[2019] UKFTT 338 (TC)

TC07166

Appeal numbers: TC/2017/00437, TC/2017/00438, TC/2017/00439 & TC/2017/00441

CAPITAL GAINS TAX – disposal –sale of shares in companies owning rights to TV game show - Marren v Ingles-type contingent consideration to be paid in loan notes under original sale agreement – later Deed of Variation amended contingent consideration to payment in cash – whether receipt of cash a capital sum derived from asset (right to loan notes) within section 22 TCGA 1992 or from original disposal of shares – closure notices referring to wrong shares – whether closure notices invalid – section 114 TMA – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) DAVID BRIGGS **Appellants**

- and –

(2) MICHAEL WHITEHILL

- and –

(3) STEVEN KNIGHT

- and –

(4)TRUSTEES OF THE BRIGGS ACCUMULATION AND MAINTENANCE TRUST

- and –

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 12 and 13 February 2018

Patrick Way QC and Philip Goeth, counsel, instructed by Brebners, Accountants, for the Appellant

John Brinsmead-Stockham, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

(Decision amended under Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009)

DECISION

Introduction

5 1. The appellants appeal against closure notices ("the closure notices") issued by the respondents ("HMRC") in respect of the tax year ended 5 April 2014 ("2013/14").

2. Each of the four appeals raises the same issue for each of the appellants, viz their liability to capital gains tax ("CGT") in 2013/14 in relation to a payment called the "Pass Through Payment" ("PTP" or "the PTP right") ("the CGT Issue").

10 3. I am asked, in relation to the CGT Issue, to decide that issue as a matter of principle because once that question is determined the parties consider that they should be able to agree the quantum of the appellants' CGT liabilities for 2013/14.

4. In addition, there is a further separate point which arises in relation to two of the appellants (Mr Whitehill and Mr Knight), viz whether the closure notices issued to 15 them were invalid because they incorrectly referred to the shares being sold. I shall refer to this issue as the "Invalidity Issue".

The evidence

5. Mr Whitehill, one of the appellants, produced a witness statement and was cross-examined. In addition, Mr David Taylor of Brebners (Chartered Accountants), tax 20 adviser to Messrs Briggs, Knight and Whitehill produced a witness statement and was cross-examined.

6. I was also provided with four bundles of documents.

The facts

Background

25 7. David Briggs ("Mr Briggs"), Michael Whitehill ("Mr Whitehill") and Steven Knight ("Mr Knight") are individuals who were resident in the UK for tax purposes at all times material to these appeals.

8. The Briggs Accumulation and Maintenance Trust ("the Trust") was established under a settlement deed dated 8 July 2004. On 2 September 2012, Matthew Briggs 30 ("Mr Matthew Briggs") became entitled to an interest in possession in the property subject to the Trust. Since that date all the income of the Trust has been paid to Mr Matthew Briggs. The trustees of the Trust ("the Trustees") were resident in the UK for tax purposes at all material times.

9. I shall refer to Mr Briggs, Mr Whitehill and Mr Knight and the Trustees 35 collectively as "the appellants".

10. At 1 December 2006, the appellants owned, between them, the entire issued share capital of two UK resident companies: Knight Whitehill Productions Limited ("KWPL") and the River Studio Ltd ("RSL"). The shareholding of each of the appellants in KWPL and RSL, as at 1 December 2006, was as follows:

Appellant	Company	Shareholding	Par value of each share
Mr Briggs	RSL	90 ordinary shares	£1
Mr Whitehill	KWPL	100 ‘A’ ordinary shares	£1
		400 ordinary shares	£1
Mr Knight	KWPL	100 ‘A’ ordinary shares	£1
		400 ordinary shares	£1
The Trustees	RSL	10 ‘A’ ordinary shares	£1

The share sale

11. On 1 December 2006, all of the shareholders in Complete Communications Corporation Limited (“CCC”), KWPL and RSL (collectively, “the Companies” and the selling shareholders collectively, “the Sellers”) entered into an agreement (“the SPA”) for the sale of the entire issued share capital of the Companies to 2 Way Traffic Holding NV (“the Buyer”). Thus, under the SPA, the appellants agreed to sell all of their shares in KWPL and RSL to the Buyer.

12. The SPA was, as is often the case, a lengthy legal document running to over 160 pages.

13. The sale of the appellants’ shares therefore took place at the same time as the sale of the shares in CCC. At the time of entering into the SPA, none of the appellants owned shares in CCC (a UK tax resident company) and, therefore, these appeals do not directly concern the sale of the shares in CCC. Nonetheless, one of the selling shareholders in CCC was a company called InvestinMedia Holdings Limited (“InvestinMedia”).

14. The Buyer was a company resident in the Netherlands.

15. Between them CCC, KWPL and RSL owned valuable rights in the well-known game show “Who Wants To Be a Millionaire”.

The consideration

16. Clause 3.1 of the SPA provided that:

> “The consideration for the sale of the Sale Shares shall be the aggregate of:
>
> (a) the Initial Consideration;
>
> (b) the NAV Adjustment (if any);
>
> (c) the Pass Through Payment (if any); and
>
> (d) the Earn Out Consideration,
>
> (together the Purchase Price).”

17. The "Initial Consideration" was defined as the sum of £106 million (SPA clause 1.1) and was paid to the Sellers in accordance with the terms of Clauses 3.2-3.5, and apportioned between the sellers under Clause 3.9 (a) in accordance with columns (4) and (5) of Schedule 6 to the SPA.

5 18. The appellants were not entitled to the "Earn Out Consideration" (Clause 3.7 and 3.9 (f)). I was also informed that no issues in this appeal related to the NAV Adjustment.

19. Each of the appellants included the sum that they received as a proportion of the "Initial Consideration" in the CGT computations of their self-assessment tax returns 10 for the year ended 5 April 2007 ("2006/07"). In those CGT computations, the Appellants treated both the acquisition costs of the shares (i.e. the par value of the shares), and other incidental costs of sale as allowable deductions in computing the chargeable gains on the disposal of the shares.

20. Subsequently, each of the appellants also received their proportion of the PTP that 15 was paid by the Buyer to the Sellers in 2013/14. These appeals concern the CGT consequences that result from that payment.

21. InvestinMedia, which as I have explained is not one of the appellants, elected at the outset to receive cash in respect of the PTP on the sale of its shares in CCC whereas the appellants elected to receive loan notes in respect of their PTP rights as 20 regards the sale of their shares in KWPL and RSL.

The PTP

22. Clause 3.6 of the SPA provided that:

> "The Pass Through Payment (if any) shall be paid to the Sellers in accordance with the provisions set out in schedule 10."

25 23. Clause 3.9 (e) provided that:

> "The Pass Through Payment (if any) shall be apportioned between each of the Sellers in accordance with the percentages detailed in column (9) of schedule 6."

24. The effect of these provisions was that Schedule 10 of the SPA (in conjunction 30 with Schedule 6) provided for how the PTP was to be calculated and apportioned between the Sellers.

25. In summary, the Buyer was liable to pay a PTP to the Sellers if the Buyer received a "Settlement Payment" in respect of specified litigation that was in progress as at 1 December 2006. The litigation concerned the claim commenced in the US courts, on 35 19 May 2004, by Celador International Limited (a subsidiary of CCC) and others, against the Walt Disney Company, and others, in respect of unpaid or underpaid royalties (SPA: Schedule 12) ("the Litigation").

26. Schedules 10 and 6 of the SPA provided for how any "Settlement Payment" was to be divided between each of the Sellers (after the deduction of various expenses 40 such as legal costs, and tax). The total aggregate sum payable by the Buyer to the Sellers, net of tax, constituted the PTP. At the time that the Sellers and the Buyer entered into the SPA on 1 December 2006, it was not known and could not be

determined: (1) whether the Sellers would receive a PTP from the Buyer; and (2) what the quantum of any future PTP would be.

27. Paragraph 6.1 of Schedule 10 to the SPA provided for the payment of the PTP by the Buyer to the Sellers as follows:

5 > "Any Pass Through Payment shall be apportioned firstly between each group of Sellers as set out in part 2 and thereafter between each of the sellers as detailed in column (9) of schedule 6 and shall be satisfied in cash in relation to InvestinMedia in accordance with paragraph 6.2 and in relation to the [CCC] Shareholders and the [KWPL] Shareholders
10 > and the [RSL] Shareholders by the issue of Loan notes within three Business Days of a Payment Date."

28. Clause 1.1 of the SPA defined "Loan Notes" to mean "the guaranteed, redeemable loan notes of the Buyer to be issued in accordance with schedule 10."

Appellants' 2006/07 tax returns

15 29. Mr Briggs and Mr Whitehill made their self-assessment tax returns for 2006/07 under section 8 Taxes Management Act 1970 ("TMA") (section 8A TMA, in the case of the Trustees) on 14 January 2008. Mr Knight made his self-assessment tax return for 2006/07 on 24 January 2008.

30. Each appellant included in their 2006/07 self-assessment return their respective
20 share of the Initial Consideration. For example, Mr Briggs' return showed net disposal proceeds of £15,736,307, reflecting the Initial Consideration and, in respect of which, business asset taper relief of 75% was claimed. Although the returns did not refer to the appellants claiming relief under section 138A Taxation of Chargeable Gains Act 1992 ("TCGA") it was, I was informed, common ground that relief had been claimed
25 under section 138A in respect of the PTP. Certainly, Mr Taylor's evidence was that no disposal proceeds in respect of the PTP were brought into account in the 2006/07 return for Mr Knight (whose 2006/07 return was the subject of an HMRC enquiry) because relief was claimed under section 138A TCGA. My understanding was that each of the appellants submitted their 2006/07 returns on the same basis as regards the
30 PTP.

31. I should mention one point of detail: the appellants attributed their entire base cost in their KWPL and RSL shares to the Initial Consideration. Strictly, the base cost should have been apportioned but, because the numbers were insignificant, Mr Taylor's evidence was that it was simpler and more pragmatic to set the entire base
35 cost against the Initial Consideration in 2006/2007.

Settlement of the Litigation

32. The Litigation was satisfactorily settled in December 2012 when the US courts found against the Walt Disney Company. As a result, substantial amounts were due to the appellants pursuant to the PTP.

40 *The Deed of Variation*

33. The appellants decided that they wished to receive the PTP in cash rather than loan notes. There was some debate before me whether this was solely for tax reasons or purely for commercial reasons. I am minded to accept that it was done mainly for

commercial reasons but, in any event, I think nothing turns on this point. In my view, the motivation of the appellants is not relevant.

34. The negotiations were handled by a Mr Paul Smith of Celador who effectively presented the appellants with a "fait accompli".

5 35. On 31 May 2013, the Sellers and a company called 2 Way Traffic Holding BV executed a Deed of Variation ("the Deed of Variation"). 2 Way Traffic Holding BV was the successor entity to the Buyer, following a merger on 29 December 2011. 2 Way Traffic Holding BV was under the control of Sony. It was common ground that nothing turned on this change in the Sellers' counterparty and therefore I shall also 10 refer to 2 Way Traffic Holding BV as "the Buyer".

36. The Deed of Variation was a short document running to only 10 pages.

37. The Deed of Variation provided, at Clause 2, that:

> 2.1 None of the [CCC] Shareholders, [KWPL] Shareholders and the [RSL] Shareholders wish [sic] any Pass Through Payment to be 15 satisfied by the issue of Loan Notes in accordance with paragraph 6.1 of part 1 of schedule 10 of the [SPA].
>
> 2.2 The Sellers and the Buyer therefore agree that the provisions of paragraph 6.1 of part 1 of schedule 10 to the [SPA] be and are hereby varied with immediate effect on the basis that paragraph 6.1 shall now 20 read as follows:
>
> "Any Pass Through Payment shall be apportioned firstly between each group of Sellers as set out in part 2 and thereafter between each of the Sellers as detailed in column (9) of schedule 6 and shall be satisfied in cash in relation to each Seller."

25 38. In other words, the Sellers no longer had an entitlement to Loan Notes in respect of the PTP but instead were now entitled to cash.

39. The Deed of Variation recorded, at clause 3.1, that as at 31 May 2013:

> "…a Settlement Payment has been made and a Pass Through Payment will become due to the Sellers, subject to agreement of the draft Pass 30 Through Payment Statement, the amount of the Net Cash Amount and the Amount of the Pass Through Payment."

40. Clause 3 provided that each of the Sellers had received a copy of a draft Pass Through Payment Statement and calculations of the Net Cash Amount and Pass Through Payment and had approved them.

35 41. The amount due to the appellants in respect of the PTP was apportioned to them pursuant to a formula described in the SPA.

42. Clause 3.4 of the Deed of Variation provided that each Seller also confirmed that:

> "(i) the amount set out opposite their respective names in column (3) of schedule 1 to [the Deed of Variation] is the amount due to them in 40 respect of their proportion of the [PTP]… and requests… that payment be made by electronic funds transfer for same day value into the account set out opposite their name in column (4) of schedule 1 to [the Deed of Variation]; and (ii) the payment by, or on behalf of, the Buyer of the amounts set out opposite their respective names and to the

accounts so designated in schedule 1 to [the Deed of Variation], and the receipt of such amount into such accounts shall be good and valid discharge, of the sum due to the Seller for this [PTP], for the [Buyer].”

43. The appellants received payment of the sum specified in schedule 1 of the Deed of Variation in US Dollars on 3 June 2013 and on 4 June 2013 converted the US dollars so received into Pounds Sterling.

44. Mr Briggs, Mr Knight and the Trustees made their self-assessment tax returns for 2013/14 on 27 January 2015 and Mr Whitehill made his self-assessment tax return for that year on 31 January 2015.

45. HMRC opened enquiries, under section 9A TMA, into the 2013/14 tax returns of: the Trustees on 19 March 2015; Mr Whitehill on 20 March 2015; and Mr Briggs and Mr Knight on 23 March 2015.

46. HMRC issued closure notices under section 28A TMA: to the Trustees on 31 May 2016; and to Messrs Briggs, Whitehill and Knight on 6 October 2016. The closure notices concluded that each of the appellants was liable for additional CGT in respect of the part of the PTP that they received in 2013/14. The appellants tax returns were accordingly amended in the closure notices as follows:

Appellant	**Original liability in 2013/14 return**	**Increase in CGT liability**	**Final liability in amended return**
Mr Briggs	£42,477.18	£8,185,749.13	£8,228,226.31
Mr Whitehill	(£1812.21)	£3,633,531.24	£3,631,719.03
Mr Knight	£26,847.36	£3,636,415.24	£3,663,262.61
The Trustees	£0.00	£908,340.72	£908,340.72

47. The closure notices issued to Mr Whitehill and Mr Knight incorrectly recorded that they had sold shares in RSL whereas, in fact, they had sold shares in KWPL. It is this mistake that has given rise to the Invalidity issue mentioned above.

48. The closure notice issued to Mr Whitehill was dated 6 October 2016 and I shall refer to that notice because the closure notice issued to Mr Knight on the same date was in the same terms and nothing turns on any differences. The closure notice stated:

> “1. 1 December 2006, all the shareholders of Complete Communications Corporation Limited [CCC], Knight Whitehill Productions Limited [KWPL] and The River Studio Ltd [RSL] sold their shareholdings to 2 Way Traffic Holding BV. This included your disposal of your interest in the shares held in River Studio Ltd.
>
> …
>
> 8. You disposed of your 90 ordinary shares held in the River Studio Ltd. These were the “old securities” for the purposes of section 138A (1) (a) TCGA.
>
> …

> 12. Part of the consideration for your disposal of 90 ordinary shares held in The River Studio Ltd was a right to be issued with loan notes by 2 Way Traffic NV.…
>
> 23.… When you entered into the Agreement, you disposed of 90 ordinary shares held in The River Studio Ltd and acquired an asset in the form of the earn-out right."

49. It seems to me plain that what happened was that the closure notices issued to Mr Whitehill and Mr Knight were "cut-and-paste" efforts based on the closure notice sent to Mr Briggs (also on 6 October 2016) but that carelessly the appropriate changes were not made.

Appeals

50. The appellants all appealed to HMRC, in time, against the amendments to their 2013/14 tax returns made by the above closure notices. They requested that HMRC formally review their conclusions. HMRC set out the conclusions of their statutory review for all of the appellants in four letters, all dated 30 November 2016. The appellants lodged Notices of Appeal with the Tribunal on 21 and 22 December 2016.

Relevant legislation

51. I set out in an appendix to this decision the relevant statutory provisions.

Submissions for the appellants

The substantive CGT issue

52. In a nutshell, Mr Way QC, appearing with Mr Goeth, for the appellants submitted that the source of the PTP was the SPA and that the Deed of Variation did not effect a disposal for CGT purposes. The Deed of Variation effected a minor variation which did not "go to the root" of the transaction (the SPA) which took place in 2006. There was, therefore, no capital sum derived at the time of the Deed of Variation – the PTP payments were received in respect of the SPA.

53. Mr Way's argument was that the Deed of Variation, in May 2013, merely slightly varied the terms of the SPA. It did not bring the original transaction embodied in the SPA to an end and replace it with a new one.

54. Mr Way drew attention to the respective lengths of the SPA and the Deed of Variation – the former was over 160 pages whilst the latter was approximately 10 pages. The change that was affected was found in paragraph 2.2 of the Deed of Variation and it merely changed three lines of the SPA. The SPA contained all the key operative provisions including, in particular, the mechanics for quantifying the PTP.

55. In relation to the treatment of the PTP payments received by the appellants on 3 June 2013, Mr Way argued that the change effected by the Deed of Variation had to be read back into the SPA as if it had been included at the outset in the original 2006 agreement. That change did not effect a disposal and was, effectively, neutral for CGT purposes.

56. On that basis, Mr Way argued that the disposal by the appellants of their shares in 2006 was for a consideration which included a so-called "*Marren v Ingles*" right (a

reference to the decision of the House of Lords in *Marren v Ingles* 54 TC 76), viz a chose in action representing the value at the time of the SPA of the right to the PTP.

57. CGT in respect of the PTP was due, Mr Way argued, in relation to the year 2006/07 by reference to the value of that chose in action at that time.

58. However, in Mr Way's submission, when the chose in action was satisfied in cash, in 2013, a disposal occurred of that chose in action by reference to the increase (or decrease) in the value of the chose in action from its value in 2006 to the amount of the PTP that was actually received in 2013.

59. It followed, according to Mr Way's argument, that CGT arose in relation to (1) the disposal which occurred in 2006 by reference to the value of the chose in action and (2) CGT potentially arose in relation to the disposal in 2013/14 of that chose in action. The CGT would be computed by reference to the gain (if any) by which the cash proceeds received in 2013/14 exceeded the valuation of the right to that cash in 2006/2007.

60. It was important to note, argued Mr Way, that no valuation of the appellants' rights, as at 2013, was relevant or undertaken because no such rights arose in respect of any disposal at that time. Instead, the position was governed by the relevant terms of the SPA.

61. Mr Way informed me that the value of the amounts which were received under the PTP in 2013 were lower than the valuation which had been computed (by reference to negotiations between InvestinMedia and HMRC). According to Mr Way, a loss arose in the year 2013/14.

62. In support of his argument that the Deed of Variation did not go to the root of the SPA and therefore did not give rise to a disposal for CGT purposes, Mr Way relied on two authorities. First, *British and Benningtons Limited v North Western Cachar Tea Company Limited and others* [1923] AC 48 ("*British and Benningtons*"), particularly the judgment of Lord Sumner at 68. Secondly, Mr Way referred to a decision of Mervyn Davies J in *IRC v Eurocopy plc* [1991] STC 707 at 154 (g-j) and 155 (a-b) ("*Eurocopy*").

63. Mr Way submitted that the Deed of Variation simply amended the way in which the consideration was received and it did so by reference to a formula which was found in the SPA. Thus, the Deed of Variation did not affect a disposal in 2013 but, rather, a slight variation of the terms of the PTP contained in the SPA. This was not a replacement of the original (SPA) transaction and its replacement with a new one.

64. Mr Way also referred to the decision of Warner J in *Zim Properties Ltd v Proctor* [1985] STC 90 ("*Zim Properties*") where it was said [at 107 (a)] that it was necessary to look at the "real (rather than the immediate) source of the capital sum." In Mr Way's submission, the real source of the PTP was the SPA and not the Deed of Variation. In this respect, the appellants were in the same situation as InvestinMedia, who initially elected to receive cash in respect of the PTP.

65. Next, Mr Way submitted that if the Buyer had reneged on its obligations after the Deed of Variation had been executed, the appellants would have sued under the SPA and not under the Deed of Variation because the SPA governed their rights.

66. In summary, Mr Way said that the chose in action disposed of in 2013 was a right to receive cash emanating from the terms of the SPA as varied by – but not rescinded by – the Deed of Variation.

67. Mr Way also referred to the speech of Lord Wilberforce in *Marren v Ingles* at 95 (H-I):

> "There was an asset in the form of the obligation (a chose in action) to pay the deferred consideration. The deferred consideration when it was paid, in 1972, was, it is difficult to deny, a capital sum derived from that asset."

68. Thus, in the present case, Mr Way submitted that the appellants had agreed to take a right to deferred cash consideration as originally offered to them in 2006. When that right to deferred cash was realised the position was governed by *Marren v Ingles.*

69. All parts of the SPA (save as altered by the Deed of Variation) continued in full force and the appellants would plainly have sued under the SPA for their rights to cash. Clause 2.2 of the Deed of Variation described the way in which the cash amounts due to the appellants were set out i.e. by reference to Part 2 of Schedule 10 of the SPA and thereafter by reference to column 9 of Schedule 6 of that agreement.

70. The appellants, said Mr Way, did not contend that there was a retrospective effect to the Deed of Variation. The tax treatment simply fell to be considered by reference to the SPA. The appellants' case was that the Deed of Variation had no effect from the point of view of whether there was a disposal in 2013 – it merely confirmed that the parties' rights and obligations were governed by the SPA.

71. Accordingly, the tax analysis, in Mr Way's submission, was as follows:

(1) the effect of the Deed of Variation was simply to change the way in which the consideration for the PTP was to be paid. It took the form of cash and was treated as having done so by reference to the original SPA, which was the source of the payment in 2013;

(2) that meant that it was necessary to recompute the CGT in respect of the disposal which took place in 2006 by increasing the purchase price by the calculated value, at that time, of the chose in action representing the right to receive, in cash, the PTP;

(3) specifically, the provisions of section 138A TCGA were not in point;

(4) it was accepted that there would be additional tax to pay (with interest) in respect of the year 2006/07 because the value of the chose in action fell to be taken into account; and

(5) when the PTP was actually received in 2013 by each appellant this represented, taking account of *Marren v Ingles*, the disposal of the chose in action and consequently a tax computation was due at that time by reference to the amount actually received.

The Invalidity Issue

72. Mr Way submitted that HMRC had failed to comply with the provisions of section 28A TMA. The closure notices issued to Mr Whitehill and Mr Knight referred to the sale of a company (RSL) in which neither taxpayer owned any shares. Accordingly, the closure notices were invalid on their face.

73. As regards section 114 TMA ("want of form or errors not to invalidate assessments etc"), Mr Way submitted that section 114(2)(a)(ii) ([mistaken] description of property) dealt with circumstances where the property described in the relevant document was "broadly" correct but there had been a slip. In the present situation section 114 was not broad enough to capture a situation where HMRC had referred to entirely the wrong property i.e. shares owned by Mr Briggs and the Trustees but not by Mr Knight and Mr Whitehill. The appellants were separate taxpayers and the assets of one appellant could not be treated as the assets of another.

74. To support his submission, Mr Way referred to the decision of the Court of Appeal in *R v HMRC, on the application of Archer* [2018] STC 38 ("*Archer*") and, in particular, to the judgment of Lewison LJ at [35]-[36]. That judgment referred to earlier authorities which considered that some mistakes were "too fundamental or gross" to be saved by section 114 TMA. Mr Way's submission was that the error in the case of Mr Knight and Mr Whitehill was too fundamental to be rescued by section 114. The closure notice referred to a disposal of shares in which they had no interest and a company in which they had no involvement.

Submissions for HMRC

The substantive CGT issue

75. Mr Brinsmead-Stockham submitted that the correct CGT analysis of the transactions was set out in HMRC's Statement of Case. The analysis was set out in relation to Mr Briggs, but the same analysis applied in respect of each the appellants (save to the extent that in respect of Mr Whitehill and Mr Knight references to RSL should be replaced with references to KWPL). The analysis was as follows:

> (1) Mr Briggs disposed of his shareholding in RSL on 1 December 2006 under the SPA. Part of the consideration for that disposal was cash i.e. Mr Briggs' proportionate share in the Initial Consideration.
>
> (2) Under the SPA, the remainder of the consideration given by the Buyer for Mr Briggs' shareholding in RSL was the grant of a right to be paid a specified proportion of any future PTP.
>
> (3) Following the reasoning of the House of Lords in *Marren v Ingles* [1980] STC 500, Mr Briggs's entitlement under the SPA to receive a specified proportion of any future PTP was "a contingent right (which might never be realised) to receive an unascertainable amount of money at an unknown date." (*Marren v Ingles, ibid,* per Lord Wilberforce at 503d-e). In *Marren v Ingles* their Lordships held that such a chose in action constituted "incorporeal property" and therefore an "asset" for the purposes of CGT, within the terms of section 21 TCGA i.e. the PTP right. Each of the appellants owned a PTP right under the terms of the SPA.
>
> (4) The PTP right was also an "earn-out right" within section 138A(1) TCGA on the basis that:
>
>> (a) the grant of the PTP right to Mr Briggs by the Buyer constituted "part of the consideration for the transfer by [Mr Briggs] of shares in… a company ("the old securities")" (section 138A(1)(a)) i.e. the shares in RSL;

(b) the PTP right "consists in a right to be issued with… debentures of another company ("the new company")" (section 138A(1)(b)) – i.e. the right to be issued loan notes in the Buyer under the SPA Schedule 10 paragraph 6.1;

(c) the "value or quantity of the… debentures to be issued in pursuance of the right [i.e. the PTP right] ("the new securities") [was] unascertainable at the time when the right [was] conferred" (section 138A(1)(c)) – i.e. on Mr Briggs entering into the SPA on 1 December 2006; and

(d) the right that constituted the PTP right "is not capable of being discharged in accordance with its terms otherwise than by the issue of the new securities" (section 138A(1)(d)) i.e. under the terms of SPA Schedule 10 paragraph 6.1 the right that constitutes the PTP right could only be discharged by the Buyer issuing loan notes.

(5) Mr Briggs did not exercise his right to make an election under section 138A(2A) and (5) to disapply the effects of section 138A(2).

(6) As an "earn-out right" within section 138A, the PTP right was deemed to be a "debenture" for the purposes of TCGA. Mr Briggs's exchange of shares in RSL in return for the PTP right, therefore, fell within the terms of the "rollover" provisions of section 135 TCGA. This was on the basis that the Buyer had issued "debentures to [Mr Briggs] in exchange for shares in…another company [i.e. RSL]". Section 135 (3) TCGA, therefore, provided that "sections 127 to 131… apply with the necessary adaptations as if [RSL] and [the Buyer] were the same company and the exchange were a reorganisation of its share capital."

(7) Consequently, section 127 TCGA applied in respect of the exchange by Mr Briggs of shares in RSL in return for the PTP right. The effect of section 127 was to deem:

(a) Mr Briggs not to have disposed of his RSL shares in consideration for the PTP right. Mr Briggs was treated, for CGT purposes, as having made only a part disposal of his shareholding in RSL in return for the cash consideration (i.e. the Initial Consideration) that he received under the SPA. Thus, the value of the PTP right was deemed not to constitute consideration for the sale of RSL shares in 2006/07; and

(b) both:

1) the shares for the sale of which the PTP right constituted the consideration; and

2) the PTP right;

were to be treated as the same asset with the same acquisition cost (i.e. the acquisition cost of the PTP right is deemed to be equal to the par value of those shares).

(8) Mr Briggs retained the PTP right until 31 May 2013. On that date, the PTP right was extinguished, by Clause 2 of the Deed of Variation, in exchange for a right for Mr Briggs to be paid a cash sum specified in Schedule 1 to the Deed of Variation.

(9) On 3 June 2013, Mr Briggs received the payment of the cash sum to which he was entitled under the Deed of Variation. By that date, at the latest, Mr Briggs had "derived" a "capital sum" from the PTP right within the terms of section 22(1) TCGA. Consequently, under section 22(1) TCGA, Mr Briggs was deemed to have disposed of the PTP right for a consideration equal to the "capital sum" derived from it (i.e. the amount specified in Schedule 1 to the Deed of Variation).

(10) Finally, there were two possible dates on which the disposal in (9) could be deemed to occur:

1) HMRC's preferred view was that the "capital sum" derived by Mr Briggs from the PTP right was the right to receive payment of a cash sum under the Deed of Variation. On that analysis, the disposal was deemed to occur on 31 May 2013, either under section 22(2) TCGA or simply on the basis that the deemed disposal under section 22(1) occurred on that date. This analysis would be consistent with the principle underlying section 28 TCGA that where an asset is disposed of by contract, the date of the disposal is the date of the contract; or

2) if the view was taken that the "capital sum" "derived" by Mr Briggs from the PTP right was the actual payment of cash received from the Buyer under the Deed of Variation, then on that analysis the disposal was deemed to occur on 3 June 2013 for the same reasons as in 1) above.

76. The result of the above analysis was that the appellants each made a deemed disposal of the PTP right on either 31 May or 3 June 2013 in return for a consideration equal to the cash sum that they were entitled to receive (and did receive) under the Deed of Variation.

77. Mr Brinsmead-Stockham noted that, in Mr Way's skeleton argument, it was expressly accepted that the Deed of Variation did not have retrospective effect for the purposes of CGT. In his submission, two consequences flowed from that fact:

(1) throughout the period 1 December 2006 - 31 May 2013 the PTP right owned by each appellant under the terms of the SPA consisted of a right to be issued with an un-ascertainable amount of loan notes by the Buyer in respect of any PTP; and therefore

(2) there was no basis for the appellants to maintain that the PTP rights that they owned throughout that period were not "earn-out rights" within section 138A TCGA.

78. In support of HMRC's analysis in respect of section 22 TCGA, Mr Brinsmead-Stockham referred to the decision in *Zim Properties*. In that case, Warner J held that in order to determine whether a "capital sum" derived from a particular asset it was necessary to consider "the reality of the matter" and "one has to look in each case for the real (rather than the immediate) source of the capital sum." Furthermore, in applying this test (according to *Aberdeen Construction Group Ltd v IRC* [1978] STC 127 at 131) one should not accept "results which are paradoxical and contrary to business sense."

79. Therefore, according to Mr Brinsmead-Stockham, it was plain that the "real source" of the "capital sum" received by each appellant was their right, under the

SPA, to receive a proportion of any PTP *in the form of loan notes*. That right was the cause of, and the basis upon which, each appellant received their "capital sum": it was the asset which they "turned to account" (*O'Brien v Bensons Hosiery (Holdings) Ltd* [1979] STC 735) in order to receive a cash payment.

80. Mr Brinsmead-Stockham argued that the two authorities cited by Mr Way (*British and Benningtons* and *Eurocopy*) provided no support for the Appellants' case – neither case concerned CGT nor the CGT concept of a "disposal". Moreover, the appellants' case was undermined by the fact that they accepted that the Deed of Variation had the effect of "extinguishing" the appellants' rights to be issued with loan notes.

81. Next, Mr Brinsmead-Stockham addressed the appellants' argument that the only relevant "capital sum" received by the appellants was the payment of cash that they received on 3 June 2013 and which was ultimately derived from the sale of shares under the SPA. The appellant, he said, simply ignored the existence of the PTP right from which the "capital sum" was actually derived. Furthermore, *Zim Properties* supported HMRC's case not that of the appellants. Under the Deed of Variation, the PTP right of each appellant was extinguished and replaced by a right to receive a sum in cash, as specified in Schedule 1 to the Deed of Variation. Each appellant's right to receive payment in cash was created when the Deed of Variation was executed and was satisfied by the receipt of cash by the appellants on 3 June 2013.

82. Furthermore, Mr Brinsmead-Stockham contended that the appellants' argument – that they did not "derive" a "capital sum" from their rights to be issued with loan notes under the SPA on the basis that no valuation of the appellants' rights, as at 2013, was relevant or undertaken – was simply wrong. First, the Deed of Variation ascribed a specific monetary value (set out in Schedule 1) to each PTP right. Secondly, the argument was irrelevant. The issue was whether the appellants "derived" a "capital sum" from their PTP rights acquired under the SPA.

The Invalidity Issue

83. The closure notices issued to Mr Whitehill and Mr Knight, said Mr Brinsmead-Stockham, satisfied all the formal requirements of a closure notice for the purposes of section 28A TMA.

84. Furthermore, Mr Brinsmead-Stockham argued that the mistake did not form part of the officer's conclusions or of the amendments to the 2013/14 returns of Mr Whitehill and Mr Knight in the closure notice. Instead it related to a background factual matter (i.e. details of the shares that Mr Whitehill and Mr Knight had sold in 2006/07). Accordingly, the mistake did not form part of the matters that were subject to this Tribunal's appeal jurisdiction under section 31 TMA. The position was, therefore, analogous to that in *Pipe v HMRC* [2008] STC 1911.

85. Mr Brinsmead-Stockham relied on the decision of the House of Lords in *Mannai Investment Company Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 ("*Mannai*") in relation to the ordinary principles of construction of written documents. In accordance with *Mannai* the two closure notices in dispute should be read as referring to KWPL and not RSL. This was because a reasonable recipient of the closure notices received by Mr Whitehill and Mr Knight, construing those documents in the light of the relevant contextual background (including the transactions themselves and the extensive correspondence between the parties) would have been

left in no reasonable doubt that the closure notices intended to refer to KWPL and the mistake was simply a typographical error by HMRC.

86. Secondly, and alternatively, Mr Brinsmead-Stockham relied on section 114 TMA to cure the mistake. The defective closure notices fell within the scope of section 114(1) TMA. It was accepted that some mistakes could be "too fundamental or gross" to be cured by section 114(1) but this was a question of degree that depended on the nature and effect of the mistake in the particular circumstances of the case (*Archer*, *ibid*, at [34]. The error could not be described as "gross" or "fundamental". It related to a background fact that was not directly relevant to the amendments made by the closure notices. Secondly, there was no material risk that either Mr Whitehill or Mr Knight would be misled by the mistake and, indeed, neither appellant had in fact been misled by the mistake. In any event, the mistake was also cured by section 114(2)(a)(ii) TMA on the basis that the mistake related to "the description of any… property" (i.e. the shares disposed of by Mr Whitehill and Mr Knight in 2006/07).

87. Finally, Mr Brinsmead-Stockham noted that even if the closure notices were "invalid", then the effect of this would be that the enquiries into the tax returns of Mr Whitehill and Mr Knight for 2013/14 would remain open. HMRC would, therefore, be entitled to issue new closure notices to Mr Whitehill and Mr Knight.

Discussion

The CGT Issue

88. I have no doubt that the tax analysis of the transactions both in 2006/07 and 2013/14 put forward on behalf of the appellants is incorrect.

89. The analysis advanced by Mr Way was that the effect of the Deed of Variation in May 2013, leading to the receipt of cash payments by the appellants in June 2013, was that the appellants became liable to account for additional CGT in 2006/07 in respect of the sale of shares under the SPA. In other words, the appellants were taxed as having a *Marren v Ingles*-type contingent an unascertainable cash right in 2006/07. The additional CGT for each appellant would be calculated on the basis of the PTP right's value at 1 December 2006 (i.e. the date of the SPA).

90. According to Mr Way, the appellants disposed of their respective PTP rights on 3 June 2013 when they received cash payments pursuant to the Deed of Variation (as set out in Schedule 1). Mr Way described the Deed of Variation as a "non-event" for CGT purposes. Thus, so the argument ran, a capital gain or loss arose in respect of each disposal by reference to the difference in value between each PTP right on 1 December 2006 and the respective payment received by each appellant on 3 June 2013. Mr Way argued that a capital loss would arise on the disposal of the PTP rights on 3 June 2013.

91. In my view, this analysis is wrong in every respect.

92. First, it does not reflect what actually happened. On 1 December 2006 each appellant received a PTP right i.e. a contingent right to an unascertainable amount of loan notes. No CGT arose in respect of the PTP right in 2006/07 because section 138A TCGA applied. Therefore, in broad terms, any gain in respect of the PTP right was deferred until such time as the PTP right matured i.e. the right to a payment (if

any) became non-contingent and ascertainable. Thus, no CGT liability in respect of the PTP right arose for any of the appellants in 2006/07.

93. The flaw in the appellants' analysis is that it ignores, as Mr Brinsmead-Stockham observed, the existence of the right to loan notes. That entitlement (i.e. the PTP right) was an asset for CGT purposes in its own right. The PTP right was then disposed of when, pursuant to the Deed of Variation, the appellants derived a payment of cash. Again, the appellants' analysis entirely, and wrongly, ignores this disposal.

94. Mr Way argued that the Deed of Variation operated simply to vary the terms of the original contract i.e. the SPA and did not effect a recission of that contract, citing *British and Benningtons* and *Eurocopy*. Even if that were so, at least as a matter of pure contract law, it does not assist the appellants' case: it is simply addressing the wrong question. The real issue is whether the PTP right constituted an "earn-out right" within section 138A(1). The next question is whether the Deed of Variation in June 2013 effected a disposal of that "asset" and whether the receipt of cash pursuant to the Deed of Variation was derived from that asset. *British and Benningtons* and *Eurocopy* have nothing to say on those issues and I agree with Mr Brinsmead-Stockham that they are essentially irrelevant in the present context.

95. There is no doubt in my mind that the PTP right was an asset for CGT purposes and that it fell to be correctly treated (as, indeed, it was treated by the appellants) as an "earn-out right" within section 138A(1) in 2006/07. The requirements of section 138A(1) (i.e. the definition of an "earn-out right") were satisfied by the PTP right. In this context, and to be clear, I am satisfied that the PTP right was "not capable of being discharged in accordance with its terms otherwise than by issue of the new securities" (section 138A(1)(d)).

96. Similarly, I have no doubt that the payment of cash in accordance with the Deed of Variation effected a disposal of the "earn-out right" in 2013/14 because the cash received was a "capital sum" which was "derived" from the PTP right (i.e. the "asset") for the purposes of section 22 TCGA. The cash payments received by the appellants in June 2013 were not derived from the sale of shares under the SPA – the appellants' entitlement under the SPA was to receive loan notes. It is true that the amount of cash payable under the Deed of Variation to each appellant was determined by reference to the SPA, but that does not in my view make the SPA the source of the payment. Moreover, Mr Way's acceptance of the fact that the Deed of Variation had the effect of "extinguishing" the appellants' rights to receive loan notes was, in my view, inconsistent with the appellants' case that the Deed of Variation did not effect a disposal of the PTP right.

97. Secondly, the appellants' analysis undermines the operation of section 138A TCGA. This provision is intended to provide relief in an earn-out situation. The difficulty with the *Marren v Ingles* decision was that it could lead to a taxpayer, who became entitled to an earn-out right in the form of loan notes on the sale of shares, paying tax long before he or she received any cash. Section 138A TCGA was intended to avoid this difficulty by effectively rolling over any gain until an earn-out right matured and the loan notes were redeemed. Section 138A TCGA applies automatically if the transaction in question constitutes an earn-out, as defined in section 138A(1).

98. A taxpayer may, however, opt out of the relief afforded by section 138A by making an election under section 138A(2A). That election must be made, in the case

of an individual taxpayer (which would include all of the appellants), on or before the first anniversary of 31 January next following the year of assessment in which the right was conferred (section 138A(5)(b)). In the present case, therefore, an election would have had to have been made on or before 31 January 2009. An election under section 138A(2A) is irrevocable (section 138A(6)).

99. It is common ground in this case that none of the appellants made an election under section 138A(2A) to prevent the operation of section 138A. It surely cannot be the case that by executing a Deed of Variation in 2013 (and receiving cash in lieu of loan notes shortly thereafter) the appellants can replicate the tax position that would have prevailed if they had made an election within the time limit specified by section 138 A(5)(b). That would make the time limit meaningless.

100. Mr Brinsmead-Stockham submitted that the reason why the appellants were seeking to maintain that they were liable to additional CGT in 2006/07 rather than 2013/14 was due to the availability of business asset taper relief (now repealed) in the earlier year but not in the later year. Business asset taper relief produced, in effect, a 10% tax rate on capital gains for higher rate taxpayers. In other words, although the appellants decided in 2006 to defer their CGT liabilities arising from the PTP rights, the result was that they lost the business asset taper relief that would otherwise have been available in 2006/07. This may well be the explanation for the appellants' submissions in this case, but regardless of whether that is so their position as a matter of law is untenable.

101. I therefore decide this preliminary issue in favour of HMRC.

The Invalidity Issue

102. Notwithstanding the mistakes contained in the closure notices sent to Mr Whitehill and Mr Knight, Mr Brinsmead-Stockham urged me to find that those errors did not invalidate those closure notices. This was because, he said, section 28A(1) and (2) TMA only required that a closure notice contained two things. First, the notice must inform the taxpayer that the officer has completed his enquiries and state his conclusions (section 28A(1)). Secondly, the notice must either state that in the opinion of the officer no amendment to the return was required or it had to make the amendments of the return required to give effect to the officer's conclusions (section 28A(2)). Both those requirements were, Mr Brinsmead-Stockham argued, satisfied in the notices given to Mr Whitehill and Mr Knight.

103. I do not accept that section 28A(1) and (2) exhaustively set out all the requirements of a valid closure notice. That must, to some extent, depend on the circumstances of each case. For example, in *Archer* it was held at [22] and [31] that an amendment to a tax return had to state the amount of tax payable and that the closure notice had to contain that information. That was so, even though that requirement was only impliedly (but not explicitly) provided for in the statute.

104. In any event, I think it is unnecessary to reach a conclusion on this point because, in my judgment, the mistakes contained in the closure notices issued to Mr Whitehill and Mr Knight were cured by section 114(1) TMA.

105. A closure notice is an "other proceeding" for the purposes of section 114 (1) TMA (see *Archer per* Lewison LJ at [34]) and it was not in dispute that the closure notices in question were ones which purported "to be made in pursuance of any

provision of the Taxes Act" . The real dispute was whether they were "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts."

106. In *Archer* the Court of Appeal held that the test under section 114 was an objective one: would a reasonable taxpayer have understood or have been misled by the closure notice? In applying that test, the taxpayer must be taken to be equipped with the knowledge that he and his agents had, including knowledge of what had led to the enquiry and what HMRC's conclusions were (see: *Archer* at [36]).

107. I should also refer to the decision of the Upper Tribunal (Judge Bishop and Judge Brannan) in *HMRC v Mabbutt* [2017] UKUT 289 (TCC). In that case, an enquiry notice under section 9A TMA purported to open an enquiry for the tax year "ended 6 April 2009" instead of referring to the tax year ended 5 April 2009. The Upper Tribunal, in holding that section 114 TMA cured the error, said:

> "63. When viewed objectively, there can be no doubt, in our judgment, that a reasonable taxpayer reading the Mabbutt letter [the letter purporting to open an enquiry under section 9A] would have concluded that HMRC were intending to open an enquiry and that the reference to the year ended 6 April 2009 was simply a minor clerical slip."

108. In that case, the Upper Tribunal reviewed the circumstances in which the purported section 9A letter had been sent and concluded that it would have been obvious to a reasonable taxpayer reading that letter, in the relevant factual context, that HMRC had intended to open an enquiry for the year ended 5 April 2009.

109. In my view, any reasonable taxpayer receiving the closure notices sent to Mr Whitehill and Mr Knight would have understood that the reference to the RSL shares was simply a typographical error. The closure notices concluded an enquiry opened under s 9A TMA into their tax returns for 2013/14. Those returns included details of their disposal of shares in KWPL, not RSL. Having reviewed the correspondence (both before and after the issue of the closure notices) between the parties it is clear that there was no misunderstanding and the error in the closure notices was immediately pointed out to HMRC by Brebners, accountants to Mr Whitehill and Mr Knight.

110. I accept that there will be some mistakes that are so fundamental or gross that they cannot be cured by section 114 TMA (see *Pipe v Revenue and Customs Commrs* [2008] EWHC 646 (Ch), [2008] STC 1911 *per* Henderson J ("*Pipe*")) but in my judgment the mistakes in the closure notices in this case were simply obvious typographical errors. In any event, the exception for fundamental or gross mistakes referred to by Henderson J in *Pipe* was considered by Lord Dyson in *HMRC v Donaldson* [2016] EWCA Civ 761, [2016] STC 2511. As Lewison LJ noted in *Archer* at [35]:

> "Lord Dyson did not approach the question from some a priori categorisation of what kind of mistakes were fundamental or gross. Instead he concentrated on the nature and effect of the omission in the particular circumstances of the case."

111. In the circumstances of this case, where no reasonable person could have been misled by the mistakes in the two closure notices, it seems to me clear that the mistakes were not fundamental or gross and that the notices were in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts.

112. Therefore, I have come to the conclusion that the mistakes contained in the closure notices sent to Mr Whitehill and Mr Knight were cured by section 114(1) TMA. Accordingly, I decide this second preliminary point in favour of HMRC.

Decision

113. I have decided both preliminary issues in favour of HMRC.

114. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 29 MAY 2019

APPENDIX – The relevant statutory provisions

Taxation of Chargeable Gains Act 1992

21 Assets and disposals

(1) All forms of property shall be assets for the purposes of this Act, whether situated in the United Kingdom or not, including—

(a) options, debts and incorporeal property generally, and

[(b) currency, with the exception (subject to express provision to the contrary) of sterling,] and

(c) any form of property created by the person disposing of it, or otherwise coming to be owned without being acquired.

(2) For the purposes of this Act—

(a) references to a disposal of an asset include, except where the context otherwise requires, references to a part disposal of an asset, and

(b) there is a part disposal of an asset where an interest or right in or over the asset is created by the disposal, as well as where it subsists before the disposal, and generally, there is a part disposal of an asset where, on a person making a disposal, any description of property derived from the asset remains undisposed of.

22 Disposal where capital sums derived from assets

(1) Subject to sections 23 and 26(1), and to any other exceptions in this Act, there is for the purposes of this Act a disposal of assets by their owner where any capital sum is derived from assets notwithstanding that no asset is acquired by the person paying the capital sum, and this subsection applies in particular to—

(a) capital sums received by way of compensation for any kind of damage or injury to assets or for the loss, destruction or dissipation of assets or for any depreciation or risk of depreciation of an asset,

(b) capital sums received under a policy of insurance of the risk of any kind of damage or injury to, or the loss or depreciation of, assets,

(c) capital sums received in return for forfeiture or surrender of rights, or for refraining from exercising rights, and

(d) capital sums received as consideration for use or exploitation of assets.

(2) In the case of a disposal within paragraph (a), (b), (c) or (d) of subsection (1) above, the time of the disposal shall be the time when the capital sum is received as described in that subsection.

(3) In this section "capital sum" means any money or money's worth which is not excluded from the consideration taken into account in the computation of the gain.

…

28 Time of disposal and acquisition where asset disposed of under contract

(1) Subject to section 22(2), and subsection (2) below, where an asset is disposed of and acquired under a contract the time at which the disposal and acquisition is made is the time the contract is made (and not, if different, the time at which the asset is conveyed or transferred).

(2) If the contract is conditional (and in particular if it is conditional on the exercise of an option) the time at which the disposal and acquisition is made is the time when the condition is satisfied.

48 Consideration due after time of disposal

[(1)] In the computation of the gain consideration for the disposal shall be brought into account without any discount for postponement of the right to receive any part of it and, in the first instance, without regard to a risk of any part of the consideration being irrecoverable or to the right to receive any part of the consideration being contingent; and if any part of the consideration so brought into account [subsequently proves to be irrecoverable, there shall be made, on a claim being made to that effect, such adjustment, whether by way of discharge or repayment of tax or otherwise, as is required in consequence].

127 Equation of original shares and new holding

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.

[135 Exchange of securities for those in another company]

[(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:

Case 1

Where company B holds, or in consequence of the exchange will hold, more than 25% of the ordinary share capital of company A.

Case 2

Where company B issues the shares or debentures in exchange for shares as the result of a general offer—

(a) made to members of company A or any class of them (with or without exceptions for persons connected with company B), and

(b) made in the first instance on a condition such that if it were satisfied company B would have control of company A.

Case 3

Where company B holds, or in consequence of the exchange will hold, the greater part of the voting power in 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.

(4) In this section "ordinary share capital" has the meaning given by section 832(1) of the Taxes Act …

…

…

(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).

[138A Use of earn-out rights for exchange of securities]

[(1) For the purposes of this section an earn-out right is so much of any right conferred on any person ("the seller") as—

(a) constitutes the whole or any part of the consideration for the transfer by him of shares in or debentures of a company ("the old securities");

(b) consists in a right to be issued with shares in or debentures of another company ("the new company");

(c) is such that the value or quantity of the shares or debentures to be issued in pursuance of the right ("the new securities") is unascertainable at the time when the right is conferred; and

(d) is not capable of being discharged in accordance with its terms otherwise than by the issue of the new securities.

(2) Where—

(a) there is an earn-out right, [and]

(b) the exchange of the old securities for the earn-out right is an exchange to which section 135 would apply, in a manner unaffected by section 137, if the earn-out right were an ascertainable amount of shares in or debentures of the new company, . . .

(c) . . .

this Act shall have effect, in the case of the seller and every other person who from time to time has the earn-out right, in accordance with the assumptions specified in subsection (3) below.

[(2A) Subsection (2) above does not have effect if the seller elects under this section for the earn-out right not to be treated as a security of the new company.]

(3) Those assumptions are—

(a) that the earn-out right is a security within the definition in section 132;

(b) that the security consisting in the earn-out right is a security of the new company and is incapable of being a qualifying corporate bond for the purposes of this Act;

(c) that references in this Act (including those in this section) to a debenture include references to a right that is assumed to be a security in accordance with paragraph (a) above; and

(d) that the issue of shares or debentures in pursuance of such a right constitutes the conversion of the right, in so far as it is discharged by the issue, into the shares or debentures that are issued.

(4) For the purposes of this section where—

(a) any right which is assumed, in accordance with this section, to be a security of a company ("the old right") is extinguished,

(b) the whole of the consideration for the extinguishment of the old right consists in another right ("the new right") to be issued with shares in or debentures of that company,

(c) the new right is such that the value or quantity of the shares or debentures to be issued in pursuance of the right (“the replacement securities”) is unascertainable at the time when the old right is extinguished, [and]

(d) the new right is not capable of being discharged in accordance with its terms otherwise than by the issue of the replacement securities, . . .

(e) . . .

the assumptions specified in subsection (3) above shall have effect in relation to the new right, in the case of [the person on whom the new right is conferred] and every other person who from time to time has the new right, as they had effect in relation to the old right.

…

(5) An election under this section in respect of any right must be made, by a notice given to an officer of the Board—

(a) in the case of an election by a company within the charge to corporation tax, within the period of two years from the end of the accounting period in which the right is conferred; and

(b) in any other case, on or before the first anniversary of the 31st January next following the year of assessment in which that right is conferred.

(6) An election under this section shall be irrevocable.

(7) Subject to subsections (8) to (10) below, where any right to be issued with shares in or debentures of a company is conferred on any person, the value or quantity of the shares or debentures to be issued in pursuance of that right shall be taken for the purposes of this section to be unascertainable at a particular time if, and only if—

(a) it is made referable to matters relating to any business or assets of one or more relevant companies; and

(b) those matters are uncertain at that time on account of future business or future assets being included in the business or assets to which they relate.

(8) Where a right to be issued with shares or debentures is conferred wholly or partly in consideration for the transfer of other shares or debentures or the extinguishment of any right, the value and quantity of the shares or debentures to be issued shall not be taken for the purposes of this section to be unascertainable in any case where, if—

(a) the transfer or extinguishment were a disposal, and

(b) a gain on that disposal fell to be computed in accordance with this Act,

the shares or debentures to be issued would, in pursuance of section 48, be themselves regarded as, or as included in, the consideration for the disposal.

…

(10) For the purposes of this section the value or quantity of shares or debentures shall not be taken to be unascertainable by reason only that it has not been fixed if it will be fixed by reference to the other and the other is ascertainable.

(11) In subsection (7) above "relevant company", in relation to any right to be issued
5 with shares in or debentures of a company, means—

(a) that company or any company which is in the same group of companies as that company; or

(b) the company for whose shares or debentures that right was or was part of the consideration, or any company in the same group of companies as that company;

10 and in this subsection the reference to a group of companies shall be construed in accordance with section 170(2) to (14).]

Taxes Management Act 1970

[28A Completion of enquiry into personal or trustee return [or NRCGT return]]
[(1) An enquiry under section 9A(1) [or 12ZM] of this Act is completed when an
15 officer of the Board by notice (a "closure notice") informs the taxpayer that he has completed his enquiries and states his conclusions.

In this section "the taxpayer" means the person to whom notice of enquiry was given.

(2) A closure notice must either—

(a) state that in the officer's opinion no amendment of the return is required, or

20 (b) make the amendments of the return required to give effect to his conclusions.

(3) A closure notice takes effect when it is issued.

…

114 Want of form or errors not to invalidate assessments, etc
(1) An assessment [or determination], warrant or other proceeding which purports to
25 be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated
30 therein according to common intent and understanding.

(2) An assessment [or determination] shall not be impeached or affected—

(a) by reason of a mistake therein as to—

(i) the name or surname of a person liable, or

(ii) the description of any profits or property, or

(iii) the amount of the tax charged, or

(b) by reason of any variance between the notice and the assessment [or determination].

5