Neutral Citation: [2022] UKFTT 00143 (TC)

Case Number: TC08474

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: **TC/2020/04218, TC/2020/04219, TC/2020/04220**

Income tax – transactions in securities – Part 13 Chapter 1 Income Tax Act 2007 – section 684 (1)(c) – whether the main purpose or one of the main purposes of the person being a party to the transactions in securities is to obtain an income tax advantage –

Heard on: 21-23 March 2022
Judgment date: 25 April 2022

Before

JUDGE GUY BRANNAN

Between

(1) IVAN WROE
(2) STEPHEN RIMMER
(3) COLIN TIMMS

Appellants

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Hartley Foster, counsel, instructed by KBL Solicitors

For the Respondents: Ben Elliott, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The Appellants (Mr Wroe, Mr Rimmer and Mr Timms) appeal against income tax assessments issued under the provisions of section 698(4) to (7) and section 700 Income Tax Act 2007 ("ITA")[1], forming part of Chapter 1 Part 13 ITA (which I shall refer to as the "Transactions in Securities legislation") and in accordance with prior counteraction notices for the years ended 5 April 2015 and 2016. The assessments were issued on the basis that the Appellants are each liable to pay additional income tax by reference to the re-purchases of preference shares by a company called Jenbest Ltd ("Jenbest").

2. Those purchases took place following a reorganisation ("the reorganisation") that had been undertaken in respect of a company called Proline Engineering Limited ("Proline"). Jenbest was established as a holding company of Proline as part of the share reorganisation; and, at all material times, the Appellants were directors and shareholders of Proline and then Jenbest.

3. Each of the three Appellants owned 200 ordinary shares in Proline, holding approximately 30% of the issued share capital of Proline, with a fourth individual shareholder, Mr Jones, holding approximately 10% of the issued share capital.

4. In August 2013, a new holding company, Jenbest, was inserted was inserted above Proline. The entire issued share capital of Proline was acquired by Jenbest. In return, each of the Appellants exchanged their Proline shares for 25% of the ordinary share capital in Jenbest and £600,000 £1 preference shares in Jenbest. The fourth shareholder (Mr Jones) was issued with 25% of the ordinary shares in Jenbest which were designated as A ordinary shares.

5. In advance of the transaction in August 2013, the Appellants applied for a statutory clearance under section 701 and HMRC subsequently gave a clearance. The clearance application did not mention the possibility of the preference shares being repurchased – the preference shares were described as "irredeemable".

6. In the period 2014-2016 (the tax years ended 5 April 2015 and 5 April 2016), Jenbest repurchased all of the preference shares for their nominal value with each Appellant therefore receiving £600,000.

7. Each Appellant returned the disposal of the preference shares on his self-assessment tax return. The Appellants treated the repurchase of the preference shares as a capital gains tax transaction subject to tax at a 10% rate.

8. In short, HMRC have challenged this treatment. They consider that the clearance that they gave in 2013 was void because the Appellants did not give full particulars of the proposed transactions (in particular, the potential repurchase of the preference shares). HMRC issued counteraction notices and assessments to each of the Appellants.

9. HMRC argue that, in broad terms, that the reorganisation was a transaction in securities and that the main purpose or one of the main purposes of each of the Appellants being a party to the transaction in securities was to obtain an income tax advantage for the purposes of section 684(1)(c). Accordingly, again in broad terms, the counteraction notices and assessments seek to tax the Appellants as if the proceeds on the repurchase of their preference shares were taxable as income rather than capital gain.

10. The Appellants argue, in summary, that a main purpose or one of the main purposes of the reorganisation did not include the obtaining of a tax advantage, pursuant to section

[1] All statutory references are to the Income Tax Act 2007 unless otherwise specified

684(1)(c), and that consequently counteraction notices and assessments should be set aside and the appeals allowed.

11. It was common ground, first, that the preconditions for counteraction set out in section 684(1)(a), (b) and (d) are met and, secondly, that the assessments that are the subject of the appeals were raised in time.

12. Accordingly, the sole issue that arises for determination by this Tribunal is whether the main purpose, or one of the main purposes, of the relevant transactions was to obtain an income tax advantage (within the meaning of section 684(1)(c)).

13. On 12 February 2021, this Tribunal directed that the Appellants' appeals should proceed together and be heard by the same Tribunal. This is the hearing of those appeals.

14. For ease of reference, I have set out in an Appendix to this decision the relevant statutory provisions.

15. For the reasons that follow, I dismiss the appeals and uphold the counteraction notices and assessments.

EVIDENCE

16. I was provided with an electronic main document bundle of over 400 pages and a supplementary document bundle of over 400 pages.

17. The sole witness to give evidence was Mr Timms. He provided two witness statements (the second correcting certain errors in the first witness statement), gave brief oral evidence in chief and was cross-examined at length.

THE COUNTERACTION NOTICES AND ASSESSMENTS UNDER APPEAL

18. As already noted, HMRC have issued counteraction notices and assessments under section 698 to each of the three Appellants in respect of the repurchase of their preference shares by Jenbest. The appeals before this Tribunal are made under section 705 against counteraction notices, adjustments and assessments made by HMRC under section 698.

19. Mr Wroe has appealed (reference TC/2020/04218) against:

(1) A counteraction notice issued on 30 March 2020 under section 698(2) in respect of a transaction on 24 June 2014 under which Mr Wroe sold 300,000 preference shares in Jenbest to that company for £300,000;

(2) An assessment for the year ended 5 April 2015 issued under section 698(4)-(5) assessing the additional income tax due as a result of that counteraction notice in the sum of £62,324.424[2];

(3) A counteraction notice issued on 30 March 2020 under section 698(2) in respect of transactions on 10 September 2015 and 2 March 2016 under which Mr Wroe sold (respectively) 200,000 and 100,000 preference shares in Jenbest to that company for total consideration of £300,000;

(4) An assessment for the year ended 5 April 2015 under section 698(4)-(5) assessing the additional income tax due as a result of that counteraction notice in the sum of £62,203.975.[3]

20. Mr Rimmer has appealed (reference TC/2020/04219) against:

[2] This figure includes interest – the amount of tax is £55,256.84 (as stated in the corresponding counteraction notice).

[3] This figure includes interest – the amount of tax is £53,616.80 (as stated in the corresponding counteraction notice).

(1) A counteraction notice issued on 30 March 2020 under section 698(2) in respect of a transaction on 24 June 2014 under which Mr Rimmer sold 300,000 preference shares in Jenbest to that company for £300,000;

(2) An assessment for the year ended 5 April 2015 under section 698(4)-(5) assessing the additional income tax due as a result of that counteraction notice in the sum of £62,203.976[4];

(3) A counteraction notice issued on 30 March 2020 under section 698(2) in respect of transactions on 10 September 2015 and 2 March 2016 under which Mr Rimmer sold (respectively) 200,000 and 100,000 preference shares in Jenbest to that company for total consideration of £300,000;

(4) An assessment for the year ended 5 April 2016 assessing the additional income tax due as a result of that counteraction notice in the sum of £58,924.757[5].

21. Mr Timms has appealed (reference TC/2020/04220) against:

(1) A counteraction notice issued on 30 March 2020 under section 698(2) in respect of transactions on 6 May 2014 and 31 December 2014 under which Mr Timms sold (respectively) 200,000 and 100,000 preference shares in Jenbest to that company for total consideration of £300,000;

(2) An assessment for the year ended 5 April 2015 assessing the additional income tax due as a result of that counteraction notice in the sum of £62,192.468[6];

(3) A counteraction notice issued on 30 March 2020 under section 698(2) in respect of transactions on 10 September 2015 and 2 March 2016 under which Mr Timms sold (respectively) 200,000 and 100,000 preference shares in Jenbest to that company for total consideration of £300,000;

(4) An assessment for the year ended 5 April 2016 assessing the additional income tax due as a result of that counteraction notice in the sum of £58,924.64[7].

THE FACTS

Undisputed facts

22. In or around May 1996, Mr. Timms and Mr. Rimmer discussed establishing a company that would design and supply conveyor systems. That idea was discussed with Mr. Wroe subsequently. It was agreed by the three Appellants that they would set up a company and this led, in due course, to the establishment of Proline. Proline was incorporated on 17 July 1996 and carried on a business of designing, installing and maintaining manufacturing equipment.

23. Mr Wroe, Mr Rimmer and Mr Timms were directors and shareholders of Proline[8]. Originally, each Appellant held one £1 ordinary share in the company. They were each allotted

[4] This figure includes interest – the amount of taxes £55,150.04 (as stated in the corresponding counteraction notice)

[5] This figure includes interest – the amount of taxes £53,616.70 (as stated in the corresponding counteraction notice).

[6] This figure includes interest – the amount of taxes 55,139.84 (as stated in the corresponding counteraction notice).

[7] This figure includes interest – the amount of taxes £53,616.70 (as stated in the corresponding counteraction notice).

[8] Mr Wroe was appointed as a director on 17 July 1996, Mr Rimmer and Mr Timms were appointed as directors on 19 July 1996.

a further 199 ordinary shares in October 2003. On 31 May 2011, the company passed a special resolution to issue a further 66 ordinary shares to another director of the company, Mr Jones[9].

24. In June 2013, the company was considered by the directors to be worth £3 million[10] and the share ownership of Proline was as follows:

Shareholder	**Shares held in Proline**	**% of ordinary share capital**
Mr Timms	200 ordinary shares	30.03%
Mr Rimmer	200 ordinary shares	30.03%
Mr Wroe	200 ordinary shares	30.03%
Mr Jones	66 ordinary shares	9.91%
Total:	**666 ordinary shares**	**100%**

25. In 2013, the Appellants sought advice from their tax advisers, CLB Coopers Chartered Accountants ("CLB"), in relation to a potential restructuring of the company which would involve equalising the shareholdings of the four shareholders. The advice from CLB was given by a tax partner called Mr Ian Smethurst. In early June 2013 there was a meeting between the Appellants, and Mr Smethurst and another colleague from CLB at which the potential restructuring of Proline was discussed. CLB's advice was subsequently summarised in a letter addressed to Mr Wroe, who was the point of contact at Proline for professional advisers, dated 25 June 2013. This letter formed an important part of HMRC's case and I shall set out the relevant extracts of the letter, as follows:

> "Dear Ivan
>
> **Proposed Reorganisation**
>
> **1. Summary of Transaction**
>
> The objective behind the transaction is to increase Gary [Mr Jones]'s ordinary shareholding in the company from 10% to 25%, and at the same time, compensate yourself, Steven [Mr Rimmer] and Colin [Mr Timms] for the reduction in your shareholding.
>
> Gary does not have the personal resources to purchase the shares of each of you, and it is therefore necessary to carry out a reorganisation of the company's shareholdings to achieve the desired result. The transaction requires the formation of a new holding company, which is something you were looking to implement in any event, and in the future, will enable you to ring fence profits and assets in the holding company.
>
> The company is considered to be worth £3 million and as such, a 30% holding is therefore worth £900,000 and Gary's 10% holding is worth £300,000.
>
> This means that yourself, Steven and Colin will have reduced the value of your ordinary shares by £600,000, and need to be compensated accordingly. The plan is therefore to issue you with £600,000 preference shares each in the new holding company.

[9] Mr Jones had been appointed a director of Proline on 1 January 2006
[10] See below, at paragraphs 25 and 30.

2. Capital Gains Tax Implications

The initial exchange of ordinary shares in Proline for ordinary and preference shares in the new holding company should not give rise to any capital gains tax (or income tax liability), as it represents a reorganisation of the company's share capital and is being carried out for bona fide commercial reasons.

We will apply for advanced clearance from HMRC for confirmation that this will be the case, under both the reorganisation legislation and the general anti-avoidance legislation for transactions in securities.

It will be important to ensure that the terms of the preference shares are such that they carry rights to participate in the full future profits of the company, and are not simply a fixed value debt. This is to ensure that the shares qualify for entrepreneur's relief on a future disposal of the shares, such that any capital gain is taxed at only 10% as opposed to 28%.

As discussed, if the reorganisation had been structured in such a way that you received cash consideration instead of the preference shares, it is extremely unlikely that HMRC would have given clearance under the general anti-avoidance legislation for transactions in securities. This is due to the fact that the three controlling shareholders would be simply reducing their combined shareholding from 90% to 75%, thereby retaining control of the company, yet drawing out the sum of £1 .8 million in the process. The upshot of this would be that the cash consideration would be taxed to income tax as a deemed dividend at the rate of 30.5%.

3. Stamp Duty

…

4. Future Encashment of Preference Shares

When HMRC grant clearance to the initial reorganisation, it is likely that their letter will say that the clearance does not extend to any future redemption of the preference shares.

The plan is such that when you cash in part or all of the shares, the disposal gives rise to a capital gain which is taxable at only 10%. The capital gain will need to be reported on your self-assessment tax returns.

However, for the reasons outlined below, I am unable to give you any guarantee that capital gains tax will definitively apply to the encashment of the preference shares, and I felt that I should make you aware of the position.

As you are aware, it will be the company that is redeeming the shares and the company will need to have both sufficient distributable reserves and cash to do so.

As mentioned above, there is general anti-avoidance legislation that can be applied to any transaction in securities, if HMRC believe that one of the main purposes of the transaction is to obtain a tax advantage.

It would be up to HMRC to issue a counter action notice if they believed that you had gained a tax advantage, and if they did, it would mean that the capital gains tax treatment would no longer apply and would instead be subject to income tax as a deemed dividend, taxable at 30.5%.

In other words, a counter action notice would simply put you back into the position that you are currently in – namely, if you were to draw a large amount of cash as a dividend, you would be liable to income tax on that dividend at an effective rate of 30.5%.

> What we are trying to achieve however, is to reduce the rate of tax to 10% by treating the amounts paid out as a capital payment, in return for shares.
>
> We could apply for advanced clearance, prior to the redemption of any of the shares. However, to do so would simply flag the matter to HMRC.
>
> If we did apply for clearance, we would need to be able to show that the redemption of the shares has been undertaken forward genuine commercial reasons (e.g. as part of your phased retirement from the business), which will help to demonstrate that the gaining of a tax advantage was not the main purpose of the transaction. This would also serve as a defence against any counter action notice.
>
> Ideally, you would not redeem any preference shares for a period of at least 12 months, and would only redeem the shares on a piecemeal basis, over a period of several years. In this way, the risk of a counter action notice being applied to the whole of the redemption is reduced.
>
> Please note that if the company was sold to a third party, or to a new management team where there was a fundamental change in the ownership of the company (more than 75% of the shares changing hands) then these provisions would not apply.
>
> I trust that this is a useful summary of the position."

26. Pausing there for a moment, it is largely on the basis of this letter that HMRC argue that the reason, or one of the main reasons, for issuing the preference shares rather than simply paying cash was to attempt to avoid the application of the Transactions in Securities legislation, in particular, in circumstances in which it was recognised that the Appellants were only reducing their combined shareholding by 15% and yet were extracting £1.8m from the company; 15% of the value of the company would be approximately £450,000 (without applying any discounts).

27. On 17 January 2019 CLB wrote to HMRC regarding their earlier letter of 25 June 2013:

> "We are unable to locate a copy of the meeting notes from the June 2013 meeting however the letter dated 25 June 2013, sent shortly after the meeting, will be a summary of the discussions…."

28. On 25 June 2013, CLB made a clearance application to HMRC under section 138 Taxation of Chargeable Gains Act 1992 ("TCGA") and, more importantly for the purposes of these appeals, section 701 ITA 2007 in relation to the reorganisation of the share capital of Proline.

29. The clearance application stated as follows:

> "[Proline] is experiencing healthy growth and the directors wish to recognise the contribution made to the company's growth by the 10% shareholder, Gary Jones.
>
> It is believed that Mr Jones is critical to the future growth and success of the company, and the directors wish to ensure that Mr Jones ordinary shareholding in the company is at least equal to the other shareholders.
>
> The directors also believe that Mr Jones could eventually lead a management buy-out of the company and are keen to ensure that he has a large enough stake in the company, which will enable him to see this through."

30. After setting out the existing shareholdings in Proline, CLB continued:

> "3. Commercial Rationale

The purpose of the proposed transaction… is to provide an equal level of share ownership, including voting rights, dividend income and future capital growth to the current shareholders of Proline, whilst putting a corporate group in place to provide flexibility for the Company to grow.

Mr Jones is a key member of the management team and the current shareholders are keen to bring his shareholding up to 25% in recognition of his importance to the future of the Company.

Mr Jones currently owns 10% of the ordinary share capital but is unable to raise sufficient personal finance to acquire a further 15% of the shareholding. The existing shareholders have therefore agreed to reorganise the share capital of the Company whilst locking in the current value of the shares. The directors have valued the Company at £3 million.

The proposed transaction also provides the ideal opportunity to put a structure in place to facilitate the eventual retirement of the directors. The future intention is to allot some share options to certain key employees under an EMI Scheme, which will pave the way for a future management buy-out on the eventual retirement of Messrs Wroe, Rimmer and Timms. It should however be noted that no director currently has any plans to retire from the Company.

4. Proposed transactions

A new company will be formed ("Newco") and an offer will be made by Newco to acquire the entire share capital of Proline. The consideration will be as follows:

Each shareholder will be offered a choice of:

1. One ordinary share of £1 each in Newco for each ordinary share in Proline; or

2. 4477.612 irredeemable preference shares of £1 each in Newco for each ordinary share in Proline.

It is anticipated that Ivan Wroe, Stephen Rimmer and Colin Timms will each exchange 134 of their ordinary shares in Proline for £600,000 of preference shares in Newco.

It is anticipated that each shareholder will exchange 66 shares of their ordinary shares in Proline for an issue of 66 ordinary shares in Newco.

The share capital of Newco will therefore comprise the following:

Shareholder	**Number of Ordinary £1 shares held**	**Percentage holding (%)**	**Preference shares held (£)**
Ivan Wroe	66	25	600,000
Stephen Rimmer	66	25	600,000
Colin Timms	66	25	600,000
Gary Jones	66	25	600,000

There will be no cash consideration exchanged for this transaction.

The preference shares will carry no automatic right to a dividend and no voting rights, but will be entitled to the first £1.8 million of any consideration on a sale or winding up.

….

6. Clearance requested

> We apply for clearance under s138(1) TCGA 1992 that the Board of HM Revenue & Customs is satisfied that the proposed transactions are to be effected for bone fide commercial reasons and will not form part of any such scheme or arrangements of which the main purpose, or one of the main purposes, is the avoidance of a liability to capital gains tax or corporation tax and that s137 TCGA 1992 will not apply to prevent the provisions of s135 TCGA from applying to the exchange of ordinary shares for securities.
>
> We also seek clearance under the provisions of s701 ITA 2007 that no notice will be given under s695(1) ITA 2007 on the above mentioned transactions."

31. It will be noted that the clearance application made no reference to any possible repurchase of the preference shares, merely describing them as "irredeemable" and stated that the shareholders would be entitled to £1.8m on a sale or the winding up of the company.

32. On 3 July 2013, HMRC provided clearance under section 701 (and section 138 TCGA) for the proposed reorganisation

33. On or around 3 July 2013, each of the Appellants and Mr Jones acquired one £1 ordinary share in Jenbest (which had already been incorporated on 30 May 2013).

34. On 23 August 2013, the reorganisation took place and the shareholders of Proline became shareholders of Jenbest (with the shareholdings specified below).

35. The Articles of Association of Jenbest provided that the preference shares had no right to vote and no right to redemption. The Articles further provided:

> "Upon a Realisation or upon any return of capital (including any distribution on a winding up) the first £1,800,000 of Realisation Proceeds or the amount available for distribution to members (as the case may be) shall be paid to the holder or holders for the time being of preference shares (pro rata to their respective shareholdings of preference shares) and subject thereto the balance of the Realisation Proceeds or the amount available for distribution to members shall be payable to the holders of the ordinary shares and A ordinary shares in proportion to the number of shares held by them respectively."

36. HMRC noted, and this was common ground, that the reorganisation did not take place in exactly the same manner as described in the clearance application because each shareholder received an additional 66 £1 ordinary shares, giving them 67 £1 ordinary shares each in total. In addition, at the date of the reorganisation, Mr Jones' 67 ordinary £1 shares in Jenbest were redesignated as £1 A ordinary shares. I do not, however, consider that anything turns on this relatively immaterial difference. Therefore, the shareholdings in Jenbest following the reorganisation were as follows:

Shareholder	**Shares held in Jenbest**	**Percentage of ordinary share capital**	**Percentage of preference share capital**
Mr Wroe	67 ordinary shares and 600,000 preference shares	25%	33.3%
Mr Rimmer	67 ordinary shares and 600,000 preference shares	25%	33.3%
Mr Timms	67 ordinary shares and 600,000 preference shares	25%	33.3%
Mr Jones	67 A ordinary shares	25%	0%

Totals	**1,800,000 preference shares and 268 ordinary shares**	**100%**	**100%**

37. There was no evidence to which my attention was drawn to suggest that Mr Jones paid anything for the increase in his percentage shareholding from 10% to 25% and I find that he did not pay for this increase.

38. In early to mid-2014 there were further discussions between the Appellants in relation to retirement and succession plans. On 20 March 2014, there was a meeting between the Appellants, Mr Jones and CLB. The notes of that meeting, prepared by CLB, were so far as material, as follows:

> "1. The meeting was held to discuss potential exit and retirement strategies for the shareholders. There is a concern that [the Appellants] are of a similar age and that all may want to retire together, and dependent upon whether their exit was structured as a management buyout, could put a significant financial strain on the company.
>
> 2. The ages of the shareholders and their retirement plans are as follows:
>
> | | Age | Retire in |
> |---|---|---|
> | [Mr Wroe] | 52 | 6 years |
> | [Mr Rimmer] | 52 | 10 years (latest) |
> | [Mr Timms] | 48 | 7 years (latest) |
> | [Mr Jones] | 43 | no plans |
>
> It is possible therefore that [Mr Wroe] and [Mr Timms] could look to retire at the same time, with [Mr Rimmer] following shortly afterwards.
>
> The issue for [Mr Jones] is whether he would be happy to take on debt within the company to fund the buy-back of shares from the retiring shareholders, and also, whether there is sufficient strength in the management team below and the willingness for them to become shareholders in the company.
>
> 3. The issue would resolve itself if all of the shareholders decided that a trade sale of the company was a preferable route.
>
> 4. If [Mr Jones] decided that he would prefer to continue building the company and to buy out the retiring shareholders, then he would need to raise the funds within the company to enable him to do so. This could be done by a combination of:
>
> a) Cash and reserves that have been built up in the business
>
> b) Bank borrowings
>
> c) Personal cash injections by the continuing shareholders
>
> d) Deferred consideration paid to the retiring shareholders
>
> e) Venture capital monies or a third party investor
>
> It will be in the interest of both the retiring shareholders and the continuing shareholders for the company to continue to trade successfully, and it will be important to ensure that the company can meet its ongoing commitment to any bank borrowings. It is common in management buy-out situations for the retiring shareholders to accept some form of deferred payment, but equally, they will also want to ensure that the company continues to trade, so that they eventually get paid out. They could seek to take a charge over the company's assets, ranking behind the bank, to give them a measure of security.

> It is often difficult for younger shareholders to raise significant amounts of personal capital and most management buy-outs are therefore funded out of a combination of the company's existing resources, bank borrowings and loans from the retiring shareholders.
>
> It was agreed that a venture capitalist would be a last resort, as [Mr Jones] may find it difficult to work with such an organisation….
>
> 5. A management buyout does not need to involve buying out all three shareholders at once. [Mr Wroe] could decide to leave first, followed by [Mr Timms] and then [Mr Rimmer], or any combination for that matter.
>
> …
>
> 7. The potential new shareholders include [Mr Green] and [Mr Webb], both aged 41, and the proposal is to award them some share options under the [EMI] scheme in the near future….
>
> ..."

39. On 6 May 2014, Jenbest acquired and cancelled 200,000 preference shares held by Mr Timms for a consideration of £200,000. In approving the transaction, the board of directors confirmed at its meeting on 6 May 2014 that had sufficient distributable profits available to repurchase the shares for the above consideration. The repurchase of Mr Timms' preference shares was funded by a dividend received by Jenbest from Proline of £199,999.80.

40. Next, on 24 September 2014, Jenbest granted one of its employees, Mr Webb, the option to acquire 9 £1 A ordinary shares. Then, on 8 October 2014, Jenbest granted another employee, Mr Green, a similar option to acquire 9 £1 A ordinary shares.

41. However, in December 2014 the Appellants and Mr Jones were informed by Mr Green that his father was terminally ill and that he needed to spend time caring for him. Mr Green's role encompassed considerable overseas travel. He informed the directors of Jenbest in or around December 2014 that he was no longer able to do this. It was agreed that his role would be changed to enable him to work from home.

42. The remaining preference shares were repurchased by Jenbest between June 2014 and March 2016.

43. First, on 24 June 2014, Jenbest repurchased 300,000 preference shares held by Mr Rimmer for a consideration of £300,000. Again, the board of directors of Jenbest, at a meeting held on the same day, confirmed that Jenbest had sufficient distributable profits available in order to pay the consideration. Once again, the share repurchase was funded by way of a dividend received by Jenbest from proline of £299,999.70.

44. Secondly, on 3 December 2014, Jenbest repurchased 300,000 preference shares held by Mr Wroe and 100,000 preference shares held by Mr Timms for an aggregate consideration of £400,000. The board of directors of Jenbest, at the meeting held on 24 June 2014, confirmed that Jenbest had sufficient distributable profits available for the payment of the consideration. The transaction was also funded by a dividend received by Jenbest from Proline of £499,500.

45. Thirdly, on 10 September 2015, Jenbest repurchased 200,000 preference shares owned by Mr Timms, 200,000 preference shares held by Mr Rimmer and 200,000 preference shares held by Mr Wroe. The preference shares were cancelled for an aggregate consideration of £600,000. At a board meeting of the directors of Jenbest on 10 September 2015, it was confirmed that Jenbest had sufficient distributable profits available for the payment of the consideration. The transaction was funded by way of a dividend received by Jenbest from Proline of £603,000.

46. On 2 March 2016, Jenbest repurchased 100,000 preference shares held by Mr Timms, 100,000 preference shares held by Mr Rimmer and 100,000 preference shares held by Mr Wroe for an aggregate consideration of 300,000. At a board meeting of the directors of Jenbest on 2 March 2016, it was confirmed that Jenbest had sufficient distributable profits available for the payment of the consideration. The transaction was funded by way of dividend received by Jenbest from proline of £301,500.

47. In November 2017, the shareholders, including the Appellants, sold their entire remaining shareholdings to an unconnected third party, CPM Holdings Inc (an investment company based in the United States) for £13 million. As part of the sale and purchase agreement, it was agreed that the Appellants and Mr Jones would remain as employees of Proline for two years after the sale. The Appellants left the company in November 2019. After the sale of the business to CPM Holdings Inc, Mr Jones was made managing director of Proline.

48. It is understood that each of Appellants and Mr Jones would have received approximately £3,250,000 from the sale (i.e. 25% of the total proceeds). At the time of this sale, the A ordinary shares held by Mr Jones were re-designated as ordinary shares.

49. Each Appellant filed their self-assessment returns on the basis that the £600,000 that they had received from Jenbest should be treated as disposal proceeds subject to capital gains tax at the rate of 10% (applying entrepreneurs' relief).

50. On 6 September 2018, HMRC notified each Appellant that they considered that the Transactions in Securities legislation might apply to the reduction in share capital in Jenbest and the payments made to the Appellants and requested the provision of certain information. This information was provided and the validity of applying section 684 ITA was discussed in correspondence.

51. On 25 October 2018, CLB wrote to HMRC summarising a meeting between CLB and the Appellants in June 2013. So far as material for present purposes, the letter stated:

> "In June 2013 a meeting was held between three directors [the Appellants] and ourselves, CLB Coopers, to discuss the options available to the three directors in terms of how they could move the business forward and how this would fit in with their plans to retire from the business in the near future and to allow the next generation of management to take the company forward.
>
> At the time of our meeting in June 2013. [Sic] All three expressed a desire to retire from the company within five years.
>
> …
>
> At the time of this meeting it was felt that the four individuals [the Appellants and Mr Jones] contributed equally to the running of the business and they were keen for this to be reflected in the shareholding such that each had a 25% holding it was also felt that bringing [Mr Jones'] shareholding to parity with the other three shareholders would be for the benefit of the trade and it would potentially allow for management buyout to be considered as a means for the directors to exit the business and retire.
>
> At the time of this transaction [Mr Jones] did not have the required finance available to acquire shares from the existing shareholders, nor was there capacity within the company to finance a MBO and as such it was agreed that in order to equalise the shareholding, a new company would be incorporated, [Jenbest], and a combination of preference shares and ordinary shares would be issued in exchange for the shareholdings in [Proline] such that equity could be equalised and remain fair to all parties.

> Preference shares were issued in order to apportion the value that had been generated to date to the existing shareholdings as it was important to the three shareholders with the larger shareholding that the value of the company that had been generated in the past was locked into their preference shares so that on any subsequent sale this value could be realised.
>
> …
>
> As part of a phased retirement plan for the three historic shareholders holding preference shares it was agreed that they would redeem their preference shares over a period of time, to manage the cash flow and financing of their retirement, in order to eliminate the preference shares first.
>
> The reason for redeeming preference shares first was to protect their investment as to sell ordinary shares first was felt to leave the historic shareholders with an exposure over when they may receive the remainder of their investment. As such it was felt important to maintain their ordinary shares as a protective measure.
>
> …
>
> In September 2015 [Mr Green] decided that he no longer wanted to be part of an MBO team and resigned from the business. His EMI share options lapsed at that time. [Mr Green's] resignation changed the focus of the Shareholders and a new direction was taken.
>
> The shareholders decided that an MBO may no longer be a viable option and decided to explore the possibility of selling their entire shareholding to an unconnected party and thus approached CLB Coopers to begin marketing the business for sale to see what value could be realised.
>
> …
>
> Based on the above knowledge on the facts of the transactions, we trust you can agree that the motive behind the redemption of the preference shares was not to gain an income tax advantage but was undertaken purely for commercial reasons as part of a phased retirement plan that was in place for the benefit of the company's trade in order that this could be preserved and moved onto the next level of management but which was somewhat superseded partway through by an offer that could not be ignored and the resignation of one of the potential MBO team. "

52. On 29 March 2019, HMRC notified the Appellants that the clearance granted on 3 July 2013 was void by virtue of the application of section 702(4).

53. On 18 November 2019, pursuant to section 695 HMRC issued preliminary notifications that section 684 ITA may apply to the purchase of the preference shares by Jenbest.

54. On 17 December 2019, each Appellant made a statutory declaration under section 696(1) that they were of the opinion that section 684 did not apply to them in respect of the specified transactions. In his evidence, Mr Timms accepted that the statutory declarations (which were materially identical as regards each of the three Appellants) had been written for the Appellants, but the Appellants had read them and signed them.

55. On 3 March 2020, this Tribunal (Judge Poole) made a determination under section 697 and decided that there was a prima facie case for HMRC to take further action on the basis that section 684 applied.

56. On 30-31 March 2020, HMRC issued counteraction notices and assessments to each Appellant in respect of the transactions under which the preference shares were purchased by Jenbest (set out above).

57. On 29 April 2020, the Appellants appealed against the counteraction notices and assessments. On 11 June 2020, the Appellants requested a statutory review of the decisions.

58. On 4 November 2020, HMRC issued the review conclusion upholding the counteraction notices.

59. On 2 December 2020, the Appellants notified their appeals to the Tribunal.

Mr Timms' evidence

60. I shall set out below the evidence of Mr Timms. Significant parts of Mr Timms' evidence were challenged in cross-examination and I shall set out my conclusions on those parts of the evidence later in this decision.

61. In so far as Mr Timms' evidence recorded the above undisputed facts, I shall not duplicate his evidence in this section as far as possible.

62. Mr Timms said that the Appellants trusted each other completely. If professional advice was required, Mr Wroe would usually attend the offices of the professionals concerned and report back to Mr Timms and Mr Rimmer.

63. Mr Jones joined Proline in 1999. With Mr Jones' assistance, Proline developed into a world-renowned manufacturer of quality conveying equipment – previously Proline had been a company which had installed and manufactured certain types of conveying equipment. The development of Proline's business led to growth in terms of turnover and employees. The reason for the allotment of 199 shares in Proline to each of the Appellants in October 2003 was to enable Mr Jones to be issued with a minority shareholding (10%). Due to work commitments, the issue of shares to Mr Jones did not take place until May 2011.

64. The Appellants considered that Mr Jones was essential to the growth and success of Proline. In 2011 the Appellants again discussed incentivising Mr Jones in seeking to ensure that he stayed at Proline. They agreed that he should be granted shares in the business. Consequently, on 31 May 2011 Proline issued 66 ordinary shares in the company to Mr Jones, providing him with a 10% holding, with the Appellants each holding 30%.

65. There was no evidence that Mr Jones paid for his 10% shareholding and Mr Timms could not remember what if anything had been paid by Mr Jones for the shares issued to him.

66. In 2004, discussions took place about appointing Mr Jones as a director. This did not take place until sometime later but from that time Mr Jones' remuneration was set at the same level as that of the Appellants and he was awarded bonuses equal to 10% of the total bonuses that were available to directors. Mr Timms said that Mr Jones was entirely trustworthy.

67. In the event, Mr Jones was appointed as a director on 1 January 2006 and became a key member of the management team. The manufacturing side of the business became increasingly responsible for a significant percentage of Proline's turnover, employing more staff and engineers, and enabling the company to be less reliant on support from sub- contractors.

68. Mr Timms said that the topic of retirement was first seriously discussed amongst the directors in 2011. He could not recall the exact date of the discussions; there were many over the course of the next 2 to 3 years or so. He said that:

> "One of the first questions that we asked each other was at what age we wanted to retire, and when that would be. In 2011, my desire was to retire at 55, which would be in 2020. I recall that both [Mr Rimmer] and [Mr Wroe] potentially wanted to retire at 57, which would be in 2019, and that [Mr Jones] potentially wanted to retire at 55, which would be in 2024. The earliest of these dates of retirement was 2019. In 2011, that seemed a long way off, particularly as these were, at this stage, the earliest dates by which we hoped to retire from working.

> But, the four of us discussed and agreed that it would be necessary to start putting things in place as soon as possible and it would be sensible to start developing a succession plan, so that Proline could continue as a successful business.
>
> …
>
> [O]ver the course of 2011 to 2013, there had been a number of discussions amongst the directors regarding retirement, and the management and development of Proline after the retirements of [the Appellants]. The exact dates on which [Mr Rimmer], [Mr Wroe] and [Mr Jones] hoped to retire fluctuated slightly over this period. To the best of my recollection, [Mr Wroe] started indicating that he wanted to stay on beyond 60 in or around 2013. This was (again) a very busy period for Proline. Whilst there were many discussions in this regard, actually implementing our personal retirement plans would always slip to the bottom of our collective 'to do' list, with the demands of the business always taking priority. "

69. In cross-examination, however, Mr Timms accepted that the account given in the CLB letter of 25 October 2018, viz that at the meeting in 2013 the Appellants expressed a desire to retire within five years, was accurate. Mr Timms noted that the Appellants' views on retirement dates changed regularly, but by 2013 they were "close to it". Mr Timms accepted that it was "probably correct" that at the meeting in 2013 the Appellants had told CLB that they wanted to retire by 2018.

70. By 2013, the majority of Proline's revenue was being generated from the manufacturing side. This was Mr Jones' department and specialisation. His intention was to remain at Proline for a number of years after the Appellants had retired. Mr Timms considered that Mr Jones was essential to the future growth and success of Proline. The Appellants wanted to ensure that Mr Jones was supported by other directors after the Appellants had retired. The Appellants considered that there were two candidates for being made directors of Proline in the future: Mr Green and Mr Webb. The Appellants agreed that Mr Green and Mr Webb should be provided with an opportunity to obtain a share of Proline and to prepare them with a view to taking over as directors on the retirement of the Appellants.

71. Proline took advice from CLB, who had been the company's accountants from 2003. Mr Wroe was in regular contact with the firm. Given the relationship with CLB, it was to that firm that the Appellants turned for advice on putting the retirement and succession plans into place.

72. In June 2013 there was a meeting with CLB attended by the Appellants. Mr Jones was not present, but he was made fully aware of the Appellants' views and discussions both before and after the meeting.

73. At the meeting, according to Mr Timms, it was explained to CLB that the Appellants wanted a structure in place that would facilitate a smooth handover of the running of the company to Mr Jones, Mr Green and Mr Webb on the Appellants' retirement. It was explained that the Appellants wanted Mr Jones' shareholding to be increased to 25%, so that he held an equal shareholding with the Appellants. Mr Jones, however, did not have sufficient funds to acquire a further 15% of the Proline shares. In relation to Mr Green and Mr Webb, the Appellants wanted them to be incentivised to remain at the company and to assist Mr Jones with its management and that this should be done by giving them either shares or share options.

74. Mr Timms said that CLB's advice was that the best way of achieving their objective as regards Mr Jones was a reorganisation, with the Appellants exchanging their ordinary shares in Proline for preference shares and ordinary shares in a new company, and Mr Jones also exchanging his ordinary shares in Proline for ordinary shares in the new company. The ordinary

share capital of the new company would be held by the Appellants and Mr Jones, with each shareholder having the same number of ordinary shares. Mr Timms was challenged in cross-examination about the reason that a new holding company was placed on top of Proline.

75. According to Mr Timms, this reorganisation would enable the capital value of Proline that had been generated previously to be preserved for the Appellants. It would also enable Mr Jones to acquire an equal shareholding so that he would then be able to participate equally in the anticipated future growth in the value of the company. As regards Mr Green and Mr Webb, it was proposed that they should be granted share options under an Enterprise Management Incentive ("EMI") scheme. The Appellants agreed with this proposal but it took some time for the share options to be granted because of the Appellants' workload and unavailability – Mr Green and Mr Webb were regularly working overseas for long periods of time.

76. Mr Timms said that he did not have any notes of the meeting and did not recall being provided with a copy by CLB. However, to the best of his recollection, he considered that the description of what was discussed at this meeting in June 2013 was accurately set out in the letter dated 25 October 2018 from CLB to HMRC (quoted at paragraph 51 above). Mr Timms' evidence was that the directors agreed with and accepted CLB's recommendations made at the June 2013 meeting. Accordingly, CLB was instructed to make an application to HMRC for clearance under section 138 TCGA and section 701 ITA. Mr Timms did not recall seeing a draft of the clearance application letter and thought it was unlikely that any of the Appellants would have commented on the draft before it was sent by CLB to HMRC.

77. When challenged as to the commercial justification for putting Jenbest on top of Proline, Mr Timms said that it was in order to get parity between the Appellants' percentage shareholdings and that of Mr Jones, whilst retaining (in the form of preference shares) "recompense" for the Appellants for founding the company. Mr Timms said that this created a structure for the future where Mr Jones could become the majority shareholder. He said that the Appellants did not want Mr Jones to feel that he had "got something for nothing".

78. Mr Timms was asked why Proline had not simply issued or transferred additional shares to Mr Jones and paid a dividend to the Appellants. He said that he did not know why this route was not adopted but that this was not an option that was put to the Appellants by CLB. He recognised that dividends were subject to income tax in the hands of the recipient. He said that the fact that the reorganisation and the subsequent redemption of preference shares did not incur income tax was "just a bonus." As I shall indicate later in this decision, I did not find Mr Timms' evidence convincing on this point.

79. Mr Timms said that he recalled reading and discussing CLB's letter of 25 June 2013. As already noted, he accepted that the letter seemed an accurate description of what was discussed at the meeting between CLC and the Appellants earlier in June. He realised that the preference shares could be repurchased at some stage but said that there was never "a plan" nor was there a planned timetable. Mr Timms was cross-examined on this statement. He was referred to the CLB letter of 25 October 2018 in which it was stated that the issue of the preference shares was part of "a phased retirement plan". Mr Timms said that he could not remember this. He said that the Appellants did not have any concrete plans in place and that everything was fluid. He considered that CLB's letter of 25 June 2013 was likely to be more accurate than their letter of 25 October 2018, the latter being written 5 years later.

80. Mr Timms was also cross-examined on the paragraph in the CLB letter of 25 June 2013 in which it was stated:

> "Ideally you would not redeem any preference shares for a period of at least 12 months and would only be able to redeem the shares on a piecemeal basis,

> over a period of several years. In this way, the risk of a counter action notice being applied to the whole of the redemption is reduced."

81. It was put to Mr Timms that this was a plan and was exactly what actually happened. Mr Timms accepted that that was what had happened and said that the letter recorded the advice of the accountants.

82. Mr Timms was also asked about the paragraph in the same CLB letter which stated:

> "What we are trying to achieve however, is to reduce the rate of tax to 10% by treating the amounts paid out as a capital payment, in return for shares."

83. Mr Timms said that this was "accountants' speak". Extracting funds from the company at capital gains tax rates was never the Appellants' first thought – capital gains treatment was just a bonus. Mr Timms accepted that the tax treatment was a factor considered by the accountants but it was never a factor that the Appellants knew about until it was proposed to them. It was the "last thing on the list of what [the Appellants] would achieve". He said that the proposal produced by CLB gave the Appellants everything they wanted commercially and that the 10% tax rate was "great".

84. Mr Timms was cross-examined about the paragraph in that CLB letter which read:

> "As discussed, if the reorganisation had been structured in such a way that you received cash consideration instead of the preference shares, it is extremely unlikely that HMRC would have given clearance under the general anti-avoidance legislation for transactions in securities. This is due to the fact that the three controlling shareholders would be simply reducing their combined shareholding from 90% to 75%, thereby retaining control of the company, yet drawing out the sum of £1 .8 million in the process. The upshot of this would be that the cash consideration would be taxed to income tax as a deemed dividend at the rate of 30.5%."

85. It was pointed out to Mr Timms that CLB were advising that if the Appellants received cash HMRC would not clear the transaction. Therefore, an intermediate stage of receiving preference shares was inserted. Mr Timms claimed that he did not remember any discussion of selling shares for cash. The Appellants had simply told CLB what they wanted to achieve.

86. In cross-examination, Mr Timms was asked whether he knew, as a result of CLB's letter of 25 June 2013, that he could sell his preference shares back to Jenbest. Mr Timms' answer was, in my view, somewhat evasive but he said that having his preference shares repurchased by Jenbest had not been in his thoughts.

87. Also, in cross-examination, Mr Timms claimed that there was no plan to redeem the preference shares at the time of the reorganisation in 2013. He said that the whole point of the preference shares was to get Mr Jones in a position where he was an equal partner. He was asked whether it was also part of the plan that the Appellants could sell their preference shares to Jenbest over time. Mr Timms, apparently referring to CLB's letter of 25 June 2013, suggested that "maybe [the letter] should be worded better."

88. Mr Elliott, appearing for HMRC, suggested that a reduction of 5% in each of the Appellants' shareholding would, on a £3 million valuation of Proline, equate to a value of £150,000. However, each shareholder received £600,000 preference shares. Mr Timms said that he did not "know how this all works". He said that the Appellants were not given any other options. He did not "know all the ins and outs of other options", which were not presented to the Appellants. I have to say that I found Mr Timms' evidence on this point disingenuous.

89. Mr Timms accepted that it would have been possible to extract cash by declaring a dividend on the Appellants' ordinary shares, which were a separate class of ordinary shares from those issued to Mr Jones. Mr Timms said that he did not know this.

90. Mr Timms said that there was no "plan" to repurchase the preference shares and that the letter from CLB were just being cautious and doing their job.

91. Mr Elliott suggested that the Appellants did not apply for clearance for the repurchase of the preference shares because there was no commercial purpose for the repurchase beyond the extraction of cash. Mr Timms said that he did not know about this.

92. Mr Elliott further suggested that the real reason why the potential repurchase of the preference shares was not mentioned in CLB's clearance application was that the Appellants did not want HMRC to know of the plan to repurchase them. Mr Timms replied that the Appellants were too busy working and could not make plans. He said that the purpose of the preference shares was not to extract £1.8 million of cash, but was simply a by-product of what was proposed by CLB.

93. Mr Timms could not recall exactly when discussions took place, but in early to mid- 2014 there were further discussions in relation to retirement and succession plans. The Appellants met CLB on 20 March 2014. Mr Timms said that a note of that meeting, which so far as material is set out at paragraph 38 above, accurately reflects the discussions at that meeting.

94. In or around April 2014, Mr Timms made an offer on a property in Chester, which was accepted, and he started the process of obtaining a mortgage to enable him to purchase the property. He could not recall exactly when, but Mr Timms said that a conversation took place regarding the property purchase with Mr Wroe. Mr Timms said that he had been contemplating taking out a mortgage to buy the property, but Mr Wroe had suggested redeeming some of Mr Timms' preference shares. Mr Wroe said that he would ask CLB whether it was possible for Mr Timms to sell some of his Jenbest preference shares back to Jenbest. Mr Wroe discussed this with CLB who indicated that this would be possible, if the company concluded that it was in its interests for this to take place (and providing it had sufficient distributable profits).

95. Mr Timms said that, at this time, Mr Jones was keen on undertaking a management buy-out, ideally with Mr Green and Mr Webb as part of the management team. Mr Timms said:

> "To the best of my recollection, the view of the directors was that my accelerating the realisation of my interests in the company was not a significant step and it was a step that could assist in relation to the anticipated MBO. There was a board meeting of Jenbest held on 6 May 2014. The directors concluded that it was in the interests of the company for it to purchase 200,000 £1 preference shares from me, for consideration of £200,000, and that it had sufficient distributable profits available for this transaction. On 24 May 2014, I purchased [the property in Chester] for £400,000.
>
> It was subsequently decided by the company that it was in its interests to purchase 300,000 £1 preference shares from [Mr Rimmer] and from [Mr Wroe] and a further 100,000 £1 preference shares from me. It is my understanding and belief that the purpose of these transactions was to ensure that the three of us maintain financial parity. From my perspective (and to the best of my knowledge and understanding, the perspective of [Mr Wroe] and [Mr Rimmer] also), it also reflected our general aim that, as part of the phased retirement plan, the preference shares would be sold over the time in a way that, so far as the company was concerned, managed the cash flow of the business and provided the benefit of preserving its trade for the intended new management and, so far as [the Appellants] were concerned, facilitated the

> financing of our respective retirements. In September 2015, it was decided by the company that it was in its interests to purchase 300,000 £1 preference shares for a consideration of £300,000 from me and from [Mr Rimmer] and that it had sufficient distributable profits available for these transactions. The like decision was taken in respect of [Mr Wroe] in March 2016. These transactions were in accordance with the general aim that I have described above in this paragraph."

96. Mr Timms said that although it was intended to issue EMI share options to Mr Green and Mr Webb by 31 July 2014, this did not, in fact, take place until a few months later.

97. In June 2014, CLB prepared a valuation of shares in Jenbest for the purposes of granting share options under an EMI share scheme and HMRC subsequently agreed the option price value of £1300 per share. EMI options were granted to Mr Green and Mr Webb on 24 September and 8 October 2014 respectively. Mr Timms' evidence was that the grant of these options was the first step in a potential management buy-out by Mr Junes, supported by Mr Webb and Mr Green.

98. However, in December 2014 the Appellants and Mr Jones were informed by Mr Green that his father was terminally ill and that he needed to spend time caring for him. Mr Green's role encompassed considerable overseas travel. He informed the directors of Jenbest in or around December 2014 that he was no longer able to do this. It was agreed that his role would be changed to enable him to work from home. Mr Timms said that this was a blow to the company and to the retirement and succession plans.

99. Other employees were considered for Mr Green's role with the potential to become a director. Either the individuals were not considered suitable or were not interested. Mr Timms described this as "a turning point". He could not recall the exact dates but there were subsequent discussions between the Appellants, Mr Jones and Mr Webb. Mr Jones and Mr Webb, according to Mr Timms, concluded that they did not have the financial competence, capability and capacity to go forward with a management buy-out. It was therefore concluded that a management buy-out was unachievable and the simplest option would be to move to an outright sale.

100. In the event, the EMI options were never exercised and Mr Green resigned from the business on 7 September 2015. Mr Webb's options were bought out when Jenbest was eventually sold to a third party in November 2017.

101. In the light of these events, and after a number of internal discussions between the directors, Mr Timms said that the Appellants were keen to retire from the business, but wanted to ensure that that their eventual exit from the company was effected in a way which helped to secure the future of all its employees and the company's relationships with customers.

102. Mr Timms said that there was a meeting between the directors of Jenbest and CLB. The preference had been for a management buy-out, but given the various developments, and the stress of dealing with management pressures and workload it was concluded by the directors of the only option was to sell the company to the preferred buyer.

DISCUSSION

The law

Burden of proof and standard of proof

103. Mr Elliott submitted that there was uncertainty as to the party on whom the burden of proof lay to demonstrate the main purpose or one of the main purposes of the transactions in securities within section 684(1)(c).

104. Previous iterations of the Transactions in Securities legislation made it clear that the burden of proof lay upon the taxpayer to demonstrate that its purpose was not to obtain an income tax advantage (see, for example, section 703(1) Income and Corporation Taxes Act 1988 and section 685 Income Tax Act 2007 as in force prior to 24 March 2010).

105. However, the current wording of section 684(1) is silent as to who must demonstrate the requisite purpose of being a party to the transactions in securities. A number of commentators consider that the burden of proof now lies upon HMRC. This is a curious result, because the main purpose of the person who is a party to a transaction in securities, the test being a subjective one, will be a matter which is primarily within the knowledge of the taxpayer rather than HMRC.

106. In his submissions, Mr Elliott addressed this issue. First, he noted that in HMRC's Statement of Case it was said:

> "The burden of proof lies with HMRC to show that the main purpose, or one of the main purposes, of the transaction was to obtain an income tax advantage."

107. However, in Mr Elliott's submission, regardless of where the legal burden of proof lay, HMRC had adduced sufficient documentary evidence to demonstrate that a main purpose or one of the main purposes of the Appellants being party to the transactions in securities was the obtaining of an income tax advantage with the result that the evidential burden of proof shifted to the Appellants. In any event, the evidential burden should lie upon the Appellants since the evidence of the Appellants' purposes was primarily within their control and knowledge. Mr Elliott noted that this Tribunal (Judge Poole), on 3 March 2020, had already made a determination under section 697 and decided that there was a prima facie case for HMRC to take further action on the basis that section 684 applied.

108. I did not understand Mr Foster, appearing for the Appellants, to dispute this analysis, but in any event I shall proceed on this basis as I see no sensible alternative.

109. It was common ground that the standard of proof was the usual civil standard of the balance of probabilities.

Transactions in Securities legislation

110. It was common ground that the preconditions for counteraction set out in section 684 (1)(a), (b) and (d) were satisfied. It was also common ground that the assessments made by HMRC upon the Appellants were raised in time. Accordingly, the parties were agreed that the only issue before me was whether the main purpose or one of the main purposes of the each Appellant being a party to the relevant transactions in securities was to obtain an income tax advantage within section 684(1)(c).

111. Section 684(1)(c) provides:

> "(c) the main purpose, or one of the main purposes, of the person in being a party to the transaction in securities, or any of the transactions in securities, is to obtain an income tax advantage…"

112. There was, in my view, no material dispute as to the case-law and the principles to be applied in in relation to the Transactions in Securities legislation. So far as relevant, the case-law can be summarised as follows:

(1) There is no statutory definition of the words "main purpose" or "main purposes" and are to be given their normal meanings as ordinary English words. "Main" has a "connotation of importance": *Euromoney Institutional Investor Plc v HMRC* [2021] UKFTT 61 (TC) (Judge Sukul).

(2) In determining whether each Appellant had the main purpose or a main purpose of obtaining an income tax advantage it is the subjective intention of the Appellant that is relevant (*Inland Revenue Commissioners v Brebner* [1967] 43 TC 705 *per* Lord Pearce at 715B and Lord Upjohn at 718E).[11]

(3) When the question of carrying out a genuine commercial transaction is reviewed, the fact that there are two ways of carrying it out - one by paying the maximum amount of tax, the other by paying no, or much less, tax - it would be wrong, as a necessary consequence, to draw the inference that, in adopting the latter course, one of the main objects is, for the purposes of the legislation, avoidance of tax. The question whether in fact one of the main objects was to avoid tax is one for the Special Commissioners to decide upon a consideration of all the relevant evidence before them and the proper inferences to be drawn from that evidence (*Ibid. per* Lord Upjohn at 718H-I).

(4) When applying section 684(1)(c), it is necessary to consider the transactions as a whole and evaluate the purposes of the Appellants in relation to the transactions as a whole (*Ibid. per* Lord Pearce at 704 I).

(5) For a person to have a purpose of avoiding income tax, there must be an alternative transaction that would incur an income tax cost. The mere fact that there exists an alternative means of undertaking a transaction which has a different tax result is not conclusive of the question as to whether an inference can be drawn that the obtaining of an income tax advantage was a main purpose of the transaction. The fact that an alternative transaction existed and was perhaps considered but rejected, may be a factor in deciding whether or not an inference can be drawn that the obtaining of an income tax advantage was a main purpose of a transaction. (*Allam v HMRC* [2020] UKFTT 2016 (TC) at [208] (Judge Greenbank), approved by the Upper Tribunal [2022] STC 37 at [168]-[169] (Edwin Johnson J and Judge Cannan).

(6) The actual transaction carried out may involve an artificial series of transactions with a view to generating a capital gain. The alternative transaction may be very straightforward. Such factors may be relevant to the FTT's assessment of the evidence as to the main purpose a taxpayer has in being a party to the actual transaction. However, there is no principle that the existence of an alternative transaction will always be a strong factor in identifying those purposes. The significance of the alternative transaction will depend on the facts of the case (*Allam v HMRC* [2022] STC 37 at [169]).

113. There are also a few of observations I wish to make about section 684(1)(c).

114. First, that provision can apply if *one* of the main purposes of the taxpayer being a party to the transactions in securities is the obtaining of an income tax advantage. Thus, there can be a number of main purposes and the provision can be satisfied if one of those main purposes is to obtain an income tax advantage even if the other main purposes are not tax-related.

115. Secondly, it is clear from the wording of section 684(1)(c) that the provision can apply where one of the main purposes of the person in being a party to *any* of the transactions in securities is the obtaining of a tax advantage. Also, Section 684(1)(d), which it was common ground was satisfied in this case, also makes it clear that the income tax advantage can arise from the combined effect of more than one transaction.

116. Thirdly, unlike earlier versions of the legislation, it is only necessary for it to be shown that a main purpose of being a party to the transactions in securities was not the obtaining of

[11] The statutory wording under consideration in *Brebner* involved an earlier version of the Transactions in Securities legislation which used the words "main object" rather than "main purpose". Neither party in this appeal, correctly in my view, sought to draw any distinction between the slightly different wording.

an income tax advantage. It is not necessary to show, for example, a commercial or business reason for the transaction. Thus, even a private or personal (non-tax) reason will be sufficient.

117. Finally, I think it follows from the wording of the legislation that even if the overall purpose of any transaction in securities is a non-tax purpose, section 684(1)(c) can still apply, and the transaction be subject to counteraction, if the way in which the transaction is carried out demonstrates that the obtaining of an income tax transaction was also a main purpose. This is, in a sense, merely demonstrating the point that a transaction can have more than one main purpose, as explained above. The transaction can have a non- tax related main purpose but at the same time be carried out in a manner that demonstrates that obtaining an income tax advantage was also a main purpose. Obtaining a tax advantage does not have to be a predominant purpose – it is enough that is simply a main purpose.

Case law regarding witness evidence

118. More generally, in relation to the challenges made by HMRC to Mr Timms' evidence, I have borne in mind the well-known guidance given by Leggatt J in *Gestmin SGPS SA v Credit Suisse (UK) Ltd & Anor.* [2013] EWHC 3560 (Comm) about the fallibility of human recollection and evidence based thereon at [15]-[22] and the relative importance of contemporary documentation in commercial cases.

119. The comments of Leggatt J in *Gestmin* are not, however, to be taken as meaning that witness evidence should simply be disregarded, even if it relates to events occurring several years ago. This was made plain by the Court of Appeal in *Kogan v Martin* [2019] EWCA Civ 1645 at [88-89] where Floyd LJ said:

> "[88] We start by recalling that the [trial] judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay The Judge as Juror: *The Judicial Determination of Factual Issues* (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon all of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.
>
> [89] Secondly, the judge in the present case did not remark that the observations in *Gestmin* were expressly addressed to commercial cases. For a paradigm example of such a case, in which a careful examination of the abundant documentation ought to have been at the heart of an inquiry into commercial fraud, see *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] EWCA Civ 1413 and the apposite remarks of Males LJ at paras. 48-49."

120. The point was reiterated by Peter Jackson LJ in *Re B-M (children: findings of fact)*[2021] EWCA Civ 1371 when he said:

> "[24] Further, and as noted by this court in *Kogan v Martin* [2019] EWCA Civ 1645 at [88-89] *Gestmin* is not to be taken as laying down any general

> principle for the assessment of evidence. Rather, as *Kogan* states, it is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. The discussion in *Gestmin* is expressly addressed to commercial cases, where documentary evidence will often be the first port of call, ahead of unaided memory."

121. I have borne these principles in mind when evaluating the all the evidence in this case.

Conclusions on the evidence

122. Having carefully reviewed all the evidence, I have come to the conclusion that a main purpose of each of the Appellants in being a party to the reorganisation and the repurchase of the preference shares was to obtain an income tax advantage.

123. I accept Mr Timms' evidence that there were commercial reasons, unrelated to taxation, why Mr Jones' shareholding was increased from 10% to 25%. It was clear that Mr Jones was an important figure in the development of Proline's business and that the future of the business was largely dependent on retaining his services. However, I do not think that Mr Timms' evidence establishes that the reorganisation was necessary to give Mr Jones a percentage shareholding in parity with the Appellants (see below at paragraph 140).

124. Furthermore, I do not think that the issue of the preference shares in the reorganisation related to the desire to give Mr Jones an equal percentage shareholding with the Appellants. The issue of the preference shares was, it was claimed, to do with the Appellants' desire to have a "phased retirement plan". I accept that that may have been so but, as I shall indicate, that plan was deliberately structured in a manner designed to produce a capital gains tax receipt rather than income subject to income tax. In other words, the Appellants wanted to extract £1.8 million from Jenbest/Proline to help fund their retirements but on the basis that the cash was received as capital rather than income. The Appellants wanted to facilitate their retirement of the Appellants by "ring fencing" the historic value of Proline which had been built up by the Appellants and subsequently extracting that value by way of the repurchase of the preference shares. The manner in which the Appellants, on the advice of CLB, decided to provide for their retirement – by the issue and subsequent repurchase of preference shares – seemed to me to have as one of its main purposes the avoidance of income tax, as I shall explain below.

125. I accept that each of the Appellants had no settled fixed date for retirement. Mr Timms' evidence, which I accept in this respect, was that the Appellants frequently discussed possible retirement dates, but those dates kept changing as the demands of the business required. Nonetheless, I consider that when the Appellants entered into the reorganisation in 2013, they did plan to retire when it was possible to do so, albeit no fixed retirement date had been established. The CLB letter of 25 October 2018, which Mr Timms considered to be accurate, stated:

> "At the time of our meeting in June 2013. [Sic] All three expressed a desire to retire from the company within five years."

126. In my view, that letter correctly reflected the Appellants' intentions as regards retirement at the time of the reorganisation. In other words, although no fixed date for each Appellant was specified, the five-year time period was a "backstop" date which was envisaged at the time. In that respect, I consider that the statement in the CLB clearance application of 25 June 2013 "…that no director currently has any plans to retire from the Company…" did not tell the whole truth and, read in context, was misleading. I shall deal with the clearance application in more detail below.

127. There were also a number of aspects of Mr Timms' evidence which I did not consider to be reliable.

128. Mr Timms emphasised that the Appellants had simply accepted the proposal relating to the reorganisation, including the issue of preference shares, because that was the only option put them by CLB. Secondly, Mr Timms indicated that the potential tax saving by achieving capital gains tax treatment on the repurchase of the preference shares was not a main motive but was purely incidental to the proposal put to them or, as he put it, it was "icing on the cake".

129. That does not, in my view, seem consistent with the terms of the CLB letter to Mr Wroe of 25 June 2013. That letter is the only contemporaneous documentary account of the meeting between the Appellants and CLB earlier in June 2013 at which the reorganisation was discussed. It is true that the letter does not constitute minutes of that meeting, but it does reflect the conclusions reached and the matters discussed. It was accepted by CLB in their letter of 17 January 2019 that it was a summary of the discussions at the meeting in June 2013 and by Mr Timms who described as an accurate reflection of the meeting in the early part of June 2013 (and likely to be a more accurate reflection of the discussions than the CLB letter of 25 October 2018). I prefer the evidence embodied in that letter to the recollections of Mr Timms in relation to the purposes of the reorganisation in 2013 because it seems a more reliable indicator of the purposes of the Appellants in relation to the reorganisation. Indeed, it is surprising that, given the importance attached by HMRC to it, Mr Timms' witness statement refers to the CLB letter in only the briefest of terms. This was indeed strange in the context of appeals where the central issue was whether the Appellants had a main purpose of obtaining an income tax advantage. Mr Timms, in cross-examination, conceded that he was aware of the tax benefits which it was hoped would accrue from the repurchase of the preference shares. Although I accept, of course, that Mr Timms was not a tax expert, I found his failure to engage with tax issues and with CLB's letter of 25 June 2013 undermined the credibility of his evidence.

130. It is clear from that letter of 25 June 2013, in my view, that although there were a number of non-tax reasons which were associated with the reorganisation, one of the main purposes of the issue of preference shares to the Appellants was to enable the Appellants, once the preference shares were repurchased, to receive cash from Jenbest/Proline, representing the historic value of Proline, in capital form so that the Appellants did not bear tax on that receipt as income. Indeed, the avoidance of being charged to income tax on the extraction of £1.8 million from Jenbest/Proline is a central theme of a letter which is, as I have said, the only contemporaneous documentary evidence of the Appellants' purposes.

131. For example, the letter stated:

> "As discussed, if the reorganisation had been structured in such a way that you received cash consideration instead of the preference shares, it is extremely unlikely that HMRC would have given clearance under the general anti-avoidance legislation for transactions in securities. This is due to the fact that the three controlling shareholders would be simply reducing their combined shareholding from 90% to 75%, thereby retaining control of the company, yet drawing out the sum of £1.8 million in the process. The upshot of this would be that the cash consideration would be taxed to income tax as a deemed dividend at the rate of 30.5%."

132. This is reinforced by subsequent paragraphs in the CLB letter as follows:

> "The plan is that when you cash in all or part of the shares, the disposal gives rise to a capital gain which is taxable at only 10%. The capital gain will need to be reported on your self-assessment tax returns."

133. Furthermore, the CLB letter states:

> "In other words, a counter action notice would simply put you back into the position that you are *currently* in – namely, if you were to draw a large amount of cash as a dividend, you would be liable to income tax on that dividend at an effective rate of 30.5%.
>
> What we are trying to achieve however, is to reduce the rate of tax to 10% by treating the amounts paid out as a capital payment, in return for shares.
>
> We could apply for advanced clearance, prior to the redemption of any of the shares. However, to do so would simply flag the matter to HMRC.
>
> …
>
> Ideally, you would not redeem any preference shares for a period of at least 12 months, and would only redeem the shares on a piecemeal basis, over a period of several years. In this way, the risk of a counter action notice being applied to the whole of the redemption is reduced." (Emphasis added)

134. In my judgment, it is plain from this and from subsequent paragraphs that alternatives to the reorganisation were discussed at the meeting earlier in June 2013. The letter seemed to take the payment of a dividend as almost a "baseline" case, indicating that even if HMRC counteracted the tax advantage, the Appellants would be in no worse position than if they had simply received dividends. To my mind, this paragraph is a clear indication that one of the main purposes of the reorganisation was to enable the Appellants to extract £1.8 million from Jenbest/Proline in the form of capital (subject to capital gains tax) rather than income (subject to the higher rates of income tax) and that that form of extraction was considered in contrast to the payment of a dividend or dividends. In other words, the plan was to achieve a better tax result than simply paying dividends.

135. In addition, I think the letter makes it clear that the plan was that the preference shares would be repurchased and not sold in a management buy-out or in a sale to a third party. The final paragraph of the CLB letter quoted above in paragraph 132 above, unmistakably indicates that it was envisaged that the preference shares would be repurchased.[12] Although no fixed dates for such repurchases were established, it was envisaged that the preference shares could be repurchased on a piecemeal basis after 12 months. I do not accept that the repurchase of the preference shares was related to the failure by the Appellants to organise a management buy-out of Jenbest/Proline. The repurchases of the preference shares started before the prospect of a management buy-out seemed no longer feasible in December 2014 (in the light of Mr Green's family circumstances) and continued thereafter.

136. I do not, therefore, accept Mr Timms' evidence that the tax benefit of achieving capital gains tax, rather than income tax, treatment for the extraction of £1.8 million from Jenbest/Proline was merely incidental or, as he put it, "the icing on the cake". It seems to me that, although there were other commercial and personal (i.e. non tax) purposes involved, one of the main purposes of the reorganisation, and of the way in which it was structured, was to enable the Appellants to achieve an income tax advantage on the subsequent repurchase of the preference shares.

137. I accept the evidence of Mr Timms that the timing of the repurchase of part of his holding of preference shares in May 2014 was occasioned by the need to obtain funds for a property purchase, but I do not think that affects the position that one of the main purposes in issuing the preference shares in the first place was to achieve an income tax advantage. In any event, there was no evidence as to his purposes or the purposes of the other Appellants in relation to

[12] I note that at the hearing the terms "repurchase" and "redeem" were used interchangeably. The preference shares were not redeemable in accordance with their terms of issue, but could as a matter of company law be repurchased out distributable profits.

subsequent repurchases save for a vague reference to a desire for the Appellants to maintain parity. There was no suggestion in the CLB letter of 25 June 2013 that the Appellants wish to maintain financial parity in relation to the repurchase of their preference shares. Accordingly, I do not accept Mr Timms' explanation in relation to financial parity.

138. I also have difficulty in accepting Mr Timms' evidence that the tax saving was not important to him. On his own evidence he needed the cash from the first repurchase of preference shares to pay for a property purchase in order to avoid having to take out a mortgage. He said it was not important to him to pay only approximately £57,000 in tax rather than income tax of approximately £162,000. I have to say that I did not find that suggestion credible. On his own evidence, he needed cash from the first repurchase of his shares in May 2014 in order to purchase a property. It would, therefore, have been highly material whether the proceeds of the repurchase were subject to tax at a rate of 10% or 30.5%

139. It is clear from the CLB letter that alternative transactions were considered. The CLB letter says, in effect, that if HMRC were to issue a counteraction notice to the Appellants in respect of the repurchase of their preference shares, they would have been in no worse position than if they had received a dividend. As I have said, receiving a dividend was effectively regarded as the "baseline" alternative. A dividend would have extracted the necessary value from Jenbest/Proline but would have been subject to income tax; by contrast, the issue and repurchase of preference shares would yield a better tax result because the repurchase proceeds would, it was anticipated, be subject only to capital gains tax. Mr Timms was perfectly well aware that dividends could be paid and that they would have been taxed on an income basis.

140. Mr Foster argued that if the Appellants had simply been paid a dividend this would have met neither of the Appellants' commercial objectives, viz the facilitation of the retirement plans of the Appellants and equalising the ordinary share ownership of Mr Jones (who was unable to raise sufficient finance to acquire a further 15% of the shares).

141. However, in response to that submission, it seems to me that the share-for-share exchange by which the Appellants exchanged their ordinary shares in Proline for a class of ordinary shares in Jenbest was unnecessary to achieve an equalisation of ordinary shares. There is no evidence that Mr Jones paid for the 15% increase in his ordinary shareholding – he could simply have been given ordinary shares by the Appellants or have had them issued to him as a separate class of ordinary shares for their nominal value (as appears to have happened when Mr Jones received his initial 10% shareholding). It was also unnecessary for the facilitation of the "phased retirement plan" of the Appellants. The cash could perfectly easily have been paid out by way of dividend over time on the Appellants' ordinary shares. The only real purpose that the preference shares served beyond ring-fencing the historic value of Proline was that, when they were repurchased, it could be argued that the cash receipt was capital in nature rather than an income dividend thereby providing the "recompense" of which Mr Timms spoke.

142. In any event, as Mr Elliott submitted, it is hard to see how the issue and repurchase of the preference shares furthered the objective of facilitating the retirement plans of the Appellants. Even after the repurchase of the preference shares, the three Appellants together still held 75% of the ordinary shares in Jenbest, thus retaining a collective controlling stake, regardless of whether they retired. In fact, they only retired in 2019 after they had sold their ordinary shares to a third party in 2017.

143. I therefore accept Mr Elliott's submission that in reality the main result of the issue and repurchase of the preference shares was the extraction of £1.8 million from Jenbest/Proline by the Appellants and that, indeed, this was a main purpose of that issue and repurchase. Mr Timms denied this when cross-examined, but I do not consider that his answer was convincing in the light of the documentary evidence (the CLB letter of 25 June 2013).

144. Mr Elliott argued that since the test of "purpose" in section 698(4) was a subjective test, the fact that neither Mr Wroe nor Mr Rimmer gave evidence meant that there was no evidence as to their subjective intentions. Whilst there is considerable force in this argument, I accept Mr Timms' evidence that the Appellants shared a close business relationship of mutual trust over many years and worked very closely together. Therefore, I was prepared to accept that the evidence given by Mr Timms in relation to objectives of the Appellants as a group, although probably hearsay as regards Mr Wroe and Mr Rimmer, could be accepted as evidence. In any event, in the light of my conclusions as to the unreliability of Mr Timms' evidence, it is unnecessary to pursue this point further.

145. In relation to the clearance application, section 702 (4) makes it clear that a clearance is void if the particulars of the proposed transactions furnished by or on behalf of the Appellants did not "fully and accurately disclose all facts and considerations which are material for the purposes of" section 701. In relation to non-statutory clearance applications, Bingham LJ said *R v Inland Revenue Commissioners, ex parte MFK Underwriting Agencies Ltd* [1989] STC 873 at 892 that: "… it is necessary that the taxpayer should have put all his cards face upwards on the table." I see no reason why a clearance application under section 701 should demand a lesser standard of disclosure from a taxpayer.

146. I have already indicated that I consider the statement in the application that "no director currently has any plans to retire from the Company" did not tell the whole truth and was misleading.

147. More importantly, I also observe that the clearance application omitted any mention of the likely repurchase of the preference shares. The CLB letter made it clear that there was a risk that, if HMRC knew that a repurchase of the preference shares was planned (as the CLB letter indicated it was), that HMRC may refuse to issue a clearance. As HMRC submitted, if there were solely non-tax motives for the envisaged repurchase of the preference shares, it is surprising that the Appellants did not explain those reasons in the clearance letter. Instead, the clearance letter omitted any mention of the Appellants' plan to extract £1.8 million from Jenbest/Proline, noting only that the preference shares were irredeemable. Indeed, the omission was deliberate because CLB believed that seeking to obtain clearance in advance for the repurchase of the preference shares would simply "flag" the issue to HMRC. That to my mind is the clearest indication that the Appellants and their advisers realised that the potential repurchase of the preference shares was material information. This, of itself, entitled HMRC to treat the clearance as void under section 702(4) on the basis that information given to HMRC under section 701 about the transaction or transactions did not fully and accurately disclose all facts and considerations which were material. It seems to me that the mechanism for the extraction of £1.8 million from Jenbest/Proline was plainly material for these purposes and that the Appellants knew it was. In short, the Appellants, via their advisers, did not put their cards face up on the table but kept them close to their chests.

DECISION

148. For the reasons given above, these appeals are dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

149. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GUY BRANNAN
TRIBUNAL JUDGE

Release date: 27 APRIL 2022

APPENDIX

Relevant statutory provisions

Section 684: Person liable to counteraction of income tax advantage

(1) This section applies to a person where—
(a) the person is a party to a transaction in securities or two or more transactions in securities (see subsection (2)),
(b) the circumstances are covered by section 685 and not excluded by section 686,
(c) the main purpose, or one of the main purposes, of the person in being a party to the transaction in securities, or any of the transactions in securities, is to obtain an income tax advantage, and
(d) the person obtains an income tax advantage in consequence of the transaction or the combined effect of the transactions.
(2) In this Chapter "transaction in securities" means a transaction, of whatever description, relating to securities, and includes in particular—
(a) the purchase, sale or exchange of securities,
(b) issuing or securing the issue of new securities,
(c) applying or subscribing for new securities, and
(d) altering or securing the alteration of the rights attached to securities.
(3) Section 687 defines "income tax advantage" .
(4) This section is subject to—
section 696(3) (disapplication of this section where person receiving preliminary notification that section 684 may apply makes statutory declaration and relevant officer of Revenue and Customs sees no reason to take further action), and
section 697(5) (determination by tribunal that there is no prima facie case that section 684 applies).

Section 685: Receipt of consideration in connection with distribution by or assets of close company

(1) The circumstances covered by this section are circumstances where condition A or condition B is met.
(2) Condition A is that, as a result of the transaction in securities or any one or more of the transactions in securities, the person receives relevant consideration in connection with—
(a) the distribution, transfer or realisation of assets of a close company,
(b) the application of assets of a close company in discharge of liabilities, or
(c) the direct or indirect transfer of assets of one close company to another close company,
and does not pay or bear income tax on the consideration (apart from this Chapter).

(3) Condition B is that—
(a) the person receives relevant consideration in connection with the transaction in securities or any one or more of the transactions in securities,
(b) two or more close companies are concerned in the transaction or transactions in securities concerned, and
(c) the person does not pay or bear income tax on the consideration (apart from this Chapter).
(4) In a case within subsection (2)(a) or (b) "relevant consideration" means consideration which—
(a) is or represents the value of—
(i) assets which are available for distribution by way of dividend by the company, or
(ii) assets which would have been so available apart from anything done by the company,
(b) is received in respect of future receipts of the company, or
(c) is or represents the value of trading stock of the company.
(5) In a case within subsection (2)(c) or (3) "relevant consideration" means consideration which consists of any share capital or any security issued by a close company and which is or represents the value of assets which—
(a) are available for distribution by way of dividend by the company,
(b) would have been so available apart from anything done by the company, or
(c) are trading stock of the company.
(6) The references in subsection (2)(a) and (b) to assets do not include assets which are shown to represent a return of sums paid by subscribers on the issue of securities, despite the fact that under the law of the country in which the company is incorporated assets of that description are available for distribution by way of dividend.
(7) So far as subsection (2)(c) or (3) relates to share capital other than redeemable share capital, it applies only so far as the share capital is repaid (on a winding up or otherwise); and for this purpose any distribution made in respect of any shares on a winding up or dissolution of the company is to be treated as a repayment of share capital.
(8) References in this section to the receipt of consideration include references to the receipt of any money or money's worth.
(9) In this section—
"security" includes securities not creating or evidencing a charge on assets;
"share" includes stock and any other interest of a member in a company.

Section 686: Excluded circumstances: fundamental change of ownership

(1) Circumstances are excluded by this section if—
(a) immediately before the transaction in securities (or the first of the transactions in securities) the person (referred to in this section as "the party") holds shares or an interest in shares in the close company, and]
(b) there is a fundamental change of ownership of the close company.
(2) There is a fundamental change of ownership of the close company if—
(a) as a result of the transaction or transactions in securities, conditions A, B and C are met, and
(b) those conditions continue to be met for a period of 2 years.
(3) Condition A is that at least 75% of the ordinary share capital of the close company is held beneficially by—
(a) a person who is not connected with the party and has not been so connected within the period of 2 years ending with the day on which the transaction in securities (or the first of the transactions in securities) takes place, or
(b) persons none of whom is so connected or has been so connected within that period.
(4) Condition B is that shares in the close company held by that person or those persons carry an entitlement to at least 75% of the distributions which may be made by the company.

(5) Condition C is that shares so held carry at least 75% of the total voting rights in the close company.

Section 687: Income tax advantage

(1) For the purposes of this Chapter the person obtains an income tax advantage if—
(a) the amount of any income tax which would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution exceeds the amount of any capital gains tax payable in respect of it, or
(b) income tax would be payable by the person in respect of the relevant consideration if it constituted a qualifying distribution and no capital gains tax is payable in respect of it.
(2) So much of the relevant consideration as exceeds the maximum amount that could in any circumstances have been paid to the person by way of a qualifying distribution at the time when the relevant consideration is received is to be left out of account for the purposes of subsection (1).
(3) The amount of the income tax advantage is the amount of the excess or (if no capital gains tax is payable) the amount of the income tax which would be payable.
(4) In this section "relevant consideration" has the same meaning as in section 685.

Section 695: Preliminary notification that section 684 may apply

(1) An officer of Revenue and Customs must notify a person if the officer has reason to believe that—
(a) section 684 (person liable to counteraction of income tax advantage) may apply to the person in respect of a transaction or transactions, and
(b) a counteraction notice ought to be served on the person under section 698 about the transaction or transactions.
(2) The notification must specify the transaction or transactions.
(3) See section 698 for the serving of counteraction notices, and sections 696 and 697 for cases where the person on whom the notice under this section is served disagrees that section 684 applies.

Section 698: Counteraction notices

(1) If—
(a) a person on whom a notification is served under section 695 does not send a statutory declaration to an officer of Revenue and Customs under section 696 within 30 days of the issue of the notification, or
(b) the tribunal having been sent such a declaration under section 697 determines that there is a prima facie case for serving a notice on a person under this section,
the income tax advantage in question is to be counteracted by adjustments.
(2) The adjustments required to be made to counteract the income tax advantage and the basis on which they are to be made are to be specified in a notice served on the person by an officer of Revenue and Customs.
(3) In this Chapter such a notice is referred to as a "counteraction notice".
(4) Any of the following adjustments may be specified—
(a) an assessment,
(b) the nullifying of a right to repayment,
(c) the requiring of the return of a repayment already made, or
(d) the calculation or recalculation of profits or gains or liability to income tax.
(5) Nothing in this section authorises the making of an assessment later than 6 years after the tax year to which the income tax advantage relates.
(6) This section is subject to—

section 699 (limit on amount assessed in section 689 and 690 cases),
section 700 (timing of assessments in section 690 cases), and
section 702(2) (effect of clearance notification under section 701).
(7) But no other provision in the Income Tax Acts is to be read as limiting the powers conferred by this section.

Section 705: Appeals against counteraction notices

(1) A person on whom a counteraction notice has been served may appeal . . . on the grounds that—
(a) section 684 (person liable to counteraction of income tax advantage) does not apply to the person in respect of the transaction or transactions in question, or
(b) the adjustments directed to be made are inappropriate.
(2) Such an appeal may be made only by giving notice to the Commissioners for Her Majesty's Revenue and Customs within 30 days of the service of the counteraction notice.
(3) On an appeal under this section [that is notified to the tribunal, the tribunal] may—
(a) affirm, vary or cancel the counteraction notice, or
(b) affirm, vary or quash an assessment made in accordance with the notice.
(4) But the bringing of an appeal under this section . . . does not affect—
(a) the validity of the counteraction notice, or
(b) the validity of any other thing done under or in accordance with section 698 (counteraction notices),
pending the determination of the proceedings.

Clearance applications

Section 701: Application for clearance of transactions

(1) A person may provide the Commissioners for Her Majesty's Revenue and Customs with particulars of a transaction or transactions effected or to be effected by the person in order to obtain a notification about them under this section.
(2) If the Commissioners consider that the particulars, or any further information provided under this subsection, are insufficient for the purposes of this section, they must notify the person what further information they require for those purposes within 30 days of receiving the particulars or further information.
(3) If any such further information is not provided within 30 days from the notification, or such further time as the Commissioners allow, they need not proceed further under this section.
(4) The Commissioners must notify the person whether they are satisfied that the transaction or transactions, as described in the particulars, were or will be such that no counteraction notice ought to be served about the transaction or transactions.
(5) The notification must be given within 30 days of receipt of the particulars, or, if subsection (2) applies, of all further information required.

Section 702: Effect of clearance notification under section 701

(1) This section applies if the Commissioners for Her Majesty's Revenue and Customs notify a person under section 701 that they are satisfied that a transaction or transactions, as described in the particulars provided under that section, were or will be such that no counteraction notice ought to be served about the transaction or transactions.
(2) No such notice may be served on the person in respect of the transaction or transactions.
(3) But the notification does not prevent such a notice being served on the person in respect of transactions including not only the ones to which the notification relates but also others.

(4) The notification is void if the particulars and any further information given under section 701 about the transaction or transactions do not fully and accurately disclose all facts and considerations which are material for the purposes of that section.