[2016] UKFTT 0677 (TC)

TC05407

Appeal number: TC/2015/04770

INHERITANCE TAX – Isle of Man trust - tax planning arrangement involving transfer of reversionary interest – whether excluded property or whether acquired for consideration – anti-avoidance case law – whether a transfer of value –* Saunders v Vautier *principle considered – appeals allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MICHAEL LAWTON SALINGER **Appellant**
JANICE LAWTON KIRBY

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS ELIZABETH BRIDGE

Sitting in public at the Royal Courts of Justice, Strand, London on 11 July 2016

Mr Richard Vallat of Counsel, instructed by Gateley LLP for the Appellant

Ms Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. In 2009, Mr Donald Paiba Salinger ("Mr Salinger") entered into tax planning arrangements by which he sought to reduce the inheritance tax ("IHT") which would arise on his estate following his death ("the Arrangements"). The relevant statutory provisions are therefore those which applied in 2009: legislation designed to block similar planning was introduced by Finance Act 2012, s 210, inserting s 74A into the Inheritance Tax Act 1984 ("IHTA").

2. The Arrangements involved the transfer of a reversionary interest in an Isle of Man ("IoM") trust to the Donald Salinger Family Trust ("the DSFT") Mr Salinger's children, Michael Lawton Salinger ("Mr Mike Salinger") and Janice Lawton Kirby are the trustees of the DSFT.

3. Mr Salinger died on 27 February 2011, and Mr Mike Salinger and Ms Kirby were appointed executors of his estate.

4. On 11 February 2015, HM Revenue & Customs ("HMRC") issued determinations on Mr Mike Salinger and Ms Kirby, in their capacity as executors of Mr Salinger's estate and also in their capacity as trustees of the DSFT ("the Appellants"). The determinations were on the basis that IHT was due, consequential upon the transfer of the reversionary interest to the DSFT.

5. The Appellants' case was that the reversionary interest was excluded property because no consideration was given for its acquisition, and that in any event there had been no transfer of value when it was transferred to the DSFT. HMRC contended that consideration had been given, and that Mr Salinger had made a transfer of value of £820,000.

6. For the reasons given in the main body of this decision, the Tribunal allowed the Appellants' appeals. Although the reversionary interest was not excluded property because consideration was given for its acquisition, its transfer to the DSFT caused no loss to Mr Salinger's estate and so was not a transfer of value.

7. The parties agreed that, following the Tribunal's decision in this case (and subject to any onward appeals) they would seek to agree between themselves whether any further IHT should be borne by Mr Salinger's estate or by the DSFT, and the arithmetical computation of any such amounts. If the parties were unable to agree, they would revert to the Tribunal. As a result, we heard no submissions on those issues.

Unless Order

8. The Appellants repeatedly failed to comply with Tribunal directions relating to the preparation of their appeals. On 2 June 2016, HMRC applied to the Tribunal, asking that the Appellants' appeals be struck out unless they complied with the agreed deadlines (an "Unless Order"), because the Appellants' failures meant that it was not possible for HMRC properly to prepare for the hearing.

9. HMRC's application asked that the Unless Order be made under Rule 8(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules"). This reads (emphasis added):

> "The proceedings, or the appropriate part of them, will *automatically* be struck out if the appellant has failed to comply with a direction that stated that failure by a party to comply with the direction would lead to the striking out of the proceedings or that part of them."

10. On 9 June 2016, Judge Poole issued an Unless Order under Rule 8(3)(a), directing that if the Appellants failed to comply with the specified deadlines, their appeals *may* be struck out.

11. Despite the Unless Order, the Appellants did not comply with certain of the directions. However, their skeleton argument was filed and served on time. Ms McCarthy said that HMRC was not now asking the Tribunal to direct that the appeals be struck out, because the skeleton argument and other documents had been received in sufficient time to allow HMRC properly to prepare for the hearing

12. We considered Rule 2 of the Tribunal Rules and decided that it was not in the interests of justice to strike out the appeals.

The law

13. The legal provisions are contained within the IHTA, as amended. So far as relevant to this decision, they are set out in the Appendix. All references to statutory provisions in this decision are to the IHTA, unless otherwise stated. In outline:

(1) IHT is charged on the value transferred by a "chargeable transfer" (s 1).

(2) A "chargeable transfer" is a transfer of value made by an individual other than an exempt transfer (s 2(1)).

(3) A "transfer of value" is "a disposition made by a person…as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition". The value transferred by the transfer is "the amount by which the value of his estate is less" as a result of the transfer (s 3(1)).

(4) In deciding whether there is a transfer of value within s 3(1), no account is taken of excluded property which ceases to form part of a person's estate as a result of a disposition (s 3(2)).

(5) IHT is charged on death as if the deceased had made a transfer of value immediately before he died; the value transferred is taken to be equal to the value of his estate at that time (s 4).

(6) A person's estate consists of all the property to which he is beneficially entitled (s 5(1)), but does not include an interest in possession acquired after 21 March 2006 (s 5(1)(a)). Furthermore, a person's estate immediately before death does not include excluded property (s 5(1)(b)).

(7) Transfers of value do not include dispositions made by way of arm's length transactions which are not intended to confer gratuitous benefit on any person (s 10).

(8) Both of the following are excluded property:

(a) a reversionary interest in an offshore trust, unless it was acquired for consideration in money or money's worth (s 48(1)); and

(b) settled property (other than a reversionary interest) if the property is outside the UK and the settlor was non-domiciled (s 48(3)).

The Evidence

14. The Tribunal had the benefit of a helpful bundle of documents prepared by the Appellants for the hearing. This included the following evidence:

(1) the correspondence between the parties, and between the parties and the Tribunal;

(2) documents relevant to the Arrangements, including:

(a) the trust deed for the Barussa Trust ("the Trust");

(b) the trust deed for the DSFT;

(c) correspondence between Mr Salinger's advisers and Mr Mike Salinger, and between those advisers and Mr Rotheroe of the Crossman Trust Company Ltd;

(d) Counsel's opinion on the Arrangements;

(e) a draft warranty deed between the Trustee and Mr Salinger and the final deed dated 24 September 2009;

(f) a deed of nomination dated 19 June 2009, under which Mr Salinger was nominated as Reversionary Beneficiary of the Trust;

(g) two deeds of extension, under which the date by which Mr Salinger's nomination could be revoked was extended ("Deeds of Extension");

(h) a further deed shortening the period and removing the Trustee's rights to nominate and revoke the interest given to a Reversionary Beneficiary ("the Deed of Revocation");

(i) an undertaking from Doughty Quinn, a firm of solicitors in the IoM, dated 18 September 2009 ("the Undertaking");

(j) an option deed dated 24 September 2009; a letter dated 25 September 2009 by which Mr Salinger exercised that option, and a deed of designation and assignment with the same date, executed by the Trust and Barussa Ltd ("Barussa"); and

(k) a deed of assignment dated 25 September 2009 between Mr Salinger and the trustees of the DSFT; and

(3) documents relating to similar arrangements in relation to a Mr Jones. He is not a party to this case, see §24 below.

The Facts

15. On the basis of the evidence provided, the Tribunal found the following facts, which were not in dispute. We make further findings later in our decision.

The Barussa Trust

16. Barussa Ltd ("Barussa"), the Crossman Trust Company Ltd, and Gullymoss Ltd ("Gullymoss") were all IoM resident and incorporated companies with common directors. They were not UK domiciled.

17. On 8 April 2008, Barussa settled the Trust. The Trustee was the Crossman Trust Company Ltd and the amount settled was £10. The Trust's governing law was that of the IoM (clause 3.1).

18. The beneficiaries of the Trust were the Income Beneficiary and the Reversionary Beneficiary (clause 1.1(xi)). The Trust Deed provided that:

(1) the Income Beneficiary was Barussa and/or any other persons who should be the assignee(s) of the whole or part of Barussa's right to income (clause 1.1(iii) and 4.4); and

(2) the Reversionary Beneficiary was Gullymoss (clause 1.1(x)).

19. The Trust Deed gave the Trustee the power:

(1) to nominate another person as the Reversionary Beneficiary instead of Gullymoss (clause 1.1(x)(a)(i));

(2) to revoke that nomination within 42 days, unless extended by deed before the expiry of the 42 day period (clause 1.1(x)(a)(ii)); and

(3) to extinguish or restrict any of its own powers (clause 6).

20. Clause 4.1 provided that the Trustee "shall hold the Trust Fund upon trust to accumulate and capitalise so much of the income thereof as the Trustees think fit and to pay the balance thereof not so accumulated and capitalised to the Income Beneficiary".

21. From the first anniversary of the settlement, the Trustee also had the power to pay the capital to the Income Beneficiary at its absolute discretion (clause 4.3(i)). In this decision, we have called the interest held by the Income Beneficiary "the income interest" although it is clear from this clause that, from 8 April 2009, the Trustee also had the power to pay the Trust's capital to the Income Beneficiary.

22. The Trust Period was 150 years; at the expiry of that period, the Trustee was to hold the capital and income on trust for the Reversionary Beneficiary (clauses 1.1(iv) and 4.3).

23. On 30 April 2008, Barussa borrowed £1m from a bank and transferred it to the Trust, so the Trust Fund then comprised £1,000,010. The Trust Fund was held in cash in an IoM bank account.

Mr Jones

24. At some point before 25 March 2009, a Mr Jones considered similar arrangements to those later entered into by Mr Salinger. On 25 March 2009, the Trustee nominated Mr Jones as the Reversionary Beneficiary in place of Gullymoss.

25. Mr Jones decided not to proceed with the planning. On 6 April 2009, the Trustee revoked the nomination and Gullymoss again became the Reversionary Beneficiary.

Communications relating to Mr Salinger

26. Mr Salinger was domiciled in the UK. At some point before 16 June 2009, Mr Mike Salinger discussed IHT planning in relation to his father's estate with his advisers, Ian Abrey of Hillier Hopkins LLP, a firm of chartered accountants and tax advisers, and Philip Laidlow of Laytons, a firm of solicitors.

27. On 18 June 2009, Mr Laidlow emailed Mr Rotheroe, a director of the Crossman Trust Company Ltd (which was also the Trustee of the Trust). Mr Laidlaw told Mr Rotheroe that Mr Salinger:

> "…has instructed me to advise him on inheritance tax planning, and among other things being considered is the possible acquisition of excluded property. Are you aware of any interest available in trusts with excluded property status. If so, please let me have details. Mr Salinger's budget is in the region of £950k to £1m."

28. The next day, the Trustee nominated Mr Salinger as the Trust's Reversionary Beneficiary in place of Gullymoss. Mr Rotheroe informed Mr Laidlow of this by email, saying:

> "A few minutes ago Mr Salinger was nominated as the Reversionary Beneficiary of an Excluded Property Trust (EPT). If your client is interested in pursuing matters we will send due diligence on the EPT."

29. On 20 June 2009, Mr Laidlow confirmed that Mr Salinger had asked for the due diligence material.

30. On 25 June 2009, Mr Laidlow emailed Mr Mike Salinger, saying:

> "I have now conducted preliminary due diligence on the trust to which your father has been nominated. He has been nominated as the reversionary beneficiary of the worthless interest on a revocable basis. He has the opportunity to make an offer for the other beneficiary interest in the trust...the trust has in fact been seen by me previously. A previous client was nominated as the reversionary beneficiary of the trust but did not proceed beyond that and his nomination was subsequently revoked by the trustee. I do not think this affects matters and in fact arguably strengthens matters by confirming that nomination

> as the reversionary beneficiary is a discrete step and not part of an inevitable series…"

31. On the same day, Mr Mike Salinger confirmed to Mr Laidlaw that his father had instructed him to proceed.

32. On 26 June 2009, Mr Salinger offered to pay £890,000 to acquire 83% of Barussa's interest in the Trust. This was rejected, as was a subsequent offer to pay the same amount, but in exchange for 82.6% of the interest. After further discussions, on 1 July 2009 Mr Rotheroe emailed Mr Laidlow saying:

> "Barussa Ltd's final position is that it will…accept a premium of approximately 8.5% over the funds in the Trust in which your client will acquire an interest. If accepted, this would mean, assuming your client's budget remains capped at £890,000, that your client would pay a premium of £70,000 to buy 820/1000 of Barussa Ltd's interest in the Trust…the purchase would be by way of a conditional option agreement for 21 years with the £890,000 being payable upon signature and a further £100, the strike price, being payable on exercise of the option."

33. On the same day, the parties agreed to proceed, subject to contract and receipt of a favourable opinion from Tax Counsel. Documentation was prepared including a draft Warranty Deed between the Trustee and Mr Salinger. By that deed the Trustee warranted, *inter alia*, that Barussa, the settlor of the Trust, was not domiciled in the United Kingdom and was controlled and managed in the Isle of Man. It also warranted that, as at the date of the deed, the Trust Fund contained £820,000. This was 82% of the £1m currently contained in the Trust.

34. By a Deed of Extension dated 28 July 2009, the Trustee extended the time limit for Mr Salinger's nomination as Reversionary Beneficiary from the 42 days specified in the Trust Deed to 84 days, in reliance on Clause 1.1(x)(a)(ii), see §19(2).

35. On 13 August 2009, Mr Stephen Arthur of Counsel opined that "the proposed arrangements outlined in my instructions will be effective to reduce the amount of IHT chargeable on Mr Salinger's estate". However, he advised that the domicile warranty should be extended from two years to four years.

36. On 20 August 2009, Mr Rotheroe emailed Ms Webster of Laytons saying:

> "A period of 4 years is unacceptable to us…Given that Laytons have already had many such cases cleared by HMRC and hence presumably the issue of who is the settlor of the EBT this is disappointing. Therefore, if your client is not prepared to accept a 2 year limitation as you have indicated this matter will not be proceeding and I would ask you to return all the documentation you have received without retaining any copies in any form."

37. On 21 August 2009, Ms Webster returned the documentation to Mr Rotheroe. However, on 26 August 2009, the parties compromised on a three year warranty period.

38. On 27 August 2009, the Trustee appointed capital out of the Trust Fund to Barussa; the amount was either £180,000 or £180,010. Both parties have stated that the former is correct, but the documentation is clear that after the transfer, £820,000 remained in the Trust. Although nothing turns on this, we find that £180,010 was transferred to Barussa.

39. Meanwhile, on 19 August 2009, Ms Webster had emailed Mr Mike Salinger, saying:

> "the reversionary interest your father will first acquire will have to be assigned to someone other than the person/s who will ultimately be assigned the income right/s of the trust after your father's death. We propose to assign this interest to a trust of which Mr Salinger's children will be nominees."

40. On 1 September 2009, Ms Webster emailed Mr Mike Salinger and Mr Alan Davis. Her email began:

> "I attach the following documentation:
>
> 1. Donald Salinger Family Trust – requires Donald's, Michael's and Janice's signature and which is where the Reversionary Interest will be assigned before Mr Salinger purchases the interest of the Income Beneficiary
>
> 2. Option Notice to be signed by Donald Salinger
>
> 3. Deed of Assignment - requires Donald's, Michael's and Janice's signature (Document to assign Reversionary Interest)
>
> Items 1-3 will be held to Mr Salinger's order until we are instructed to date them."

41. By a deed dated 9 September 2009 the Trustee further extended the time limit for the possible revocation of Mr Salinger's nomination as Reversionary Beneficiary from 84 days to 98 days.

42. On 18 September 2009, Mr Laidlow emailed Mr Davis, stating that:

> "Completion is scheduled for Thursday 24 September…My assistant Alexandra Webster will be travelling to the Isle of Man to deal with it. She will be in London on Wednesday and will be make arrangements to receive the signed documents.
>
> I am attaching various documents which require signature and various commentaries. These are:
>
> 1. a copy of the Barussa Trust plus commentary
>
> 2. option deed (requires signing by Mr Salinger) plus commentary
>
> 3. warranty deed (requires signing by Mr Salinger) plus commentary
>
> 4. deed reducing time to revoke nomination of reversionary beneficiary
>
> 5. Donald Salinger Family Trust (requires signing by Mr Salinger, Janice and Mike)

6. deed of assignment (requires signing by Mr Salinger, Janice and Mike)

7. option exercise notice (requires signing by Mr Salinger).

The various commentaries explain the particular documents

The overall picture is as follows. There are two interests in the Barussa Trust. The main interest carries 99.9% of the economic value of the trust and is to be bought by Mr Salinger. The secondary interest is the reversionary interest which is relatively worthless. Mr Salinger is currently nominated as the reversionary beneficiary. Up to Thursday that appointment can be revoked. If he does not buy the main interest it will certainly be revoked. Mr Salinger cannot own both beneficiary interests at once otherwise the trust will come automatically to an end (Saunders v Vautier). On Thursday Mr Salinger will sign the option deed which will allow him subsequently to exercise the option (at a strike price of £100) to acquire the main beneficiary interest. The £890,000 will be paid on Thursday to the selling beneficiary, Barussa Limited. From Thursday therefore Mr Salinger will have the certainty of acquiring the main beneficiary interest. In the event of his death prior to exercising the option (which period would only be a matter of 2 or 3 days) I confirm that his PRs [personal representatives] could exercise the option. Therefore there is no risk of losing the £890,000 and acquiring nothing in return…

After Mr Salinger has signed the option deed on Thursday he will get rid of his interest as reversionary beneficiary. He will do so by assigning it to the Donald Salinger Family Trust. This trust is a regular settlor interested trust ie Mr Salinger is the beneficiary for the rest of his life. Janice and Mike are the trustees. All three will need to sign this document. When this document is signed, Mr Salinger should please hand over to Janice and/or Mike or to you on their behalf, £20 as being the initial trust fund…

The idea of assigning the reversionary interest to the Donald Salinger Family Trust is so that the interest is held within the Salinger camp but is no longer held personally by Mr Salinger. The deed of assignment will subsequently be executed, a day or two following the 24th. Mr Salinger, Janice and Mike will need to sign the document. Please do not date it. The assignment is to be in consideration of £20…I appreciate that the passage if the £20 backwards and forwards may seem like a pantomime but the procedure ought to be followed please.

Once the assignment has taken place, Mr Salinger can safely exercise the option as at that point he will have disposed of the reversionary interest and there will be no danger of him holding both interests at once. Mr Salinger should please sign the option exercise notice but it should not be dated. At an appropriate moment I will ask for confirmation of Mr Salinger's wish that I should date the document and make it effective. At that point it will be sent to [the Trustee] and the whole exercise will have been completed…"

43. On the same day, Doughty Quinn provided the Undertaking to Mr Laidlaw. This stated that the £890,000 would be held in their client account, and only released to Barussa on certain conditions, which included the following:

(1) when the Option Agreement is duly executed by Mr Salinger and the Trustee;

(2) after midnight on 24 September 2009, and then only if Mr Salinger's nomination as Reversionary Beneficiary has not been revoked; and

(3) when a properly executed counterparty Option Agreement has been executed by Barussa, granting Mr Salinger the option to acquire the interest of the Income Beneficiary.

44. On 23 September 2009, Mr Davis sent the signed and undated documents to Mr Laidlow by courier. On the same day, the DSFT was settled by Mr Salinger; the trust fund was £20.

45. On 24 September 2009 the following documents were executed:

(1) a deed of Revocation, by which the Trustee shortened the period by which it could revoke Mr Salinger's nomination, and also exercised its power under clause 6 of the Trust Deed to extinguish its right to nominate or revoke a Reversionary Beneficiary;

(2) the Warranty Deed, amended to include the three year domicile warranty;

(3) an Option Deed, by which Barussa granted Mr Salinger the option to acquire the rights of the income beneficiary for £890,000 ("the Option"). The Option was exercisable for a period of 21 years for an exercise price of £100.

46. On 25 September 2009 the funds held in escrow by Doughty Quinn were released to Barussa in accordance with the Undertaking.

47. At 4pm on the same day, Mr Salinger transferred his reversionary interest in the Trust to the DSFT in exchange for £20. At 4.35pm he exercised the Option. At 5pm Barussa assigned the income interest in the Trust to Mr Salinger.

48. On 27 February 2011, Mr Salinger died. The Appellants were appointed as executors of his estate.

Submissions on behalf of the parties

49. The parties' submissions were on two main issues:

(1) whether the planning succeeded because no consideration had been given for the reversionary interest, which was therefore excluded property; and if not

(2) whether there was in any event a loss to Mr Salinger's estate when the reversionary interest was transferred to the DSFT.

50. The next part of our decision considers each issue in turn.

Whether consideration was given for the reversionary interest

Mr Vallat's submissions on behalf of the Appellant

51. Mr Vallat relied on s 48(1)(a), which provides that a reversionary interest is excluded property, providing it is not acquired for consideration. Mr Salinger had acquired the interest on 19 June 2009 without any payment in money or money's worth. At that stage there was no certainty that he would pay any money to the Trustee. This could be seen from the facts that:

(1) there had been a previous nomination of a Reversionary Beneficiary (Mr Jones), who had not gone on to acquire the income interest;

(2) the parties did not agree the value of the income interest until August 2009, and that agreement was also conditional on obtaining a favourable Counsel's opinion; and

(3) negotiations subsequently collapsed and all documents were returned to the Trustee.

52. Mr Vallat said that Mr Salinger's nomination was "merely an invitation to treat". This was "given freely as a preliminary step in the negotiations and there was no monetary *quid pro quo*."

53. Although his skeleton argument stated that Mr Salinger paid the £890,000 entirely for the Option, he accepted during the hearing that part of that sum was to ensure that the Trustee could not subsequently revoke the reversionary interest. However, he submitted this was irrelevant, because s 48(1)(a) did not apply only to indefeasible reversionary interests, but to all reversionary interests. Parliament could have made a distinction by providing that only indefeasible interests came within s 48(1)(a), but had not done so.

54. He went on to say that there was, in any event, no logical reason why there would be such a distinction. Not all revocable interests were valueless: for example, shares subject to a forfeiture clause has value. Equally, it is possible to make an irrevocable interest worthless, such as by appointing capital out of a trust.

55. Mr Vallat also accepted that, had Mr Salinger decided not to proceed with the Arrangements, the Trustee would have revoked his nomination as Reversionary Beneficiary. However, he said that this was similarly irrelevant. The nomination was not revoked, and as a question of fact, no consideration had been given for the interest. When the £890,000 passed to Barussa, the reversionary interest was already owned by Mr Salinger.

56. The Appellants' position was, he said, straightforward: Mr Salinger had obtained the reversionary interest for no consideration, and that was sufficient for the Arrangements to succeed.

Ms McCarthy's submissions on behalf of HMRC

57. Ms McCarthy said that the transfer of the reversionary interest to Mr Salinger on 19 June 2009 was "a nothing". Had he not proceeded with the Arrangements, the interest would have been revoked. In her submission, the real acquisition came later, when Mr Salinger paid £890,000 to acquire a bundle of rights, including the Option

and the warranties; making the reversionary interest indefeasible was a key part of that package. That this was the position was absolutely plain from the correspondence between the parties.

58. She said that the issue was how to construe the relevant statutory provisions, citing *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 ("*Arrowtown*") *per* Ribeiro PJ at [35]:

> "The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically. Where schemes involve intermediate transactions having no commercial purpose inserted for the sole purpose of tax avoidance, it is quite likely that a purposive interpretation will result in such steps being disregarded for fiscal purposes. But not always."

59. She relied on Lord Reed's summary of anti-avoidance case law in *UBS AG v HMRC; Deutsche Bank v HMRC* [2016] UKSC 13 ("*UBS*") at [61]-[68], under the heading "the *Ramsay* approach". He said at [64]:

> "This approach has proved to be particularly important in relation to tax avoidance schemes as a result of two factors identified in Barclays Mercantile at [34]. First, 'tax is generally imposed by reference to economic activities or transactions which exist, as Lord Wilberforce said, "in the real world"'. Secondly, tax avoidance schemes commonly include 'elements which have been inserted without any business or commercial purpose but are intended to have the effect of removing the transaction from the scope of the charge'. In other words, as Carnwath LJ said in the Court of Appeal in *Barclays Mercantile* [2002] EWCA Civ 1853, [2003] STC 66, 76 TC 446 (at [66]), taxing statutes generally 'draw their life-blood from real world transactions with real world economic effects'. Where an enactment is of that character, and a transaction, or an element of a composite transaction, has no purpose other than tax avoidance, it can usually be said, as Carnwath LJ stated, that 'to allow tax treatment to be governed by transactions which have no real world purpose of any kind is inconsistent with that fundamental characteristic'…"

60. Taking into account the guidance in *UBS*, Ms McCarthy submitted that it was wrong to see the acquisition of the reversionary interest on 19 June 2009 as a separate transaction. Instead, viewed realistically, it was part of a composite series of transactions.

61. She also drew attention to [69]-[71] of *UBS*, where Lord Reed summarised *HMRC v Scottish Provident Institution* [2005] STC 15, and relied in particular the final sentence of that summary, which reads:

> "…the statutory provision was properly construed as being concerned with a real and practical entitlement to gilts, it did not apply to a legal entitlement which was intended and expected to be cancelled by an equal and opposite obligation, even if there was a risk that the arrangement might not work as intended."

62. There was, she said, also an analogy between this appeal and the facts of *Arrowtown*. That case concerned a series of transactions including the issuance of "B" shares. Lord Millett said at [152] that the B shares had "no commercial content" and "barely even a shadowy existence", with the result they were not "share capital" within the meaning of the statutory provision at issue.

63. Ms McCarthy also relied on [77] of *UBS*, where Lord Reed said:

> "Approaching the matter initially at a general level, the fact that Ch 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."

64. She also submitted that the allocation of consideration by parties to an avoidance scheme is not conclusive, citing *HMRC v Tower MCashback LLP 1* [2011] UKSC 19 and *Booth v Buckwell* [1980] STC 578 at 584. Where, as here, the amounts so allocated do not reflect the true value of the assets being acquired, the allocation can be disregarded as mere labelling. However, she said that there was no need for her to identify what part of the £890,000 payment had been made to acquire the reversionary interest: it was enough for her to show that it had been acquired "for consideration".

Mr Vallat's response on the anti-avoidance case law

65. Mr Vallat accepted that *Arrowtown* and *UBS* were the relevant authorities. However, he emphasised the following passage from Lord Reed's judgment in *UBS*:

> "[68]…The point is that the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus on a specific transaction, as in *MacNiven* and *Barclays Mercantile*, then other transactions, although related, are unlikely to have any bearing on its application."

66. Mr Vallat said that the statutory provision in issue here was s 48(1), which provides that a reversionary interest is excluded property "unless it has at any time been acquired…for a consideration in money or money's worth". The other transactions, such as the acquisition of the Option, were simply not relevant when considering that section. The only realistic view of the facts was that Mr Salinger paid nothing for the reversionary interest.

67. In his submission there was no parallel with the B shares in *Arrowtown,* because the reversionary interest was not one which "came and went" but subsisted throughout the period. Neither was there any proper basis for relying on *UBS* at [77]. The statutory provisions relevant to UBS were contained in Chapter 2 of Part 7 of the Income Tax (Earnings and Pensions) Act 2003, and one of the purposes of Part 7 was to counteract tax avoidance opportunities, see *UBS* at [74]. There was no similar purpose to s 48(1).

Discussion

68. We agree, of course, that we must follow the approach set out in *Arrowtown* and *UBS*. The question we must answer is therefore whether "the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically".

69. The relevant statutory provision here is s 48(1), namely that "a reversionary interest is excluded property unless it has at any time been acquired…for a consideration in money or money's worth".

70. It seems to us that the word "acquired", construed purposefully, means that the acquirer must have at least some of the rights attributable to an owner - for instance, to dispose or transfer the interest, to mortgage it or to lend it.

71. Viewed realistically, we find that:

(1) when Mr Salinger was nominated as Reversionary Beneficiary on 19 June 2009, he received an empty shell, with no rights or powers. The interest was revocable at the discretion of the Trustee. Had Mr Salinger not gone ahead with the Arrangements, the nomination would have been revoked, just as happened with Mr Jones. This was recognised by Mr Laidlow in his email to Mr Davis of 18 September and was not disputed by Mr Vallat. The nomination had no purpose other than tax avoidance: it was merely a step in a pre-ordained tax avoidance scheme. To use the words of earlier judgments, Mr Salinger had "no real and practical entitlement" to the interest, which had "no real world purpose of any kind"; and

(2) Mr Salinger acquired the reversionary interest on 24 September 2009, when the Deed of Revocation was executed. That Deed prevented the Trustee from revoking the interest, either within the time period stated in the earlier Deeds of Extension or otherwise. It formed part of a package with other documents, including the Option Deed and the Warranty, for which consideration of £890,000 was given.

72. We agree with Ms McCarthy that there is a relevant parallel with the B shares in *Arrowtown*, which were described by Lord Reed at [52] as follows:

> "The creation and issue of the 'B' non-voting shares formed part of a larger transaction under which the development land was to be sold and transferred to a joint venture company in which Shiu Wing would retain a small 2% equity stake. The shares were created and issued in order to meet the qualifications for exemption from stamp duty in s 45 of the Ordinance. This was explicitly stated in the Heads of Agreement. They had no other purpose. This was not seriously disputed. Leaving aside for the moment their nominal value and the right to appoint a director of Prepared and Arrowtown which was attached to them, they had no commercial content at all. They carried no rights to dividends or capital on a winding up. If shares are considered as a bundle of rights, they had barely even a shadowy existence."

73. Lord Reed ends his judgment by saying at [157]:

> "The words 'issued share capital' in the section, properly construed, mean share capital issued for a commercial purpose and not merely to enable the taxpayer to claim that the requirements of the section have been complied with.."

74. Mr Vallat argued that the mere fact that the interest is revocable does not mean that it falls outside s 48(1), citing shares subject to forfeiture as an example. But we are not making our decision only on the basis that the interest granted to Mr Salinger in June 2009 is revocable, but because, like the B shares in *Arrowtown*, it had "barely even a shadowy existence".

75. We therefore agree with Ms McCarthy that HMRC succeed on this point. We also agree with her that no allocation of the purchase price between the different parts of the package is required; it is sufficient that consideration was given.

76. It follows that the reversionary interest is not excluded property.

Whether there was a transfer of value from Mr Salinger's estate

Submissions on behalf of the Appellants

77. Mr Vallat said that, even if consideration had been given for the reversionary interest, that did not mean any IHT was due. The reversionary interest had no value: its only entitlement was to the income and capital remaining in the Trust at the expiry of the Trust Period, which was 150 years (clauses 1.1(iv) and 4.3). As a result, the transfer of the interest to the DSFT cannot have diminished Mr Salinger's estate.

78. Mr Vallat emphasised that HMRC's determinations were made on the basis that Mr Salinger had made a chargeable transfer when the reversionary interest was transferred to the DSFT. HMRC had not challenged the purchase or exercise of the Option. The Tribunal would therefore be acting outside its powers if it decided that there had been a transfer of value relating to the acquisition or exercise of the Option.

79. It was, he said, in any event clear that there was also no transfer of value when Mr Salinger acquired the Option, because either:

(1) his estate was not diminished as a result of that acquisition; or

(2) if it was diminished, the transaction came within s 10, because Mr Salinger purchased the Option from Barussa on arm's length commercial terms and there was no intention to confer any gratuitous benefit.

80. In consequence, Mr Salinger's interest in the Trust, which he acquired when he exercised the Option, was excluded property within s 48(3)(a) because Barussa was not domiciled in the UK when the settlement was made, and at the relevant time there was no relevant anti-avoidance provision to prevent that outcome: s 74A had not then been introduced, and s 48(3B) only prevents a settlement from being excluded property if a UK domiciliary obtains an interest in possession for consideration, and Mr Salinger had not acquired an interest in possession.

Submissions on behalf of HMRC

81. Ms McCarthy said HMRC accepted that the £70,000 paid as fees to Barussa was a commercial transaction within s 10. However, it was HMRC's case that on 25 September 2009, Mr Salinger made a transfer of value of £820,000.

82. This was because, immediately prior to assigning the reversionary interest to the DSFT, Mr Salinger owned that interest and also had the power to exercise the Option. Had he exercised the Option, he would have obtained the income rights. He could then have called upon the Trustee to transfer the Trust Fund to him, in accordance with the principle established in *Saunders v Vautier* [1841] EWHC Ch J82.

83. Ms McCarthy did not cite any authorities for this well-established principle, but we note that in *Thorpe v HMRC* [2009] EWHC 611(Ch) at [45] Evans-Lombe J, citing *Snells Equity* (31st edn, 2005) at para 27-25, sets it down as follows:

> "Although the beneficiaries cannot, in general, control the trustees while the trust remains in being, or commit them to particular dealings with the trust property, they can, if *sui juris* and together entitled to the whole beneficial interest, put an end to the trust and direct the trustees to hand over the trust property as they direct; and this is so even if the trust deed contains express provisions for the determination of the trust."

84. Ms McCarthy said that, instead of putting himself in the position where he owned both interests, Mr Salinger had deliberately transferred away the reversionary interest before exercising the Option. Having done so, he was left with the Option.

85. In Ms McCarthy's submission, when Mr Salinger then exercised the Option and obtained the income interest, the rights attaching to that interest were also of negligible value because payments out of Trust Fund could only be made at the discretion of the Trustee (clauses 4.1 and 4.3).

86. If the Appellants were contending that the income rights had value, it was for them to lead evidence to that effect, and they had not done so. Mr Salinger's transfer of the reversionary interest was therefore a disposition, the result of which was that the value of his estate was reduced by £820,000.

87. She submitted that, if the Tribunal did not accept her submissions on *Saunders v Vautier*, HMRC should nevertheless succeed on the alternative ground that the transaction fell outside s 10 because:

(1) as set out in the preceding paragraphs, the income interest was of negligible value; and

(2) the reversionary interest was worthless, as its only entitlement was to the income and capital remaining in the Trust at the expiry of the Trust Period, which was 150 years.

88. It followed, she said, that Mr Salinger had therefore made a payment of £820,000 and obtained nothing of value. That cannot be a commercial transaction and must fall outside s 10.

89. Her skeleton argument included a third submission based on the wording of s 3(2), but it was abandoned in the course of the hearing and we say no more about it.

90. The Tribunal asked Ms McCarthy what would have happened had Mr Salinger asked the Trustee to pay him the Trust Fund – perhaps because he had fallen out with his children between September 2009, when he made the Arrangements, and his death in February 2011? Ms McCarthy said this possibility had not been considered, because the whole purpose of the Arrangements was to move the £820,000 out of Mr Salinger's estate for IHT purposes.

Mr Vallat's response

91. Mr Vallat submitted that *Saunders v Vautier* did not apply, because at the time the reversionary interest was transferred to the DSFT, the income interest was held by Barussa. As a result, the Trustee would have been unable to transfer the whole of the Trust Fund to Mr Salinger, even had he asked for it.

92. He accepted, in the context of the Tribunal's question to Ms McCarthy, that the whole of the capital in the Trust Fund could have been appointed to Mr Salinger as the Income Beneficiary.

Discussion

93. HMRC's position is that, had Mr Salinger exercised the Option at a time when he still held the reversionary interest, he would have had a right to the Trust Fund. The Appellants' response is that the *Saunders v Vautier* principle cannot apply, because Mr Salinger was never the sole beneficiary of the Trust.

94. The facts are clear that Mr Salinger transferred the reversionary interest on 25 September at 4pm, and only acquired the income interest an hour later. He was never in a position to ask the Trustee to collapse the Trust and pay out the Trust Fund. To

the extent that Ms McCarthy is submitting that *Saunders v Vautier* nevertheless applies, we do not agree.

95. We note that Ms McCarthy did not seek to argue that the *Ramsay* approach, as interpreted by *Arrowtown* and *UBS*, was in any way relevant. We agree this is correct. That approach applies to legislation and does not extend to basic legal principles such as that which underpins *Saunders v Vautier*: see for example *Lewin on Trusts*, 18th edition (2008), at 24-08 cited by Henderson J in *Hughes v Bourne* [2012] EWHC 2232 (Ch) at [34]:

> "The principle of *Saunders v Vautier* is not a rule of construction but depends on the proposition that the beneficiaries are collectively the beneficial proprietors of the fund."

96. Ms McCarthy is also, in terms, submitting that by deliberately blocking the possibility that *Saunders v Vautier* might apply, Mr Salinger omitted to do something he could easily have done. We agree that the Arrangements were structured taking into account *Saunders v Vautier*, see §42.

97. But an omission to act is not a disposition, apart from certain specific statutory exceptions such as those in s 3(3). HMRC did not submit that any such exception applied in this case.

98. Moreover, for s 3(1) to apply, there has to be a loss of value to Mr Salinger's estate as a result of the disposition. It is common ground that the reversionary interest was of negligible value, because its holder was entitled only to the income and capital remaining in the Trust at the expiry of the Trust Period. HMRC did not seek to argue that the reversionary interest had any greater value because of the very high probability that the Reversionary Beneficiary would be entitled to the entire Trust Fund on Mr Salinger's death.

99. HMRC's case is, instead, that the transfer of the reversionary interest prevented Mr Salinger accessing the Trust Fund as a matter of right, under *Saunders v Vautier,* and that the income interest which remained after he failed to take that opportunity was also of negligible value because income and capital could only be paid out to the Income Beneficiary at the discretion of the Trustee. We cannot agree.

100. Once Mr Salinger owned the income interest, he could have asked the Trustee to pay him the full value of the Trust Fund. Clause 4.2(i) gives the Trustee the power to pay the capital to the Income Beneficiary at its absolute discretion. As there is only one Income Beneficiary (Mr Salinger), it is very difficult to see any basis on which a reasonable trustee could have refused that request. There is no evidence of the Trustee acting unreasonably: for example, on 27 August 2009 £180,010 was paid out to Barussa on its request, so as to leave exactly £820,000 in the Trust Fund.

101. Alternatively, Mr Salinger could have assigned the interest to a third party under clause 1.1(iii), just as Barussa had assigned it to him. The Trust Fund is held in cash, not land, shares or property so this is not a case which involves difficult matters of valuation.

102. Ms McCarthy submitted that, unless the Appellants led evidence as to the value of the income interest, it could be assumed to have no value. Again, we do not agree. The Appellants' position was clear: namely that that Mr Salinger's estate had not been diminished by the exercise of the Option. There is no dispute as to the amount of money held by the Trust, or the powers of the Trustee.

103. Section 160 provides that "Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time". We do not need further evidence to find that, immediately after Mr Salinger had acquired the income interest on 25 September 2009, a third party would have be prepared to pay around £820,000 for the income interest, subject to some small discount for the administrative costs of applying to the Trustee.

104. It follows that we also find that the transfer of the reversionary interest to the DSFT was not a transfer of value, because there was no loss to Mr Salinger's estate as a result of that transfer. The Appellants' appeals therefore succeed on that basis.

105. For completeness, we also address Ms McCarthy's submission that Mr Salinger made a payment of £820,000 to obtain nothing of value, and that the transaction with Barussa was therefore not on a commercial basis. Mr Vallat said, rightly in our view, that this submission was not open to HMRC because it had not challenged the acquisition of the Option. Instead, the determinations were made on the basis that Mr Salinger had made a transfer of value when the reversionary interest was transferred to the Trust.

106. But in any event, we reject Ms McCarthy's submission. Mr Salinger made a payment of the £890,000, not only for the purchase of the Option, but for a package of rights, including the reversionary interest and the Warranty. It is clear from the detailed negotiations carried out between the parties that this was a transaction at arm's length between unconnected parties. As we have already found, the income interest was worth at or around the £820,000 contained within the Trust's bank account, so it was not the case that Mr Salinger had made a payment of £820,000 and obtained nothing of value. We therefore find that s 10 was satisfied.

Decision and appeal rights

107. We allow the Appellants' appeals. Although the reversionary interest is not excluded property, because consideration was given for its acquisition, there was no loss to the value of Mr Salinger's estate immediately following the transfer of that interest.

108. This document contains full findings of fact and reasons for the decision. If HMRC is dissatisfied with this decision, it has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules.

109. That 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 11 OCTOBER 2016

APPENDIX

Inheritance Taxes Act 1984[1]

1 Capital Transfer Tax

Capital transfer tax[2] shall be charged on the value transferred by a chargeable transfer.

2 Chargeable transfers and exempt transfers

(1) A chargeable transfer is a transfer of value which is made by an individual but is not (by virtue of Part II of this Act or any other enactment) an exempt transfer…

3 Transfers of value

(1) Subject to the following provisions of this Part of this Act, a transfer of value is a disposition made by a person (the transferor) as a result of which the value of his estate immediately after the disposition is less than it would be but for the disposition; and the amount by which it is less is the value transferred by the transfer.

(2) For the purposes of subsection (1) above no account shall be taken of the value of excluded property which ceases to form part of a person's estate as a result of a disposition…

(3) Where the value of a person's estate is diminished, and the value–

(a) of another person's estate, or

(b) of any settled property, other than settled property treated by section 49(1) below as property to which a person is beneficially entitled,

is increased by the first-mentioned person's omission to exercise a right, he shall be treated for the purposes of this section as having made a disposition at the time (or latest time) when he could have exercised the right, unless it is shown that the omission was not deliberate.

3A Potentially exempt transfers

(1A) Any reference in this Act to a potentially exempt transfer is…a reference to a transfer of value–

(a) which is made by an individual on or after 22nd March 2006,

(b) which, apart from this section, would be a chargeable transfer (or to the extent to which, apart from this section, it would be such a transfer), and

(c) to the extent that it constitutes–

(i) a gift to another individual

(ii) a gift into a disabled trust, or

(iii) a gift into a bereaved minor's trust on the coming to an end of an immediate post-death interest…

(4) A potentially exempt transfer which is made seven years or more before the death of the transferor is an exempt transfer and any other potentially exempt transfer is a chargeable transfer.

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[1] The provisions here set out are from the version of IHTA which was in force in 2009-10

[2] The reference in this section to CTT must be read as a reference to IHT in respect of a liability to tax arising on or after 25 July 1986, see FA 1986 s 100(1), (2)

(5) During the period beginning on the date of a potentially exempt transfer and ending immediately before–

(a) the seventh anniversary of that date, or

(b) if it is earlier, the death of the transferor,

it shall be assumed for the purposes of this Act that the transfer will prove to be an exempt transfer.

4 Transfers on death

(1) On the death of any person tax shall be charged as if, immediately before his death, he had made a transfer of value and the value transferred by it had been equal to the value of his estate immediately before his death…

5 Meaning of estate

(1) For the purposes of this Act a person's estate is the aggregate of all the property to which he is beneficially entitled, except that–

(a) the estate of a person–

(i) does not include an interest in possession in settled property to which section 71A or 71D below applies, and

(ii) does not include an interest in possession that falls within subsection (1A) below unless it falls within subsection (1B) below, and

(b) the estate of a person immediately before his death does not include excluded property….

(1A) An interest in possession falls within this subsection if–

(a) it is an interest in possession in settled property,

(b) the settled property is not property to which section 71A or 71D below applies,

(c) the person is beneficially entitled to the interest in possession,

(d) the person became beneficially entitled to the interest in possession on or after 22nd March 2006, and

(e) the interest in possession is–

(i) not an immediate post-death interest,

(ii) not a disabled person's interest, and

(iii) not a transitional serial interest.

(1B) An interest in possession falls within this subsection if the person–

(a) was domiciled in the United Kingdom on becoming beneficially entitled to it, and

(b) became beneficially entitled to it by virtue of a disposition which was prevented from being a transfer of value by section 10 below.

(2) A person who has a general power which enables him…to dispose of any property other than settled property, or to charge money on any property other than settled property, shall be treated as beneficially entitled to the property or money; and for this purpose "general power" means a power or authority enabling the person by whom it is exercisable to appoint or dispose of property as he thinks fit.

6 Excluded property

(1) Property situated outside the United Kingdom is excluded property if the person beneficially entitled to it is an individual domiciled outside the United Kingdom..

10 Dispositions not intended to confer gratuitous benefit

(1) A disposition is not a transfer of value if it is shown that it was not intended, and was not made in a transaction intended, to confer any gratuitous benefit on any person and either–

(a) that it was made in a transaction at arm's length between persons not connected with each other, or

(b) that it was such as might be expected to be made in a transaction at arm's length between persons not connected with each other…

(3) In this section–

"disposition" includes anything treated as a disposition by virtue of section 3(3) above;

"transaction" includes a series of transactions and any associated operations.

47 Reversionary interest

In this Act "reversionary interest" means a future interest under a settlement, whether it is vested or contingent (including an interest expectant on the termination of an interest in possession which, by virtue of section 50 below, is treated as subsisting in part of any property).

48 Excluded property

(1) A reversionary interest is excluded property unless–

(a) it has at any time been acquired (whether by the person entitled to it or by a person previously entitled to it) for a consideration in money or money's worth, or

(b) it is one to which either the settlor or his spouse or civil partner is or has been beneficially entitled…

(3) Where property comprised in a settlement is situated outside the United Kingdom–

(a) the property (but not a reversionary interest in the property) is excluded property unless the settlor was domiciled in the United Kingdom at the time the settlement was made, and

(b) section 6(1) above applies to a reversionary interest in the property but does not otherwise apply in relation to the property; but this subsection is subject to subsection (3B) below…

(3B) Property is not excluded property by virtue of subsection (3)…above if–

(a) a person is, or has been, beneficially entitled to an interest in possession in the property at any time,

(b) the person is, or was, at that time an individual domiciled in the United Kingdom, and

(c) the entitlement arose directly or indirectly as a result of a disposition made on or after 5th December 2005 for a consideration in money or money's worth.

(3C) For the purposes of subsection (3B) above–

(a) it is immaterial whether the consideration was given by the person or by anyone else, and

(b) the cases in which an entitlement arose indirectly as a result of a disposition include any case where the entitlement arose under a will or the law relating to intestacy

49 Treatment of interests in possession

(1) A person beneficially entitled to an interest in possession in settled property shall be treated for the purposes of this Act as beneficially entitled to the property in which the interest subsists.

(1A) Where the interest in possession mentioned in subsection (1) above is one to which the person becomes beneficially entitled on or after 22nd March 2006, subsection (1) above applies in relation to that interest only if, and for so long as, it is–

(a) an immediate post-death interest,

(b) a disabled person's interest, or

(c) a transitional serial interest...

160 Market value

Except as otherwise provided by this Act, the value at any time of any property shall for the purposes of this Act be the price which the property might reasonably be expected to fetch if sold in the open market at that time; but that price shall not be assumed to be reduced on the ground that the whole property is to be placed on the market at one and the same time.