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Case Number: TC09369

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2023/07452

CORPORATION TAX – restrictions on use of carried-forward losses – meaning of "relevant profits" in section 730G Corporation Tax Act 2010

Heard on: 24-25 October 2024
Judgment date: 6 December 2024

Before

TRIBUNAL JUDGE MARK BALDWIN
MRS CATHERINE FARQUAHRSON

Between

BLACKFRIARS HOTEL (UK) HOLDINGS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

<u>Representation:</u>

For BHHL: Nikhil Mehta of counsel, instructed by NGM Tax Law LLP

For the Respondents: Mark Fell KC and Harry Winter of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal is concerned with one narrow issue, whether (and, if so, how) section 730G of the Corporation Tax Act 2010 ("CTA 2010") affects the entitlement of the Appellant ("BHHL") to use its carried forward non-trading loan relationship deficits in its accounting period ended 31 December 2016 (the "2016 Accounting Period") and subsequent accounting periods.

FACTS

2. The agreed facts are as follows:

(1) At all material times, BHHL was a holding company, initially only holding all the shares of Blackfriars Hotel Limited ("BHL") and then from December 2015 holding those shares and all the shares in The Terrace Hotel Limited ("TTHL"). BHL owned and operated a hotel in London, and TTHL owned and operated a hotel in Edinburgh. TTHL bought the hotel in Edinburgh in December 2015 from a third party.

(2) From 2011, BHHL had a third-party bank loan of approximately £27.9m. Approximately £20m of the loan was used in subscribing for equity in BHL, and the balance was lent to BHL at interest.

(3) In each of the accounting periods ending 31 December 2011 through to 31 December 2015, BHHL had non-trading loan relationship deficits, due largely to interest on the bank loan being greater than interest earned from BHL. Some of the deficits were surrendered to BHL by way of group relief. BHL set the amounts surrendered against its profits from its hotel trade.

(4) As at 31 December 2015, BHHL had cumulative carried forward non-trading loan relationship deficits of approximately £2.36m.

(5) On 29 December 2015, BHHL made two intercompany loans as follows:

(a) An interest-bearing loan of £10m to TTHL, together with an equity subscription of £6m, to enable it to fund the purchase of the hotel in Edinburgh ("the TTHL Loan"); this loan and the equity subscription were funded out of BHHL's capital raised by way of additional share subscription and a shareholder loan;

(b) An interest-bearing loan of £20m to BHL ("the BHL New Loan"). The BHL New Loan was funded by reinvesting a dividend received from BHL, itself funded by way of a capital reduction in BHL.

(6) As we have seen, there was additional debt funding from BHHL to BHL for use in its business operations. The outstanding principal on these stood at approximately £7.3m as at 31 December 2014, and at approximately £3.6m as at 31 December 2015. The principal was further amortised to £1.9m by 31 December 2016. This debt funding is referred to as "the BHL Old Loan".

(7) The principal repayments of (and interest on) the BHL Old Loan were financed by BHL from its normal trading profits, not from any of the proceeds of the BHL New Loan. Both BHL loans carried interest at 6.6%. Interest on the BHL New Loan came to £1.32m in 2016, and interest on the amortising BHL Old Loan was £105,974, giving a total of £1,425,974 of interest on both loans. TTHL paid interest of £409,167 to BHHL in 2016 on the TTHL Loan.

(8) In the 2016 Accounting Period, BHHL made a net profit of £899,976 equal to interest from the intercompany loans less bank interest paid. This amount was reduced to £898,650 by the deduction of small management expenses of £1,326, which we will ignore in the rest of this decision as their quantum is immaterial. BHHL made further net profits in this manner in subsequent accounting periods up to the period ended 31 December 2019.

3. BHHL sought to use its carried forward non-trading loan relationship deficit against its profits for these four accounting periods. The Respondents ("HMRC") denied this treatment. The question for us is whether HMRC were right to do this.

THE LEGAL FRAMEWORK

4. The treatment of profits and losses from loan relationships is set out in Part 5 of the Corporation Tax Act 2009 ("CTA 2009"). Relevant points for us are outlined below:

5. Section 301 of CTA 2009 determines whether a company has a non-trading profit or a non-trading deficit from its loan relationships. Section.301(4) to (7) provide as follows:

> "(4) A company has non-trading profits for an accounting period from its loan relationships if the non-trading credits for the period exceed the non-trading debits for the period or there are no such debits.
>
> (5) The non-trading profits are equal to those credits, less any such debits.
>
> (6) A company has a non-trading deficit for an accounting period from its loan relationships if the non-trading debits for the period exceed the non-trading credits for the period or there are no such credits.
>
> (7) The non-trading deficit is equal to those debits, less any such credits"

6. In short, all non-trading debits and credits are aggregated to arrive at a non-trading profit or deficit. The aggregation of debits and credits under section 301 of CTA 2009 is subject to sections.441 and 442 of CTA 2009, which limit the bringing into account of debits and certain type of credit where the company has a loan relationship for an 'unallowable' (broadly, tax avoidance) purpose.

7. CTA 2009 lays down arrangements for how and when any deficit is brought into account for tax purposes: a non-trading deficit can be set off against profits for the deficit period or carried back to an earlier period. A deficit can also be carried forward and set off against future non-trading profits.

8. In some circumstances, one company in a group can surrender losses (a term we will use as a shorthand to include a non-trading loan relationship deficit) under Part 5 of the Corporation Tax Act 2010 ("CTA 2010") to another company in the same group and the latter company can then use the surrendered loss to reduce its own taxable profits. Until 1 April 2017, it was only possible to claim group relief in respect of surrendered losses where the 'claim period' and the 'surrender period' overlapped; group relief was not available in respect of losses which had been carried forward from an earlier period. From 1 April 2017, group relief was, generally, extended to carried forward losses. However, the right to surrender carried forward non-trading deficits from loan relationships only applies to non-trading deficits arising after 1 April 2017.

9. Put broadly, the predicament BHHL found itself in towards the end of 2015 was that it had carried forward losses (non-trading loan relationship deficits) which it could not surrender to another group company. It could only use those losses against its own future profits, but (as things stood) it was unlikely to have any. The only way those losses could be used by the group would be if BHHL could transact with one or both operating companies in a way which gave them a tax deduction, with BHHL using the carried forward losses to shelter the income

produced by that transaction. In effect, BHHL would be "refreshing" the losses by using them to generate new, more valuable in-year deductions elsewhere in the group.

10. As might be expected, the government introduced legislation designed to counter such "loss refreshing" arrangements. Part 14B of CTA 2010, which includes s.730G (the provision we are concerned with), is entitled "Tax avoidance involving carried forward losses". The Explanatory Notes prepared by HMRC and HM Treasury explain that the provisions in Part 14B "introduce an anti-avoidance rule to prevent companies from obtaining a corporation tax advantage by entering contrived arrangements to convert certain carried-forward reliefs into more versatile in-year deductions." Those Explanatory Notes state (at paragraph 25) that the "government has introduced this anti-avoidance rule to counteract the advantage for companies of entering into contrived arrangements to circumvent…the group relief rules…. which only allow relief to be surrendered by a group company against profits arising in the same overlapping period, and not the surrender of relief that has been carried forward".

11. The provision in Part 14B we are concerned with is section 730G. So far as relevant, it provides as follows:

> "(1) This section applies if conditions A to E are met.
>
> (2) Condition A is that—
>
> > (a) for the purposes of corporation tax a company has profits ("relevant profits") for an accounting period,
> >
> > (b) the relevant profits arise to the company as a result of any arrangements ("the tax arrangements"), and
> >
> > (c) in the absence of this section the company ("the relevant company") would, for corporation tax purposes, be entitled to deduct from the relevant profits for the period an amount in respect of any relevant carried-forward losses.
>
> (3) Condition B is that—
>
> > (a) the relevant company, or a company connected with that company, brings a deductible amount into account as a deduction for an accounting period, and
> >
> > (b) it is reasonable to assume that neither the company, nor any company connected with it, would have brought that amount into account as a deduction for that period but for the tax arrangements.
>
> (4) Condition C is that the main purpose, or one of the main purposes, of the tax arrangements is to secure a relevant corporation tax advantage….—
>
> > (a) for the relevant company…
>
> (5) In this section "relevant corporation tax advantage" means a corporation tax advantage involving—
>
> > (a) the deductible amount mentioned in subsection (3), and
> >
> > (b) the deduction of any relevant carried-forward losses from the relevant profits…
>
> (6) Condition D is that, at the time when the tax arrangements were entered into, it would have been reasonable to assume that the tax value of the tax arrangements would be greater than the non-tax value of the tax arrangements.
>
> (7) The "tax value" of the tax arrangements is the total value of—
>
> > (a) any relevant corporation tax advantage,…

> (b) any other economic benefits derived by—
>
> > (i) the relevant company… as a result of securing the relevant corporation tax advantage….
>
> (8) The "non-tax value" of the tax arrangements is the total value of any economic benefits, other than those falling within subsection (7)(a) … or (b), derived by—
>
> (a) the relevant company….
>
> as a result of the tax arrangements.
>
> (9) Condition E is that the tax arrangements are not arrangements in relation to which section 269CK (banking companies: profits arising from tax arrangements to be disregarded) applies.
>
> (10) If this section applies, the relevant company is not entitled to deduct from the relevant profits any amount in respect of the relevant carried-forward losses."

12. It is common ground that conditions B, C, D and E are met and so we are concerned only with the correct interpretation and application of condition A. A "relevant carried-forward loss" in subsection (10) includes a carried forward non-trading loan relationship deficit; see sections 730H(1) and 730F CTA 2010.

13. It is also agreed that we should proceed on the basis that the "tax arrangements" comprise only the BHL New Loan and the steps taken to bring it into existence, namely BHL's reduction of capital and payment of a dividend.

14. Although made at the same time as the BHL New Loan, it is agreed that the TTHL Loan is not part of the tax arrangements. Mr Fell has some reservations about whether the BHL Old Loan might be part of the tax arrangements, but this point was not argued and, as nothing turns on this, we have assumed that it is not.

15. At one point during the hearing Mr Mehta suggested for the first time that the "tax arrangements" might also include the continuing third-party bank loan to BHHL, but that suggestion was later abandoned when Mr Fell suggested that, if Mr Mehta was allowed to raise this argument, HMRC would want to be allowed to argue that some or all of the debits (interest charges) on the bank loan should be disallowed under sections.441 and 442 of CTA 2009 (see [6] above).

BHHL'S SUBMISSION

16. BHHL has two quite different arguments as to why HMRC are wrong to use section 730G to try to stop it using all its carried forward losses in the 2016 Accounting Period and subsequently. Firstly, it says that "relevant profits" is a defined term in condition A and it refers to all the profits for an accounting period. So, unless all BHHL's profits arise as a result of tax arrangements, condition A is not satisfied. Here, BHHL earned credits in the form of interest on the TTHL Loan and the BHL Old Loan. Neither of these loans had anything to do with the tax arrangements, but both credits, together with interest on the BHL New Loan, went into the computation of BHHL's profits.

17. BHHL says that the expression profits "arising as a result of" tax arrangements requires there to be a causal nexus between the profits and the tax arrangements. Mr Mehta submits that this is like the Latin concept of "causa causans", used to determine whether income or another form of benefit has a sufficient causal link with an employment to be taxable as employment income. The wording in condition A requires the tax arrangements to be the causa causans of the relevant profits. In the profit computation, interest generated on the TTHL Loan and the

BHL Old Loan has nothing to do with the tax arrangements, and so it cannot be said that the BHL New Loan is the causa causans of BHHL's profits for the 2016 Accounting Period.

18. BHHL's secondary argument, if its primary argument fails, is a computational one. To follow this, it may be useful to set out the figures for the 2016 Accounting Period, which are:

Interest paid to bank	(935,165)
BHL Old Loan interest	105,974
BHL New Loan interest	1,320,000
TTHL Loan interest	409,167
Profit	£899,976

19. BHHL has what it terms a "narrow" and a "broad" approach to its secondary argument. On its "narrow" approach, BHHL submits that the relevant profits are those profits arising from the tax arrangements less BHHL's interest expenditure. So, the calculation is £1,320,000 less £935,165 = £384,835. These are the relevant profits for the purposes of Section 730G(10), against which a deduction for carried forward losses should be denied. This leaves BHHL's profit arising from the TTHL Loan interest of £409,167, and £105,974 from interest on the BHL Old Loan. There is nothing in Section 730G to deny the use of carried forward losses against these profits, which here amount to £515,141.

20. On its "broad" approach, BHHL says that in subsection (10) "the relevant profits" refers to "profits ("relevant profits") for an accounting period" in subsection (2)(a). This means all the profits. The logic of this approach is that the law requires only one computation, and that computation brings into account all loan relationship credits and debits to ascertain relevant profits. The relevant profits include loan relationship items created by the tax arrangements and those existing independently. Adding both together and deducting debits results in a single profit figure. Under this approach, the computation for the 2016 Accounting Period gives a profit of £899,976. However, these are all the profits BHHL made, not just those arising from the tax arrangements. To compute those, it is necessary to exclude the interest from the TTHL Loan, as well as interest on the BHL Old Loan, so the profits arising from the tax arrangements are (again): £1,320,000 (interest on the BHL New Loan) less £935,165 (bank interest), giving relevant profits of £384,835. These are the relevant profits against which carried-forward losses may be denied under Section 790G(10).

21. BHHL submits that the difference between the two approaches is that the first limits relevant profits to those arising from the tax arrangements, and the second takes into account all profits for the period as the starting point. But both approaches give the same result of preserving the profits which remain once the tax arrangement profits have been removed. BHHL says that the relevant profits arising from the tax arrangements cannot be £899,976 as contended by HMRC. There is nothing in section 730G which requires the interest on the TTHL Loan or the interest on the BHL Old Loan to be subject to the rule in section 730G denying carry forward loss relief. All that is required is the computation of profits on a strict mathematical basis, including both profits from the tax arrangements and those which arise separately.

22. When we asked Mr Mehta on what basis he set the bank loan interest paid against the BHL New Loan interest received to calculate the relevant profits, he said that it is clear from a structure paper prepared by BDO (which Mr Mehta took us to in the Hearing Bundle) that the BHL New Loan was designed to create additional interest income, over and above the interest paid on the bank loan, and that link between the interest received on the BHL New Loan and its target (the interest paid on the bank loan) is what justifies the interest paid on the bank loan

being set against the interest received on the BHL New Loan for the purposes of calculating BHHL's relevant profits. It was at this point that Mr Mehta raised the suggestion (which he later withdrew) that the bank loan was part of the tax arrangements.

HMRC'S SUBMISSIONS

23. HMRC submit that the scope of the phrase 'relevant profits' in section 730G(2)(a) should be read in the light of the phrase "the relevant profits arise to the company as a result of...the tax arrangements" in section 730G(2)(b).

24. Those words in turn require us to ask whether the profits against which the relevant carried forward losses have been set arose "a result of" the tax arrangements. The phrase "as a result of" is commonly read by the court in statutes and elsewhere as connoting causation, but not exclusive causation: see, for example, *FCA v Avacade Limited & Ors*, [2021] EWCA Civ 1206 at [76]. Importantly, the phrase in condition A is "a result of…the tax arrangements", not "the result of…the tax arrangements" or "from…the tax arrangements", which (Mr Fell submits) suggests a relatively permissive causation test.

25. Mr Fell says that BHHL's profits all resulted from the BHL New Loan. If BHHL had not made the BHL New Loan, BHHL would have made a loss. The BHL New Loan essentially involves the addition of a tax motivated loan arrangement into BHHL's otherwise loss-making arrangements, turning the loss from that company's commercial loan arrangements into a profit.

26. Mr Fell described BHHL's primary case (that condition A will not be met at all where some of the company's profits in a period arise as a result of a tax arrangement and some do not) as giving rise to absurd and improbable implications which Parliament cannot have intended, making section 730G (in his words) "comically unlikely to apply". He referred to Lord Hodge's comments in *Project Blue Ltd v HMRC*, [2018] UKSC 30 at [31], that legislation should be construed in a way which seeks to avoid absurd or unlikely results. He says that HMRC's reading is a natural fit with the language of s.730G(2) and (10) as a whole and is consistent with the purpose of Part 14B of counteracting tax avoidance.

27. Mr Fell has three more granular criticisms of BHHL's primary case. First, he says that BHHL is confusing credits (the interest it earned on its loans) with profits; credits and debits are aggregated to arrive at profit.

28. Secondly, BHHL suggests that the causation test under condition A is similar to the Latin concept of causa causans (immediate cause), which it suggests is applied to determine whether earnings have a sufficient causal link with an employment to be taxable as employment income. This is a mischaracterisation of the case law on employment income, which applies an altogether less metaphysical and demanding test than causa causans: see *Kuehne + Nagel Drinks Logistics Limited v HMRC,* [2012] EWCA Civ 34 at [31] and [32], and the survey of authorities in *Charman v HMRC,* [2020] UKUT 253 (TCC) at [65] to [99]. In any event the modern case law on employment income is interpreting and applying the phrase "earnings from an employment". This wording suggests a significantly higher causal bar than the phrase "as a result of" in section 730G. So, it is not safe to apply employment earnings authorities as a guide to whether the causal test in condition A is met.

29. Third, BHHL suggests that causes should be treated as mutually exclusive for the purposes of section 730G, such that, if it can be shown that a profit is a result of a non-tax arrangement, it cannot also be a result of a tax arrangement. This is wrong in principle. Parliament can be taken to understand that the common law readily recognises the existence of concurrent causes; see *Avacade* at [76]. The contrary view was, Mr Fell says, "comprehensively debunked" in the Supreme Court's recent decision in *FCA v Arch Insurance*

(UK) Ltd & Ors, [2021] UKSC 1: see the observations of Lord Hamblen and Lord Leggatt at [171] to [176]. Even in the context of the strong concept of causation in employment earnings cases, Mr Fell says that the courts recognise the possibility of concurrent 'causes': see *Kuehne + Nagel Drinks Logistics Limited* at [56], per Patten LJ.

30. As far as BHHL's secondary case is concerned, Mr Fell criticises both the narrow and the broad approach for seeking to apply the phrase "the relevant profits arise to the company as a result of…. the tax arrangements" in condition A to the <u>credits</u> arising from the BHL New Loan, whereas the test is looking at <u>profits</u>. Secondly, in deducting debits only against credits from the BHL New Loan, both approaches conflict with the requirement in section 301(4) to (7) of CTA 2009 that whether a company has a non-trading profit or deficit is determined by aggregating all credits and debits. Third, both approaches generate results in which a company which enters a tax arrangement ends up in a better tax position than one which does not. Mr Fell suggests BHHL is really engaged on an apportionment exercise, but that is not permitted; section 730G(10) states that "the relevant company is not entitled to deduct from the relevant profits <u>any amount</u> in respect of the relevant carried-forward losses".

31. Finally, in terms of approach to section 730G, Mr Fell referred us to the comments of Lord Briggs and Lord Leggatt in *Rossendale Borough Council v Hurstwood Properties (A) Ltd*, [2021] UKSC 16 and Lord Reed in *UBS AG v HMRC* [2016] UKSC 13. He submits that BHHL's arguments run contrary to that purposive approach by trying to preserve some efficacy for the tax arrangements.

DISCUSSION

32. We start our analysis by addressing the approach we should take to analysing section 730G and the reading of section 730G that exercise leads us to.

33. The two Supreme Court cases cited by Mr Fell make it clear that the approach we should take to construing section 730G is a purposive one.

34. Hurstwood looked at schemes to avoid liability for business rates by the registered owner of empty premises granting a short lease of the unoccupied property to a special purpose vehicle ("SPV") without any assets or business. The SPV was immediately put into members' voluntary liquidation. The thinking was that the SPV became the "owner" of the property for the purpose of the liability for business rates, but relied on an exemption which applies where the owner of the property is being wound up. The registered owner is relieved from paying business rates, either until it terminates the lease because it has a tenant or other use for the property or until the lease is disclaimed by the liquidator. The period until the necessarily onerous leases were disclaimed by the liquidator would be deliberately prolonged.

35. Lord Briggs and Lord Leggatt (with whom the other Justices agreed) surveyed the modern purposive approach to statutory interpretation and confirmed that it applied to fiscal legislation. They explained that the reason why the result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions, which have no business purpose and have as their sole aim the avoidance of tax, is not some special tax rule, but simply that it is not generally to be expected that Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance. They considered that there are numerous authoritative statements in modern case law which emphasise the central importance in interpreting any legislation of identifying its purpose. They gave two examples, one of which was *R (Quintavalle) v Secretary of State for Health*, [2003] UKHL 13, where Lord Bingham of Cornhill said (at [8]):

> "Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the

> permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."

36. As a result, on the facts of that case, they held:

> "47. There can be no doubt that the definition of the "owner" of a hereditament in section 65(1) of the 1988 Act as "the person entitled to possession of it" is to be interpreted as denoting in a normal case the person who as a matter of the law of real property has the immediate legal right to actual physical possession of the relevant property. …
>
> …
>
> 48. In the unusual circumstances of this case, however, identifying "the person entitled to possession" in section 65(1) of the 1988 Act as the person with the immediate legal right to possession of the property would defeat the purpose of the legislation. As we have explained, the schemes were designed in such a way as to ensure that the SPV to whom a lease was granted had no real or practical control over whether the property was occupied or not and that such control remained at all times with the landlord.
>
> 49. In our view, Parliament cannot sensibly be taken to have intended that "the person entitled to possession" of an unoccupied property on whom the liability for rates is imposed should encompass a company which has no real or practical ability to exercise its legal right to possession and on which that legal right has been conferred for no purpose other than the avoidance of liability for rates. Still less can Parliament rationally be taken to have intended that an entitlement created with the aim of acting unlawfully and abusing procedures provided by company and insolvency law should fall within the statutory description.
>
> 50. In these circumstances we have no difficulty in concluding that, on the agreed and assumed facts, the SPVs to which leases were granted as part of either of the schemes we have described did not thereby become "entitled to possession" of the demised property for the purposes of the 1988 Act. Rather, throughout the term of the lease that person remained the defendant landlord."

37. *UBS* concerned a scheme to avoid tax on bankers' bonuses by the bank subscribing for redeemable shares in a special purpose offshore company set up solely for the purpose of the scheme. The shares were then awarded to the employees in place of the bonuses. Short-term restrictions were attached to the shares which were intended to enable them to benefit from the exemptions from income tax conferred by sections 425(2) and 429 of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003") on the award of such shares and the expiry of the restrictions. Once the restrictions expired, the shares were redeemable by the employees for cash, which would give rise to a charge to capital gains tax. In addition, there was an opportunity for employees to defer the redemption of their shares until they had held them for two years, by which time the rate of tax chargeable would be only 10%.

38. The Supreme Court took the view that the relevant part of ITEPA was introduced partly for the purpose of forestalling tax avoidance schemes. As a result, Lord Reed (with whom the other Justices agreed) commented at [77]:

> "Approaching the matter initially at a general level, the fact that Chapter 2 was introduced partly for the purpose of forestalling tax avoidance schemes self-evidently makes it difficult to attribute to Parliament an intention that it should apply to schemes which were carefully crafted to fall within its scope, purely for the purpose of tax avoidance. Furthermore, it is difficult to accept that

> Parliament can have intended to encourage by exemption from taxation the award of shares to employees, where the award of the shares has no purpose whatsoever other than the obtaining of the exemption itself: a matter which is reflected in the fact that the shares are in a company which was brought into existence merely for the purposes of the tax avoidance scheme, undertakes no activity beyond its participation in the scheme, and is liquidated upon the termination of the scheme. The encouragement of such schemes, unlike the encouragement of employee share ownership generally, or share incentive schemes in particular, would have no rational purpose, and would indeed be positively contrary to rationality, bearing in mind the general aims of income tax statutes."

39. He considered that there was no reason why section 425(2) should apply to "transactions having no connection to the real world of business, where a restrictive condition was deliberately contrived with no business or commercial purpose but solely in order to take advantage of the exemption. On the contrary, the general considerations discussed in para 77 above, and the approach to construction explained in paras 64 and 68 above, point towards the opposite conclusion".

40. In addition to these authorities, the Tribunal raised the older authorities which suggested (long before purposive interpretation had become the norm) that anti-avoidance provisions should be given a wide interpretation. In *Greenberg v CIR*, [1979] AC 109, Lord Reid said (at p137e):

> "We seem to have travelled a long way from the general and salutary rule that the subject is not to be taxed except by plain words. But I must recognise that plain words are seldom adequate to anticipate and forestall the multiplicity of ingenious schemes which are constantly being devised to evade taxation. Parliament is very properly determined to prevent this kind of tax evasion and, if the courts find it impossible to give very wide meanings to general phrases, the only alternative may be for Parliament to do as some other countries have done, and introduce legislation of a more sweeping character which will put the ordinary well-intentioned person at much greater risk than is created by a wide interpretation of such provisions as those which we are now considering."

41. Perhaps presciently, he later commented (at p138e):

> "I sometimes suspect that our normal meticulous methods of statutory construction tend to lead us astray by concentrating too much on verbal niceties and paying too little attention to the provisions read as a whole."

42. Lord Wilberforce elaborated on this approach in *IRC v Joiner*, [1975] 1 WLR 1701 at p1705g:

> "On the enactment of the original s 28 of the Finance Act 1960 it was possible to contend, and it was contended, that this section (and its associated sections) was directed against a particular type of tax avoidance known generally under such descriptions as dividend-stripping, asset-stripping and bond-washing, and that the sections and particular expressions used in them, amongst others 'transactions in securities', should be interpreted in the light of this supposed purpose. But this line of argument became unmaintainable after the decisions of this House in *Inland Revenue Comrs v Parker*' and *Greenberg v Inland Revenue Comrs*. It is clear that all the members of this House who decided those cases were of opinion that a wide interpretation must be given to the sections and to the expressions used in them. More than this, it appeared from the opinion of Lord Reid in *Greenberg v Inland Revenue Comrs* that the sections called for a different method of interpretation from that traditionally

> used in taxing Acts. For whereas it is generally the rule that clear words are required to impose a tax, so that the taxpayer has the benefit of doubts or ambiguities, Lord Reid made it clear that the scheme of the sections, introducing as they did a wide and general attack on tax avoidance, required that expressions which might otherwise have been cut down in the interest of precision were to be given the wide meaning evidently intended, even though they led to a conclusion short of which judges would normally desire to stop."

43. More recent cases appear to recognise the continued validity of this approach to the interpretation of anti-avoidance provisions as a free-standing principle, notwithstanding the more general ascendancy of purposive interpretation, which might be thought to have subsumed that approach or otherwise rendered it otiose; see the comments of Lord Doherty in the Inner House of the Court of Session in *Moulsdale v HMRC*, [2021] CSIH 29 at [54], where he referred to a comment of Lord Hoffmann in *Newnham College Cambridge v HMRC*, [2008] UKHL 23 at [15] (although Lord Hoffmann seems simply to be reciting an HMRC submission to this effect without commenting on it one way or another), and the comments of the Upper Tribunal in *HMRC v Sehgal*, [2024] UKUT 00074 (TCC) at [60].

44. Even without looking at the heading ("Part 14B: Tax Avoidance Involving Carried-forward Losses") of the Part of CTA 2010 in which section 730G falls or at the contemporaneous explanatory materials referred to at [10], we can readily see that section 730G is a carefully targeted anti-avoidance provision. We say this because:

(1) It is stepping in to prevent what would ordinarily be permissible. It operates after the profits and losses/deficits of relevant companies have been calculated and prevents the set-off of carried forward losses against "relevant profits" which would otherwise be permitted; and

(2) It operates only where there is a tax motivated arrangement, the tax value of which exceeds its non-tax value.

45. Where section 730G applies "the relevant company is not entitled to deduct from the relevant profits <u>any amount</u> in respect of the relevant carried-forward losses." These words (in particular those we have underlined) lead us to agree with Mr Fell that Parliament's intention here is that, where section 730G applies, the profits which result from the tax arrangements should not be sheltered by carried forward losses to any extent at all. Put another, perhaps broader and more colloquial, way, Parliament's intention would seem to be that any company participating in an arrangement within section 730G should not be any better off as a result of participating in that arrangement. As well as being consistent with the words in section 730G, such an interpretation reflects a purposive approach to the construction of the provision. It is hard to see why Parliament would want a company which engaged in arrangements within the scope of section 730G to be able to improve its position in any way at all.

46. Mr Mehta's primary contention is that, for section 730G to apply, <u>all</u> BHHL's profits in an accounting period must arise as a result of tax arrangements. He says this because "relevant profits" appears in quotation marks and parentheses immediately after "profits" in paragraph (a) of subsection (2). It is clear from this, he submits, that "relevant profits" refers to the profits of the accounting period and so, to meet the requirement in paragraph (b), the relevant profits (i.e. all the profits of the accounting period) must arise as a result of tax arrangements.

47. This means that, if a company has profits from an "untainted" activity, section 730G cannot apply, even in a case where there are profits generated by tax avoidance arrangements on a scale which dwarfs the profits of the untainted activity. We took as an example a company with a very large lending activity (like BHHL's) which also ran a small, but profitable, shoe shop. Mr Mehta was very clear that, even if the company engaged in tax arrangements which

generated all the profit of its lending activity, section 730G would not apply, even if those profits dwarfed those of the shoe shop. The same position obtains where "untainted" activities contribute to a single source of profits. BHHL's profits do not arise solely because of the tax arrangements, and that is sufficient to stop section 730G applying.

48. We are not with Mr Mehta on this point. In our view, a more natural reading of section 730G is that it applies if the company has profits in an accounting period which arise as a result of tax arrangements, whether or not it has other profits. In terms of the language of section 730G, both paragraphs (a) and (b) in subsection (2) contribute to the definition of "relevant profits": "relevant profits" are the company's profits for the purposes of corporation tax for an accounting period ((a)), which arise to the company as a result of tax arrangements ((b)).

49. We have seen that subsection (10) provides that, where section 730G is engaged, relevant carried-forward losses cannot be deducted "from the relevant profits". That provision draws a clear distinction between "relevant profits" and other profits. If section 730G could only be only engaged in a case where a company's entire profits arose as a result of tax arrangements, there would be no need to have a concept of "relevant profits", section 730G could simply refer to "profits" without more and subsection (10) could simply provide that carried forward losses cannot be set against the company's profits.

50. As well as being a more natural reading of section 730G, we consider that the reading set out in [48] is more consistent with the policy behind section 730G, as we have discerned it, that companies should not be able to improve their tax position by engaging in tax arrangements of the type that section 730G attacks. There is no reason consistent with that policy why Parliament should aim section 730G solely at companies with no profits other than those which result from tax arrangements and be content for companies which have other profits (however small in scale) to be free to continue engaging in loss refreshing schemes to their heart's content. We appreciate that there may be clearer ways of defining "relevant profits" than the approach adopted here, but we have no hesitation in holding that "relevant profits" are those which result from tax arrangements without there being any requirement that these are the company's only profits in the accounting period.

51. Mr Fell had some more granular criticisms of BHHL's principal argument (in particular that Mr Mehta treats the concepts of profit and loan relationship credit as interchangeable when in fact they are quite different), but we do not need to deal with them at this point. Our conclusion that, on a purposive construction of section 730G, the provision applies wherever a company has profits which result from tax arrangements, even if it has other profits, is sufficient to dispose of what Mr Mehta described as BHHL's principal argument.

52. Although we have disposed of BHHL's principal argument in the abstract, we have not yet decided whether BHHL had any "relevant profits" and, if it did, what the quantum of those profits was, and it is to those questions that we now turn.

53. Relevant profits are those which arise "as a result of" tax arrangements. In his skeleton argument Mr Mehta equated "as a result of" with the test he says the courts have historically used to determine whether an amount or benefit arises from a person's employment. This, he submitted, is a tight test of direct causation. The wording in condition A requires the tax arrangements to be the causa causans of the relevant profits, in other words that which causes the profits to arise. He says that the interest receipts in BHHL's profit computation generated on the TTHL Loan and on the BHL Old Loan are not caused by the tax arrangements. Accordingly, it cannot be said that the relevant profits for the accounting period arise from the tax arrangements.

54. Mr Mehta's position evolved somewhat in argument and he now says that all he is doing is adopting the "causa causans" test/approach as a useful tool in construing what "as a result

of" means here. He would accept that "because of" would be just as viable a reading. So, if we were to say that the profits arose because of the tax arrangements, then the section clearly bites with full force. But, if the profits arise because of the tax arrangements and because of something else, the section cannot operate. He draws a distinction between the situation here and the causation cases we discuss below, which deal with situations where there is more than one cause but a relevant cause is present. That may be enough (for example) for a valid claim to arise under an insurance policy. Here, he says, if there is more than one cause, then section 730G cannot apply at all.

55. Mr Fell accepts that the TTHL Loan and the BHL Old Loan play a contributory or co-operating role in the quantum of BHHL's profit, but he says that it would be wrong to think that, because there are other causal factors at play, it follows that the BHL New Loan was not the cause of the entirety of the profit. This is because the authorities recognise that there can be more than one cause of a single event.

56. *Avacade* concerned a company and associated individuals who, it was alleged, were knowingly concerned in contraventions of the UK's financial services legislation. Section 382 of the Financial Services and Markets Act 2000 allows the court to make a restitution order where a person has been knowingly concerned in a relevant breach and "profits have accrued to him as a result of the contravention". In that case customers were persuaded to set up self-invested pension plans (SIPPs) which would purchase various investment products. The question was whether the commissions on the purchase of the investment products were earned "as a result of" the contraventions (which were confined to making arrangements for entering into the SIPPs). It was held that the commissions arose "as a result of" the contraventions. Two reasons were given for this. One was the seamless and indivisible nature of the arrangements, which involved contravention by advising and arranging for the consumers to enter into the SIPPs for the purposes of making the investments. The contravention was a single indivisible set of arrangements. The second was described by Popplewell LJ (with whom the Master of the Rolls and Peter Jackson LJ agreed) like this (at [76]):

> "The second reason is that I would equate the test of causation in the words found in s. 382, "as a result of", with the common law test in negligence, namely that the contravention must be an efficient cause, but it need not be the sole or dominant cause: see generally Clerk & Lindsell on Torts, 23rd edn at 2-09ff. … Applying that test I would conclude that the consumer's entry into the SIPP was an efficient cause of the investment in the products and the consequent earning of commission. It was not the sole cause, or even the dominant cause, but the use of the SIPP was a necessary precursor to the investment being made and did more than merely provide the opportunity for the investment. The product investments could only be achieved by calling on the savings of consumers from their pensions, and that required the use of a pension mechanism, the SIPP, in order to make the investment. The transfer into the SIPP had an effective and efficient causative potency in bringing about the product investments and their consequent commission, even if analysed as a separate step in the arrangements."

57. We can see essentially the same point in *Arch Insurance*. The question there was whether particular cases of Covid caused the Government to introduce the restrictions that triggered business interruption insurance. The Supreme Court concluded that the Government's measures were taken in response to information about all the Covid cases and so it was realistic to analyse that situation as one in which all the individual Covid cases were equal causes of the imposition of the national measure. Lord Leggatt and Lord Hamblen said this about concurrent causes:

> "171. Although in *Leyland Shipping* Lord Shaw referred to "the" proximate cause or "the" real efficient cause of loss, and other speeches also used the definite article, in *Reischer v Borwick* [1894] QB 548, 551, Lindley LJ had contemplated the possibility that the ingress of water when the vessel was under tow was a concurrent proximate cause but that this would not prevent the loss from being covered, as the policy did not require the loss to be exclusively caused by the collision. It has since become well established that, as Lord Buckmaster expressed the principle in *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534, 539: "it is no answer to a claim under a policy that covers one cause of a loss that the loss was also due to another cause that was not so covered."
>
> 172. In *Heskell v Continental Express Ltd* [1950] 1 All ER 1033, 1048, *Reischer v Borwick* was treated by Devlin J as authority for a more general principle, extending beyond the field of insurance, that "if a breach of contract is one of two causes, both co-operating and both of equal efficacy, … it is sufficient to carry judgment for damages"."

58. Bearing in mind the need to construe section 730G in a purposive way, we cannot accept that "relevant profits" must be caused only by tax arrangements. Given that the profits of a company (or a particular head of profits, such as trading profits) can result from many different transactions, Mr Mehta's argument that "relevant profits" must be caused solely by tax arrangements would allow a company to introduce tax arrangements into a pre-existing activity (for example, a trade or, as here, a lending business) with complete impunity as far as section 730G is concerned. To our mind, such a proposition runs even more strongly counter to the policy behind section 730G than the proposition that section 730G can only operate on a company which has no profits other than relevant profits, and we have already explained that we cannot accept that proposition as it narrows the scope of a clear anti-avoidance provision in a way which Parliament cannot possibly have intended.

59. We should add that we do not consider that Mr Mehta's resort to the employment income authorities helps him here. They do not (as Mr Fell explained) give him unequivocal support and they are, in any event, addressing a differently articulated causation test.

60. We would respectfully adopt Popplewell LJ's expression in *Avacade* and hold that, for profits to arise as a result of tax arrangements, those arrangements must be an efficient cause of the profits, but they need not be the sole or even the dominant cause. We agree with Mr Fell that Parliament should be assumed to have legislated with an understanding that the common law readily recognises such an existence of concurrent causes. Putting the law to one side for a moment, it might also be expected to have legislated against a common sense understanding that very few (if any) events have a single cause. If Parliament had intended that relevant profits should result from tax arrangements and nothing else, we would have expected to see a stronger causal link articulated.

61. So far, we have decided that it is not necessary, for section 730G to operate, that all of a company's profits should be "relevant profits" (those which result from tax arrangements) and also that, in order for profits to be "relevant profits", tax arrangements must be an efficient cause of those profits, but they need not be the sole or even the dominant cause of them.

62. Profits are, as we have seen, the net result of a number of transactions, and neither of these two conclusions helps us to work out, in a case where tax arrangements comprise some (but not all) of the transactions effected by the company, the amount of profits which are "relevant profits".

63. The answer clearly cannot be <u>none</u> (on the basis that the profits are not solely generated by tax arrangements – we have already roundly rejected the idea that relevant profits must arise

solely from tax arrangements), but equally we cannot accept that all a company's profits are necessarily relevant profits just because tax arrangements contribute to them. If (in contrast to the position here) a company would have made profits (albeit of a lower amount) without engaging in tax arrangements, it cannot be the case that all the company's profits are relevant profits just because tax arrangements feature in their calculation. Subsection (10) clearly contemplates the existence of "untainted" profits to which the prohibition in section 730G will not apply. If the presence of tax arrangements meant that the prohibition in section 730G applied to all profits, subsection (10) would be unnecessary and the effect of section 730G would be to punish a company for engaging in tax arrangements, as it could end up in a worse position than if it had not done so, and we cannot see anything in the wording of section 730G or elsewhere which suggests that section 730G is intended to have such an effect. We end up needing, as Mr Mehta put the point in his closing submissions, to identify (quantify might be a more accurate expression) the effect of different concurrent causes.

64. At the risk of repeating ourselves, BHHL's profits are the net result of several transactions (interest received on the TTHL Loan and the BHL Old Loan, as well as interest received on the BHL New Loan, and interest paid on the bank loan). We cannot identify any rational basis on which to build a standalone calculation of the profit which results from the tax arrangements. Mr Mehta attempted this in his secondary argument. Both his broad and narrow approaches effectively linked the interest paid on the bank loan and the interest received on the BHL New Loan. Other than the fact that the BHL New Loan was designed to create additional interest income, over and above the interest paid on the bank loan, there is no link between the interest received on the BHL New Loan and its target (the interest paid on the bank loan) which could begin to justify such an approach to calculating BHHL's relevant profits. In addition, this calculation of BHHL's relevant profits includes a feature (interest paid on the bank loan) which has nothing to do with the tax arrangements, it now being accepted that the tax arrangements only comprise the BHL New Loan. We can readily identify a credit (interest on the BHL New Loan) which results from the tax arrangements, but we are not sure that we can identify any particular part of BHHL's profits (to which all these items of interest paid and received contribute).

65. The conclusion we have drawn from this exercise is that the correct approach to finding BHHL's relevant profits is not to try to isolate particular items (positive or negative) in the overall calculation of profit and in that way build up to a calculation of the relevant profits, "from the bottom up" as it were. In our view, the correct way to calculate how much of BHHL's profit has the tax arrangements as an efficient cause is to calculate what BHHL's profits would have been if the tax arrangements had not been implemented and compare that figure with BHHL's actual profits for the same period. Removing the effect of the tax arrangements in the alternative calculation of profits is consistent with our understanding of the purpose of section 730G (that companies should not be able to improve their position by participating in tax arrangements).

66. The calculation of BHHL's profits in the 2016 Accounting Period is at [18]. To calculate its profits without the tax arrangements, we need to remove the entry which reflects the interest received on the BHL New Loan, as the tax arrangements comprise the BHL New Loan, and so, in this hypothetical alternative world, there is no BHL New Loan. On that basis, BHHL's profit would be:

Interest paid to bank	(935,165)
BHL Old Loan interest	105,974
TTHL Loan interest	409,167

Loss/deficit	£(420,024)

67. This comparison shows that there would have been no profits (in fact there would have been an in-year non-trading loan relationship deficit) if there had been no tax arrangements, and so the tax arrangements are an efficient cause of the entirety of BHHL's profits in the 2016 Accounting Period, which therefore all arise "a result of" the tax arrangements. It follows that all BHHL's profits in the 2016 Accounting Period were "relevant profits".

68. We have not set out the figures, but the same effective position obtained in all the other accounting periods of BHHL under consideration.

DISPOSITION

69. For the reasons set out above, we have concluded that all the profits made by BHHL in the accounting periods under consideration were "relevant profits" for the purposes of section 730G CTA 2010, and therefore BHHL cannot deduct any amount in respect of its carried forward non-trading loan relationship deficits from any of those profits.

70. This appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

71. 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.

RELEASE DATE: 6th DECEMBER 2024