its RFP calculations and accounted for ring fence corporation tax on that RFP, including the aggregate gain, at a rate of 30 per cent; but excluded the aggregate gain from the figure put forward as ARFP for the purpose of calculating its liability to the Supplementary Charge.

[7] An enquiry was opened by HMRC and Wintershall submitted a further amended return revising the figures but, again, omitting the aggregate gain from the ARFP subject to the Supplementary Charge. On 11 February 2011, HMRC gave formal notice of their intention to launch an enquiry into Wintershall's return under paragraph 24, Schedule 18 FA 1998. On 3 June 2011, HMRC wrote to Wintershall setting out their view that the aggregate gain was subject to the Supplementary Charge. On 3 September 2012, HMRC issued a closure notice and amended Wintershall's return on the basis that the aggregate gain should have been included in the ARFP for the purpose of calculating the Supplementary Charge.

[8] Wintershall appealed to the First-tier Tribunal ("FTT") on 18 January 2013. On 21 March 2014 the FTT refused the appeal.

The relevant statutory provisions

[9] The relevant statutory provisions concerning ring fencing and the taxation of ring fence profits are to be found in ss.492-502 in ICTA 1988, Part XII Chapter V, which deals with Petroleum Extraction Activities. I set them out in the version in force at the material time.

[10] Ring-fencing, which (so I was told) was first introduced in 1975, is dealt with in section 492, as follows:

> "**492 Treatment of oil extraction activities etc. for tax purposes.**
>
> (1) Where a person carries on as part of a trade —
>
> (a) any oil extraction activities; or
>
> (b) any of the following activities, namely, the acquisition, enjoyment or exploitation of oil rights; or
>
> (c) activities of both those descriptions, .
>
> those activities shall be treated, for the purposes of the charge of corporation tax on income, as a separate trade, distinct from all other activities carried on by him as part of the trade.
>
> (2) Relief in respect of a loss incurred by a person shall not be given under section 380 or 381 against income arising from oil extraction activities or from oil rights ("ring fence income") except to the extent that the loss arises from such activities or rights.
>
> (3) Relief in respect of a loss incurred by a person shall not be given under section 393(A1) against his ring fence profits except to the extent that the loss arises from oil extraction activities or from oil rights.
>
> …
>
> (8) On a claim for group relief made by a claimant company in relation to a surrendering company, group relief shall not be allowed against the claimant company's ring fence profits except to the extent that the claim relates to losses incurred by the surrendering company that arose from oil extraction activities or from oil rights."

It is to be noted that the subsections (2), (3) and (8) all address the question of relief against "ring fence profits", a term which is defined later in section 502.

[11] The charge to tax so far as the Supplementary Charge is concerned is contained in ss.501A and 501B:

> "**501A Supplementary charge in respect of ring fenced trades**

(1) Where in any accounting period … a company carries on a ring fence trade, a sum equal to 20 per cent of its adjusted ring fenced profits for that period shall be charged on the company as if it were an amount of corporation tax chargeable on the company.

(2) A company's adjusted ring fence profits for an accounting period are the amount which, on the assumption mentioned in subsection (3) below, would be determined for that period (in accordance with this Chapter) as the profits of the company's ring fence trade chargeable to corporation tax.

(3) The assumption is that financing costs are left out of account in computing –

(a) the amount of the profits or loss of any ring fence trade of the company's for each accounting period …; and

(b) where for any such period the whole or part of any loss relief is surrendered to the company in accordance with section 492(8), the amount of that relief or, as the case may be, that part.

…

501B Assessment, recovery and postponement of supplementary charge

(1) Subject to subsection (3) below, the provisions of section 501A(1) relating to the charging of a sum as if it were an amount of corporation tax shall be taken as applying, subject to the provisions of the Taxes Acts, and to any necessary modifications, all enactments applying generally to corporation tax, including …

(2) Accordingly (but without prejudice to subsection (1) above) the Management Act shall have effect as if any reference to corporation tax included a reference to a sum chargeable under section 501A(1) as if it were an amount of corporation tax.

…"

[12] Finally I should refer to the interpretation section, s.502:

"**502 Interpretation of Chapter V**

(1) In this Chapter —

…

"oil extraction activities" means any activities of a person—

(a) in searching for oil in the United Kingdom or a designated area or causing such searching to be carried out for him; or

(b) in extracting or causing to be extracted for him oil at any place in the United Kingdom or a designated area under rights authorising the extraction and held by him or, if the person in question is a company, by the company or a company associated with it; or

(c) in transporting or causing to be transported for him … oil extracted at any such place not on dry land under rights authorising the extraction and so held …; or

(d) in effecting or causing to be effected for him the initial treatment or initial storage of oil won from any oil field under rights authorising its extraction and so held;

…

"ring fence income" means income arising from oil extraction activities or oil rights; and

"ring fence profits" has the meaning given by sub-s.(1A) below or, in any case where that subsection does not apply, means ring fence income.

(1A) Where in accordance with section 197(3) of the [TCGA 1992] a person has an aggregate gain for any chargeable period, that gain and his ring fence income (if any) for that period together constitute his ring fence profits for the purposes of this Chapter.

…"

The reference in s.502(1A) to s.197(3) TCGA 1992 is important because, as Mr Peacock pointed out, it is not all capital gains that are included in the definition of ring fence profits but only those resulting from a disposal of an interest in an oil field or of a connected asset disposed of in pursuance of that disposal.

Outline arguments

[13] Ms Wilson's argument for the respondents, HMRC, was straightforward. The company's "adjusted ring fence profits", on which the supplementary charge is levied in terms of section 501A ICTA 1988, means the company's "ring fence profits" as adjusted to remove financing costs from the calculation. Those ring fence profits, whether adjusted or not, include a chargeable gain of the type in question in these proceedings. The aggregate chargeable gain arising from the transaction in the present case therefore falls to be included in Wintershall's calculation of its liability to the Supplementary Charge.

[14] Developing this argument in a little more detail, there is no dispute that Wintershall carries on a ring fence trade; nor that it was liable to ring fence corporation tax on its ring fence profits. "Ring fence profits" is a defined term: section 502(1A) ICTA 1988. As applied to the present case, it includes not only Wintershall's ring fence income but also the aggregate chargeable gain arising from the initial intra-group disposal (brought into charge by reason of its subsequent departure from the Palace Group). The question is whether Wintershall's "adjusted ring fence profits" which, in terms of section 501A, are subject to the Supplementary Charge, also include the aggregate chargeable gain arising from that transaction. This is a matter of statutory construction. ARFP means the amount which, on certain assumptions, would be determined as "the profits of the company's ring fence trade" chargeable to corporation tax: section 501A(2). Those assumptions, set out in section 501A(3), require financing costs (however arising) to be left out of account in computing the profits of the company's ring fence trade. The legislative purpose of that adjustment is to prevent financing costs being manipulated so as to minimise the supplementary charge. The exclusion of financing costs from the calculation is the only adjustment to be made when moving from RFP to ARFP. The reference in the definition of ARFP to the "profits of the company's ring fence trade" is just another way of referring to the company's RFP. Accordingly, the "adjusted ring fence profits" (adjusted RFP or ARFP) are simply the company's RFP as adjusted to remove financing costs from the calculation. They include the chargeable gain as well as the income arising from the ring fence trade.

[15] For the appellants, Mr Peacock QC submitted that HMRC's argument was flawed for a number of reasons. ARFP was not the same conceptually as RFP. It was a separate statutory concept chosen by the draughtsman for the purposes of the Supplementary Charge and calculated by reference to different component elements. RFP was a defined term which included both

income and chargeable gain. That gave an extended meaning to the term "profits" as used in that expression. By choosing to define ARFP by reference to the "profits of the company's ring fence trade" as opposed to "the company's RFP", the draughtsman deliberately refrained from importing into that definition that extended meaning of "profits". The word "profits", when used in the phrase "profits of the company's ring fence trade" as part of the definition of ARFP, should be given its ordinary and established meaning. It does not include chargeable gains of any sort. Accordingly, the chargeable gain in question in this case did not fall to be included in the calculation of ARFP for the purpose of assessing liability to the Supplementary Charge under section 501A.

The FTT's Decision

[16] The FTT preferred the submissions for HMRC. They preferred what they described as "a fairly straightforward approach to the interpretation of the terminology" used in the relevant provisions, taken in their statutory context. They considered that Wintershall's argument, to the effect that "profits of a ring fence trade" and RFP had different meanings, was "strained and artificial". Under reference to s.6(4)(a) ICTA 1988 (now re-enacted as s.188(1) Corporation Taxes Act 2010), they took the view that the word "profit" was a familiar term in revenue law, apt to include both income and capital gains, at least for the purpose of ordinary corporation tax liability. In addition, the dictionary meaning of profit was habile to include both income and capital gain. The exact sense in which the word was used depended on its context. The context here was the charging provisions for the Supplementary Charge. There was no reason not to construe the word "profits" where it appeared in the expression ARFP in section 501A(1) ICTA 1988 as having the same meaning as when it appeared in the expression RFP and, therefore, as including aggregate chargeable gains.

Discussion

[17] I consider that the appeal must fail, substantially for the reasons given by the FTT.

[18] Although I was referred to the decisions in *Ramsay* v *IRC* [1982] AC 300 and *Barclays Mercantile Business Finance Ltd* v *Mawson* [2005] 1 AC 684, neither party sought to suggest that

anything in the scheme of the provisions of Chapter V ICTA 1988 taken as a whole or, more particularly, of the sections directly concerned with levying the Supplementary Charge (sections 501A and 501B), pointed to one construction as being more in keeping with the purpose of the legislation than the other. That being the case, what I am concerned with is a short point of pure statutory construction, to identify the purpose of Parliament from the words used in the statute. Clear words are, of course, needed to impose a charge to tax: *Ramsay* per Lord Wilberforce at pages 323–324. On my reading of the relevant section, those clear words are present. It is often said that in these circumstances the proper construction to be given to a particular provision in a statute or in a contract is a matter of impression. In this case my first and abiding impression is that the expression "profits of the company's ring fence trade", where it appears in section 501A, is intended to have the same meaning as the expression "ring fence profits" where it appears in section 492(3) and in the interpretation section, section 502(1) and (1A). It seems to me inherently unlikely that the draughtsman would use the expression "adjusted ring fence profits" in the charging provision, section 501A, if he did not intend the "ring fence profits" part of that expression to have the same meaning there as when used elsewhere. When in section 501A(2) he inserted a definition of "adjusted ring fence profits" as being, on certain assumptions, "the profits of the company's ring fence trade chargeable to corporation tax", he could not have been intending that to mean anything other than "ring fence profits" adjusted as directed by sub-s.(3) to take account of those assumptions; otherwise he would have been giving the expression "ring fence profits", where it appears as part of the expression "adjusted ring fence profits", a different meaning from that given to the same expression in the interpretation section. He must have intended the expression "ring fence profits" to mean the same thing in both places. Had he had a contrary intention, I would have expected him to have made that clear.

[19] Mr Peacock QC advanced a number of arguments in support of a different construction. He pointed out that Parliament had deliberately used the expression "profits of the company's ring fence trade" instead of the defined expression RFP. He must therefore have intended something different. It followed that "adjusted ring fence profits" did not simply mean RFP as adjusted. The word "trade" was important in the expression "profits of the ring fence trade" and should not be elided or ignored. That pointed to the narrower, more traditional, meaning of "profits" and would not include aggregate gain, which is not a profit of a trade. "Trade profits" or "profits of a trade" has an established meaning in tax law: see s.42 Finance Act 1998 and s.5 Income Tax (Trading and Other Income) Act 2005. "Ring fence trade" is defined in s.492 ICTA

1988; and it is a straightforward exercise to define the profits of the ring fence trade. The aggregate gain only enters into the ring fence fiscal regime by reason of being an arithmetical constituent of RFP; where RFP is not mentioned, there is no basis for importing that constituent (the aggregate gain) into the computation. The mere textual overlap between RFP and ARFP does not militate in favour of the opposite view. The draughtsman has defined ARFP by reference to the profits of the ring fence trade. He has therefore excluded the possibility that ARFP simply means RFP as adjusted to eliminate financing charges.

[20] I see the force of those submissions. But to my mind they tend to assume what they set out to prove. If one starts from the assumption that the word "profits", particularly when linked to the word "trade", is not apt to include chargeable gains of any sort, then it is not difficult to infer that the expression "profits of the company's ring fence trade" is aimed at excluding chargeable gains from the calculation. But as Ms Wilson pointed out, s.5 Income Tax (Trading and Other Income) Act 2005 is concerned with the calculation of income chargeable to income tax, not corporation tax and certainly not the Supplementary Charge. It does not carry any implication that the same meaning of "profits" must attach whenever that word is used in a taxing statute, whatever the context. As the FTT point out in para 30, for ordinary corporation tax purposes the word "profits" means "income and chargeable gains": s.6(4)(a) ICTA 1988 (now re-enacted as s.188(1) Corporation Taxes Act 2010) and see also s.2 Corporation Tax Act 2009. Similarly, in s.8 of the TCGA 1992 it is made clear that chargeable gains are to be included in a company's total profits. It is well-established that the proper approach to statutory construction is to interpret the actual words used in their statutory context, without importing assumptions from the way those words are or may be used in other contexts unless, of course, and this is not such a case, the words used have such a clear and well-established meaning that it is to be assumed, unless the contrary is shown, that Parliament must have used them in that sense.

[21] If one starts from the premise that the word "profits" when used in conjunction with the word "trade" is not decisive, then one is left with the fact that the draughtsman has deliberately adopted the expression "ring fence profits" as part of the description of what sums are liable to the Supplementary Charge. The Supplementary Charge is levied not on RFP but on ARFP, i.e. RFP adjusted so as to exclude financing costs from the calculation. But this is not simply a linguistic overlap, as Mr Peacock sought to characterise it. In truth, ss501A and 501B, which provide the statutory basis for the levy of the Supplementary Charge, are placed within Chapter V of the ICTA

1988. That Chapter is concerned with Petroleum Extraction Activities and, for the purposes of taxation, is concerned to ring fence oil extraction and related activities from all other activities carried on by the company concerned. As part of that structure, it is concerned throughout with concepts such as "ring fence trade", "ring fence income" and "ring fence profits". Those are all defined terms. It would make little sense of that part of the legislation if the sum liable to the Supplementary Charge was not defined in terms of "ring fence profits", albeit adjusted. S.501(1) provides that the Supplementary Charge is to be charged on the company "as if it were an amount of corporation tax chargeable on the company". That must mean in accordance with Chapter V. This is made clear in s.501(2), which states that ARFP is the amount which, on the assumptions from third to about financing costs, would be determined as the profits of the company's ring fence trade chargeable to corporation tax "in accordance with this Chapter". For purposes of corporation tax, the company's profits are calculated (in accordance with that Chapter) in terms of RFP. There is further linkage in the detail in s.501A. Thus, for example, s.501A(3) sets out the assumptions which have to be made for the purpose of calculating ARFP. The second of those assumptions, in sub-s.(3)(b), refers to loss relief surrendered to the company in accordance with s.492(8). S.492(8) is concerned with group relief allowable against RFP. In effect, therefore, for the purpose of calculating ARFP, s.501A(3)(b) requires there to be left out of account certain financing costs identified by reference to a claim for loss relief against RFP. That linkage provides a strong indication that ARFP as a concept is RFP adjusted in accordance with s.501A(3). But, as Ms Wilson pointed out, it goes a bit further than that. S.501(3)(b) seems to assume that the loss relief surrendered to the company in accordance with s.492(8), albeit stripped of financing costs, can be deducted from the "profits of the company's ring fence trade", in order to arrive at a figure for ARFP. If Mr Peacock is correct in his submission, this would allow for the deduction from profits, narrowly construed, of an aggregate loss of a capital nature falling within s.492(8). If, as one might expect, this was not to be allowed, then there would need to be some explanation of what could or could not count as relief. But there is no such explanation in s.501A. The problem does not arise if ARFP simply means RFP as adjusted to leave financing costs out of account.

[22] I should note that s.501A was rewritten to s.330 Corporation Tax Act 2010 in identical terms. However, in 2010 an amendment was made to that section by s.182 Finance Act 2012. That replaced the expression "profits of the company's ring fence trade" where it appeared in s.330 (formerly s.501(2) ICTA 1988) with "company's ring fence profits". Both parties prayed this in aid to some extent, Mr Peacock suggesting that it showed that a legislative change was needed to

achieve the result now contended for by HMRC, Ms Wilson suggesting that it simply clarified the law in the light of a dispute having arisen. I do not think that anything helpful can be taken from this.

[23] Finally, I should note that the Explanatory Notes to the Finance Bill 2002 are consistent with HMRC's case. While I recognise that this may be an admissible aid to statutory construction (*Westminster City Council* v *National Asylum Support Service* [2002] UKHL 38 per Lord Steyn at Paras [2] – [6]), I have reached my views on the outcome of this case independently of that.

Decision

[24] For these reasons the appeal is refused. I shall reserve all questions of expenses.

LORD GLENNIE

RELEASE DATE: 23 JUNE 2015