Andrew v Revenue and Customs Commissioners

[2019] UKFTT 177 (TC)

FIRST-TIER TRIBUNAL (TAX)

JUDGE GREENBANK

26–27 JUNE 2018, 5 MARCH 2019

Tax avoidance – Income tax – Discounted securities – Gilt strips – Computation of loss – Taxpayer establishing trust for participation in tax avoidance scheme – Taxpayer acquiring Treasury principal gilt strips and granting call option to trust – Gilt strips being sold subject to call option to third party bank – Call option being cancelled in consideration for payment by bank to trustees – Taxpayer claiming loss pursuant to scheme – Whether taxpayer suffering loss – Whether amounts received by trust pursuant to scheme constituting income on which taxpayer assessable – Income and Corporation Taxes Act 1988, s 18, Sch D, Case VI – Finance Act 1996, Sch 13, paras 1, 14A(1).

In February 2003, the appellant taxpayer entered into a deed of settlement to establish the Neville Andrew No 2 Settlement ('the NA Trust') for the purpose of participation in a tax avoidance scheme involving certain transactions in gilt strips. The trustee was the BDO Fidecs Trust Company Limited ('the NA Trustee'). Under the terms of the settlement: (i) the taxpayer was the life tenant and, in default of any exercise of any power of appointment, was entitled to the income of the trust fund during his lifetime; (ii) the taxpayer's wife and children were included in the class of beneficiaries together with his remoter issue and certain charities; (iii) there was a discretionary power of appointment under which the trustees could appoint income or capital for the benefit of the beneficiaries; and (iv) there was an additional discretionary power of appointment under which the trustees could pay the whole or any part of the trust fund to the taxpayer as the life tenant or for his benefit without having regard to any of the interests of the other beneficiaries. In October 2003, the taxpayer paid £1,879,687.50 into a bank account and requested that the bank use those funds to acquire certain UK Treasury principal gilt strips. The bank acquired the gilt strips and charged the taxpayer commission. Under a call option agreement ('the Call Option Agreement'), the taxpayer granted the NA Trustee, for a consideration of £100, an option ('the Call Option') to acquire the gilt strips for two per cent of their market value on the date of exercise. The NA Trustee was entitled to cash cancel the Call Option at any time whilst the option was exercisable for the amount equal to the market value of the gilt strips at the time less the exercise price and notional dealing costs. The option lapsed on the earlier of two defined days. The obligations of the taxpayer were secured by a charge over the gilt strips. BDO sought offers from banks to acquire the gilt strips and received offers from an offeror bank ('Investec') at discounts to the market value of the gilts on the date of sale. Arrangements were put in place for the sale of the gilt strips to Investec. There was an exchange of letters between the taxpayer and NA Trustee pursuant to which the taxpayer requested and the NA Trustee granted consent for the taxpayer to transfer the gilt strips to Investec subject to

Investec agreeing to enter into a deed of adherence to the Call Option Agreement and deed of charge on essentially the same terms as the taxpayer. On the same day, the taxpayer was released from his obligations under the Call Option Agreement and the deed of charge by the NA Trustee, the taxpayer entered into an agreement to sell the gilt strips to Investec for £30,740, and Investec entered into a deed of adherence in relation to the Call Option Agreement and a deed of charge over the gilt strips. The NA Trustee wrote to Investec electing to cash cancel the Call Option, following which Investec paid the NA Trustee the cash cancellation price of £1,840,442, the NA Trustee released Investec from the charge and the NA Trustee wrote to the taxpayer's bank to inform it that it should deal with the gilt strips according to Investec's wishes. The scheme was designed to produce a loss for tax purposes which could be set against the taxpayer's taxable income without a material economic cost to the taxpayer and his family. The marketing material for the scheme stated that the scheme sought to generate a loss of gilt strip without a commercial loss and that the only cost to the client was the cost to participate. In his self-assessment for the relevant year, the taxpayer claimed a loss of £1,844,248, being the difference between the price that he paid to purchase the gilt strips and the price for which he sold them to Investec under the sale and purchase agreement. The Revenue and Customs Commissioners ('HMRC') opened an enquiry into the taxpayer's return and issued a closure notice making amendments to the return to disallow the loss and to assess the taxpayer to income tax on profits arising in the NA Trust as a result of the scheme. The taxpayer appealed. The issues before the tribunal were (a) whether the taxpayer suffered a loss within the meaning of para 14A[a] of Sch 13 to the Finance Act 1996 (which set out the circumstances in which an individual was entitled to relief from losses arising from transactions in gilt strips); and (b) whether the amounts received by the NA Trust pursuant to the scheme constituted income on which the taxpayer was assessable under s 660A or s 739[b] of the Income and Corporation Taxes Act 1988. As to the first issue, it was common ground that in interpreting para 14A it was necessary to construe the legislation viewed purposively to the facts viewed realistically. However, the parties disagreed as the effect of such a construction: HMRC argued that the purpose of para 14A(3) was to be found in para 14(1) and was to give relief for real losses arising from real commercial outcomes, whereas the taxpayer argued for a statutory formula which defined the amount of any loss as the amount by which the amount paid by an individual for the strip exceeded the amount payable on a transfer or redemption of the strip. The taxpayer submitted, inter alia, that it was not permissible to take into account any other payments made as part of the scheme or to test the result of the formula to determine whether or not it represented a 'real' loss. As to the second issue, HMRC asserted, inter alia, that income arose to the NA Trust on the basis that the NA Trustee realised a profit from the discount on the gilt strips which fell within para 1[c] of Sch 13 to the Finance Act 1996, or the NA Trustee realised a profit which was subject to tax as income under the Income and Corporation Taxes Act 1988, s 18, Sch D, Case VI[d]. The taxpayer contended that para 1 was a special rule that applied to the holder of a gilt strip

a Paragraph 14A, so far as material, is set out at [45], below.

b Sections 660A, 739 are described at [126], below.

c Paragraph 1, so far as material, is set out at [131], below.

d Section 18, so far as material, is set out at [141], below.

and at no stage did the NA Trustee acquire or dispose of any gilt strips; and that the profit of the NA Trustee could not fall within Sch D Case VI.

Held – (1) A purposive interpretation of para 14A should seek to give relief to a person who sustained a loss from a discount on a strip where that loss reflected a real commercial outcome. This would normally involve a taxpayer suffering some real economic detriment. In practical terms, in the context of a transaction which was not self-cancelling (ie was not one where the taxpayer was at no real risk of sustaining a loss), the way in which this was achieved was by ensuring that the inputs into the formula in para 14A(3) reflected the reality of the transaction. In the case of a self-cancelling scheme, there was clearly no economic detriment and so no loss within para 14A. Whether that conclusion was reached by the application of a purposive interpretation of para 14A(1) (ie there was no loss that met the description in that paragraph) or through the application of para 14A(3) as informed by para 14A(1) (so that the price paid to by the holder to acquire the security and the amount payable on its transfer were in reality the same) did not really matter; the result was the same. The scheme in the instant case was not a self-cancelling transaction. It was not possible to treat a receipt by the NA Trust as a receipt by the taxpayer: the trust was not a 'sham'; the taxpayer was not the only beneficiary of the trust and therefore suffered some detriment as a result of the operation of the scheme in that funds in the trust were available to other beneficiaries; and, while it was true that funds from the NA Trust could have been paid to the taxpayer as the principal beneficiary, that did not happen in relation to a substantial proportion of the funds in the trust. A planned transaction with a connected person could in appropriate circumstances give rise to a loss within para 14A and therefore the taxpayer's claim to relief could not be rejected on that basis. The scheme in the instant case was a pre-planned scheme which should be treated as a composite whole for the purposes of the interpretation of the inputs into the calculation required by para 14A(3). The payment of the cash cancellation price, as an integral part of the arrangements for the transfer of the gilt strips to Investec, was part of the 'amount payable on the transfer' of the gilt strips for the purposes of para 14A(3). That approach was consistent with the purposive interpretation of para 14A as giving effect to real economic outcomes. As a provision dealing with circumstances in which a calculation of the amount of a loss was determined by reference to the actual transactions that took place (before the application of any special rules), para 14A had to encompass circumstances where the consideration for a transfer may have been directed to another person. There was nothing in the provision which confined the interpretation of 'transfer' in the present context to transactions with Investec that took place pursuant to the sale agreement. Therefore, the amount payable on the transfer for the purposes of para 14A(3) was the aggregate of the amount paid by Investec to the taxpayer and the amount of the cash cancellation payment paid by Investec to the NA Trust, and the taxpayer made a loss of £3,805.94 for the purposes of para 14A(3) (see [83], [91], [93], [95], [96], [103], [107], [114], [116]–[118], [121], [123], [124], [157], below); *Berry v Revenue and Customs Comrs* [2011] STC 1057 applied; *Bretten v Revenue and Customs Comrs* [2013] SFTD 900 at [91], [92] doubted; *Campbell v IRC* [2004] STC (SCD) 396 considered.

(2) Paragraph 1 Sch 13 FA 1996 was a special rule that treated certain transactions in relevant discounted securities and strips as giving rise to income in circumstances where they might otherwise not do so. In particular, the

wording of para 1(2)(a) suggested that a profit from a relevant discounted security or a strip only fell within para 1 where the person in question transferred the security or strip or received redemption proceeds 'as the holder of' the security or the strip. At no point did the NA Trustee hold an interest in the gilt strips which it could 'transfer' other than its rights under the deed of charge, which were not registered when the taxpayer transferred the gilt strips to Investec. Even when para 1 was applied purposively to the facts viewed realistically, the 'profit' made by the NA Trust did not answer to the statutory description of a 'profit from the discount' on the gilt strips. The NA Trust did not hold an interest in the gilt strips; it held an option under the Call Option Agreement, which gave it rights to acquire the gilt strips, and its rights under the deed of charge. Furthermore, it was never intended that the NA Trust would acquire the gilt strips or sell the gilt strips. In reality, it simply received a proportion of the proceeds of sale of the gilt strips (see [135]–[139], below).

(3) A profit arising from an isolated purchase and sale of an asset could not fall within Sch D Case VI. Such a profit could only be subject to tax as income if the transaction was in the nature of a trade and so within Case I. If not, the profit arising would be of a capital nature and so not within Case VI. The same might not apply where the transaction was not an isolated transaction but was repeated over a number of years. Further, the profit also had to be *ejusdem generis* with profits and gains specified in the other five Cases in Sch D. Case VI could not therefore apply to a gratuitous payment. However, where a receipt was of an income rather than a capital nature and it was paid pursuant to a binding contract in return for some kind of service, the receipt would be subject to tax under Case VI. In the instant case, the transactions were akin to isolated transactions. The NA Trustee acquired rights to the Call Option and disposed of its rights in a single transaction by electing to cancel the Call Option for the cash cancellation price. There was no evidence before the tribunal that those transactions were part of a repeated pattern of behaviour. The receipt of the cash cancellation price was capital in nature and so could not fall within Sch D Case VI. The timing of the transactions, and in particular the short timeframe between the acquisition and disposal of the option rights, and the short term nature of the option rights themselves did not disturb that conclusion. In those circumstances, the profit realised by the NA Trustee was not subject to tax as income under Sch D Case VI. Accordingly, the profit realised by the NA Trustee was not subject to tax as income under Sch D Case VI (see [149]–[151], [153], [156], [157], below); *Leeming v Jones* [1930] AC 415 applied.

The appeal would be allowed in part (see [158], below).

Notes

For relief for losses incurred on the disposal of a strip, see Simon's Taxes D9.523.

For the Income and Corporation Taxes Act 1988, s 18, Sch D, Case VI, as it was at the material time, see the Yellow Tax Handbook 2003–04, Part 1a, p 1049. Section 18 was repealed by the Corporation Tax Act 2009 and rewritten to the Income Tax (Trading and Other Income) Act 2005 with effect for tax years 2009–10 onwards.

For the Finance Act 1996, Sch 13, paras 1, 14, see the Yellow Tax Handbook 2003–04, Part 1b, p 5320. Schedule 13 was repealed by and rewritten to the Income Tax (Trading and Other Income) Act 2005 with effect for 2005–06 and subsequent tax years.

Cases referred to

Astall v Revenue and Customs Comrs [2009] EWCA Civ 1010, [2010] STC 137, 80 TC 22.

Audley v Revenue and Customs Comrs [2011] UKFTT 219 (TC), [2011] SFTD 597.

Barclays Mercantile Business Finance Ltd v Mawson (*Inspector of Taxes*) [2004] UKHL 51, [2005] STC 1, [2005] 1 AC 684, [2005] 1 All ER 97, [2004] 3 WLR 1383.

Berry v Revenue and Customs Comrs [2011] UKUT 81 (TCC), [2011] STC 1057; *affg* [2009] UKFTT 386 (TC).

Bretten v Revenue and Customs Comrs [2013] UKFTT 189 (TC), [2013] SFTD 900.

Campbell v IRC [2004] STC (SCD) 396, 7 ITLR 211.

Collector of Stamp Revenue v Arrowtown Assets Ltd [2003] HKCFA 46, (2003) 6 ITLR 454.

Cooper (*Inspector of Taxes*) *v Stubbs* [1925] 2 KB 753, 10 TC 29, [1925] All ER Rep 643, CA.

IRC v John Lewis Properties plc [2002] EWCA Civ 1869, [2003] STC 117, [2003] Ch 513, [2003] 2 WLR 1196, 75 TC 131.

IRC v Scottish Provident Institution [2004] UKHL 52, [2005] STC 15, [2004] 1 WLR 3172, [2005] 1 All ER 325, 76 TC 538, 7 ITLR 403.

Leeming v Jones [1930] AC 415, 15 TC 355, [1930] All ER Rep 584, HL.

MacNiven (*Inspector of Taxes*) *v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] STC 237, [2003] 1 AC 311, [2001] 1 All ER 865, [2001] 2 WLR 377, 73 TC 1, 3 ITLR 342.

Manduca v Revenue and Customs Comrs [2015] UKUT 262 (TCC), [2015] STC 2002.

Pearn v Miller (*Inspector of Taxes*) (1927) 11 TC 610.

Ramsay (*WT*) *Ltd v IRC, Eilbeck* (*Inspector of Taxes*) *v Rawling* [1981] STC 174, [1982] AC 300, [1981] 1 All ER 865, [1981] 2 WLR 449, 54 TC 101, HL.

RFC 2012 plc (*in liq*) (*formerly Rangers Football Club plc*) *v A-G for Scotland* [2017] UKSC 45, [2017] STC 1556, [2017] 1 WLR 2767, [2017] 4 All ER 654, 2018 SC (UKSC) 15, 2017 SLT 799.

Scott (*Inspector of Taxes*) *v Ricketts* [1967] 2 All ER 1009, [1967] 1 WLR 828, 44 TC 303, CA.

Versteegh Ltd v Revenue and Customs Comrs [2013] UKFTT 642 (TC), [2014] SFTD 547; *affd* sub nom *Spritebeam Ltd v Revenue and Customs Comrs* [2015] UKUT 75 (TCC), [2015] STC 1222.

David Yates (instructed by *Reynolds Porter Chamberlain LLP*) for the taxpayer.

Jonathan Davey QC and *Sam Chandler* (instructed by the *General Counsel and Solicitor to Revenue and Customs*) for HMRC.

The tribunal took time for consideration.

5 March 2019. The following decision was released.

JUDGE GREENBANK.

INTRODUCTION

[1] This decision relates to an appeal by the appellant, Mr Neville Andrew, against the amendments made by the respondents, the Commissioners for Her Majesty's Revenue and Customs ('HMRC') to his self-assessment tax return for the tax year 2003–04 by a closure notice dated 4 December 2005.

[**2**] The amendments made by the closure notice related to matters arising from Mr Andrew's participation in a tax avoidance scheme (the 'scheme') devised and promoted by BDO Stoy Hayward LLP ('BDO') involving certain transactions in gilt strips. In particular, those amendments:

(1) disallowed Mr Andrew's claim for a loss of £1,844,248 arising from the transactions in the scheme; and

(2) assessed Mr Andrew to income tax under s 18, s 660A or s 739 of the Income and Corporation Taxes Act 1988 ('ICTA') on profits of £1,840,342 arising to the Neville Andrew No 2 Settlement (the 'NA Trust') from transactions in the scheme.

[**3**] Mr Andrew died in 2016. This appeal is being pursued by his personal representatives.

[**4**] This appeal has been designated as a lead case under r 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, SI 2009/273.

APPLICATION TO AMEND STATEMENT OF CASE

[**5**] HMRC filed its statement of case on 9 May 2016. On 22 March 2018, HMRC wrote to the appellant's solicitors requesting consent to an order from the Tribunal permitting HMRC to amend its statement of case to reflect certain issues, which had been raised in the appellant's statement of case (and which had been filed on 7 June 2017). HMRC enclosed an amended statement of case with its letter.

[**6**] On 1 May 2018, the appellant's solicitors wrote to HMRC suggesting that HMRC was seeking to introduce new legal arguments that were not reflected in its original statement of case or in the closure notice. The appellant's solicitors suggested that the appropriate course of action was for HMRC to apply to the Tribunal for permission to amend its statement of case.

[**7**] By a notice dated 10 May 2018, HMRC applied to the Tribunal for permission to amend its statement of case. I heard submissions relating to the application at the commencement of the hearing.

[**8**] For the most part, the appellant did not object to the changes to HMRC's statement of case. The appellant did, however, object to two particular amendments.

(1) The first such amendment involved the insertion of a new para 38B, which put forward the proposition that the divestment of assets in favour of family members could not amount to sustaining a loss within the meaning of para 14A of Sch 13 to the Finance Act 1996 ('FA 1996').

(2) The second amendment involved the insertion of a new para 38C, which articulated an argument that the 'amount payable on the transfer' of gilt strips (for the purposes of para 14A(3)(b) of Sch 13 FA 1996) could include amounts payable to a person other than the transferor (and previous holder of the gilt strips).

[**9**] Having heard argument on the application in so far as it related to those changes, I granted the application. Both of these amendments are legal in nature and do not require any new factual enquiry. Both provide further particulars of issues which are either already before the Tribunal or which would inevitably have to be addressed in argument. The appellant had had more than three months' notice of the changes. There was, in my view, no material prejudice to the appellant in admitting the changes, which would allow all of the relevant issues to be ventilated before the Tribunal.

THE EVIDENCE

[**10**] I was provided with agreed bundles of documents for the hearing. There were no witnesses.

THE FACTS

[**11**] The issues before the Tribunal relate to certain tax avoidance arrangements to which Mr Andrew was a party and which were marketed by BDO. The particular scheme was referred to as the 'AmberBox Income Tax Shelter Arrangements'.

The scheme

[**12**] The bundle of documents, which was provided to me, included a draft statement of facts, which was marked with HMRC's comments and suggested amendments. That draft, after taking into account HMRC's comments and suggested amendments, is set out in Appendix 1 to this decision notice, subject to the changes to which I have referred to below.

(1) The draft statement contained cross-references to HMRC's statement of case and amended statement of case, which I have removed.

(2) The draft statement also included a note from HMRC to the effect that the draft reflected HMRC's current understanding of the facts and nothing in the document was to be construed as an admission by HMRC. I have removed this note.

[**13**] Notwithstanding the note to which I refer above, at no point in the hearing did either party demur from any statement that is included in the draft statement of agreed facts. Accordingly, I have adopted the draft statement in the form set out in Appendix 1 to this decision as my findings of fact in relation to the implementation of the scheme.

[**14**] For ease of explanation, I have set out a summary of those facts in the paragraphs that follow. It is not intended to detract from my findings of fact as set out in Appendix 1.

[**15**] There were five main elements to the scheme: (i) the creation of a trust for the benefit of Mr Andrew and his family; (ii) the acquisition of certain gilt strips by Mr Andrew; (iii) the grant by Mr Andrew to the trust of a call option over the gilts; (iv) the sale of the gilt strips subject to the call option by Mr Andrew to a third party bank; and (v) the cancellation of the call option in consideration for a payment by the bank to the trustees.

The creation of the trust

[**16**] On 7 February 2003, Mr Andrew entered into a deed of settlement to establish the NA Trust with an initial property of £1,000. The trustee was BDO Fidecs Trust Company Limited (the 'NA Trustee'). The NA Trustee was incorporated in Gibraltar and was not resident in the UK for tax purposes.

[**17**] Under the terms of the deed of settlement:

(1) Mr Andrew was the life tenant and, in default of any exercise of any power of appointment, was entitled to the income of the trust fund during his lifetime;

(2) his wife and children were included in the class of beneficiaries together with his remoter issue and certain charities;

(3) there was a discretionary power of appointment under which the trustees could appoint income or capital for the benefit of the beneficiaries;

(4) there was an additional discretionary power of appointment under which the trustees could pay the whole or any part of the trust fund to Mr Andrew as the life tenant or for his benefit without having regard to any of the interests of the other beneficiaries.

The purchase of the gilt strips

[**18**] On 13 October 2003, Mr Andrew paid £1,879,687.50 into an account with SG Hambros Bank & Trust (Jersey) Limited ('SG Hambros Bank') and requested SG Hambros Bank to use these funds to acquire certain UK Treasury principal gilt strips.

[**19**] SG Hambros Bank acquired the gilt strips for £1,874,987.94 and charged a commission of £4,687.47. The trade was agreed on 14 October 2003 and the settlement date for the trade was 15 October 2003.

The grant of the Call Option

[**20**] Under a call option agreement dated 17 October 2003 (the 'Call Option Agreement'):

(1) Mr Andrew granted to the NA Trustee, for a consideration of £100, an option (the 'Call Option') to acquire the gilt strips for 2% of their market value on the date of exercise;

(2) the NA Trustee was entitled to cash cancel the Call Option at any time whilst the option was exercisable for an amount equal to the market value of the gilt strips at the time less the exercise price (ie 2% of the market value of the gilt strips) and notional dealing costs;

(3) the option would lapse on the earlier of: (i) at 11.59 pm on the third business day after the date of the Call Option Agreement if the FTSE 100 index at close of business on that day had risen by more than 3% since the close of business on the date of the Call Option Agreement (the 'FTSE condition') and (ii) 11.59 pm on the 45th day after the date of the Call Option Agreement.

[**21**] The obligations of Mr Andrew were secured by a charge over the gilt strips. The NA Trustee was also appointed as Mr Andrew's attorney in respect of the gilt strips under a power of attorney dated 17 October 2003.

[**22**] The FTSE 100 index did not rise by more than 3% by the close of business on the third business day after the grant of the Call Option (22 October 2003) and so the Call Option did not lapse at the end of that day.

The sale of the gilt strips to Investec

[**23**] BDO sought offers from banks to acquire the gilt strips and received offers from Gerrards Private Bank and Investec Bank (UK) Limited ('Investec') at discounts of 0.3875% and 0.36% respectively to the market value of the gilts on the date of sale.

[**24**] Arrangements were put in place for the sale of the gilt strips to Investec. On 28 October 2003, there was an exchange of letters between Mr Andrew and the NA Trustee pursuant to which Mr Andrew requested and the NA Trustee granted consent for Mr Andrew to transfer the gilt strips to Investec subject to Investec agreeing to enter into a deed of adherence to the Call Option Agreement and deed of charge on essentially the same terms as Mr Andrew.

[**25**] On the same day:

(1) Mr Andrew was released from his obligations under the Call Option Agreement and the deed of charge by the NA Trustee;

(2) Mr Andrew entered into an agreement agreed to sell the gilt strips to Investec for £30,740;

(3) Investec entered into a deed of adherence in relation to the Call Option Agreement and a deed of charge over the gilt strips.

The cash cancellation of the Call Option

[**26**] On 3 November 2003, the NA Trustee wrote to Investec electing to cash cancel the Call Option.

[**27**] On 7 November 2003:

(1) Investec paid the NA Trustee the cash cancellation price of £1,840,442;

(2) the NA Trustee released Investec from the charge;

(3) the NA Trustee wrote to SG Hambros Bank to inform SG Hambros Bank that it should deal with the gilt strips according to Investec's wishes.

Other background information

[**28**] The bundle of documents, to which I have referred above, contains numerous documents relating to the marketing and implementation of the scheme. For the most part, those documents simply confirm that the scheme was implemented in the manner set out in Appendix 1 and which I have summarized above. The other key facts that I take from the documents are set out in the following paragraphs.

[**29**] First, it is clear that the steps that I have described above form a complex tax avoidance scheme that was designed and implemented as a whole. The steps were choreographed from start to finish by BDO. The scheme was described as 'aggressive' and 'not for the faint-hearted' in the marketing materials.

[**30**] The scheme was designed to produce a loss for tax purposes which could be set against Mr Andrew's taxable income without a material economic cost to Mr Andrew and his family. The marketing material states at various points that the scheme 'seeks to generate a loss on gilt strip without a commercial loss' and that 'the only cost to the clients is the cost to participate'.

[**31**] The scheme contained various features which were designed to introduce a degree of uncertainty as to whether or not the steps in the scheme would proceed as planned. These included:

(1) the FTSE condition, which I have described at [20](3) above, under which the Call Option would lapse if the FTSE 100 index had risen by more than 3% in the three days after the date of the Call Option Agreement;

(2) the Call Option Agreement itself, under the terms of which, if the FTSE condition was met, the NA Trustee might elect to exercise the Call Option and purchase the gilt strips, or to cash cancel the Call Option, or to allow the Call Option to lapse; and

(3) the involvement of the third party banks and the process by which tenders were sought for the purchase of the gilt strips so that, at the start of the scheme, it was not possible to specify with certainty the identity of the purchaser of the gilt strips.

There was no suggestion on the part of HMRC that any of these elements were not genuine or that any of the terms of the relevant agreements were in any way a sham. However, it is clear, and I find as a fact, that the parties

intended and expected that the steps would be implemented and would operate in the manner in which they were in fact ultimately implemented.

[**32**] In particular, the documentary evidence shows that, although tenders were formally sought from several banks for the purchase of the gilt strips after Mr Andrew had acquired the gilt strips and had granted the Call Option, enquiries had been made of Investec regarding its participation in the scheme and its willingness to purchase gilt strips at least as early as August 2003. I infer that similar approaches had been made to other banks. As a result, although requests for tender were genuinely made to various banks at the appropriate juncture in the scheme and it was not, at that time, possible to say with certainty which of the banks would ultimately purchase the gilt strips, there was no practical likelihood that a purchaser bank would not be found at an acceptable price.

[**33**] As regards the election by the NA Trustee to cash cancel the Call Option on 3 November 2003, it is clear that, from the outset, Investec expected that the NA Trustee would elect to cash cancel the Call Option and so Investec would acquire the gilt strips outright: its credit committee approvals assumed a purchase of the gilt strips; the prices at which the banks made their tender offers assumed that they would acquire the entire interest in the gilt strips free from the Call Option; and the communications between Investec and its legal advisers anticipated that the NA Trustee would elect to cash cancel the Call Option (albeit without ruling out the possibility of the Call Option being exercised or being allowed to lapse). Furthermore, the NA Trustees undertook to Investec not to register the charge that had been granted by Investec over the gilt strips because of concerns expressed by Investec about the effect of the registration of a large number of charges at the Companies Registry. This further demonstrates that the NA Trustee was also not expecting to exercise the Call Option and to acquire the gilt strips, but rather was expecting to cash cancel the Call Option.

[**34**] The evidence shows that the NA Trust was not established solely for the purpose of the scheme. Significant distributions were made to Mr Andrew from the trust by the NA Trustee. However, the funds obtained by the trust from the cash cancellation of the Call Option were not immediately advanced to Mr Andrew. Following the implementation of the scheme, no distributions were made to Mr Andrew from the NA Trust (other than a relatively small distribution of £52,270 in December 2004) until the tax year 2007–08. In that year, distributions amounting in aggregate to £628,193 were made to Mr Andrew, but £600,817 of that amount was a distribution of income of the trust to Mr Andrew as the life tenant. In the following six tax years, distributions of capital were made to Mr Andrew in an aggregate amount of £1,464,510.55. However, at no point in that period did the capital account of the NA Trust fall below £1,746,170 and, at 5 April 2017, the capital account of the NA Trust stood at £3,493,078.

HMRC's enquiry and the issue of the closure notice

[**35**] In his self-assessment tax return for the 2003–04 tax year, Mr Andrew claimed a loss of £1,844,248, being the difference between the price that he paid to purchase the gilt strips (£1,874,987.94) and the price for which he sold them to Investec (£30,740) under the sale and purchase agreement.

[**36**] HMRC opened an enquiry into Mr Andrew's return for the 2003–04 tax year, which concluded by the issue of the closure notice on 4 December 2015.

The closure notice made amendments to the return to disallow the loss and to assess Mr Andrew to income tax on profits arising in the NA Trust as a result of the scheme.

[**37**] The reasons for the amendments were set out in a document accompanying the closure notice entitled 'HMRC View of Gilt Strip Scheme Marketed by BDO in 2003–04'. That document concludes as follows:

> '1. There is no loss within paragraph 14A(1) and (3) construed according to its purpose.
>
> 2. The legal effect or end result of the scheme is that you made no loss. The Gilt Strips and the option are part of a composite and circular self-cancelling series of transactions which left you where you started.
>
> 3. The amount received from the option was part of "the amount payable on the transfer" of the Strips in making the calculation under paragraph 14A(3)(b).
>
> 4. There is an income profit arising on the trust under Schedule D Case VI which is assessable on individual as settler [sic] and beneficiary of the trust.'

[**38**] By notice of appeal dated 18 December 2015, Mr Andrew appealed against HMRC's decisions to disallow the loss and to impose a charge to income tax under Sch D Case VI on him as settlor and beneficiary of the NA Trust.

THE ISSUES BEFORE THE TRIBUNAL

[**39**] There are two issues before the Tribunal:

(1) whether Mr Andrew suffered a loss within the meaning of para 14A Sch 13 FA 1996; and

(2) whether the amounts received by the NA Trust pursuant to the scheme constitute income on which Mr Andrew is assessable under s 660A or s 739 ICTA.

[**40**] I have dealt with these issues separately below.

DID MR ANDREW SUFFER A LOSS WITHIN PARAGRAPH 14A SCHEDULE 13 FA 1996?

[**41**] The first issue is whether Mr Andrew suffered a loss within the meaning of para 14A Sch 13 FA 1996.

The relevant legislation

[**42**] The legislation which applied to the acquisition and disposal of gilt strips at the time of the transactions in the scheme appeared in Sch 13 FA 1996. This is the legislation that applied to gains and losses arising on the acquisition and disposal of 'relevant discounted securities'.

[**43**] Schedule 13 was extended to gains and losses on the acquisition and disposal of gilt strips by para 14 Sch 13 FA 1996, which treated every strip as a relevant discounted security.

[**44**] I have set out in Appendix 2 relevant provisions of Sch 13 FA 1996 to which I refer in this decision notice and to which reference was made by the parties in argument. Appendix 2 shows those provisions in the form in which they were in effect at the time of the transactions in the scheme.

[**45**] The key provision for the purpose of this case is para 14A, which set out the circumstances in which an individual was entitled to relief from losses arising from transactions in gilt strips. At all material times, para 14A provided as follows:

'**14A**

(1) A person who sustains a loss in any year of assessment from the discount on a strip shall be entitled to relief from income tax on an amount of his income for that year equal to the amount of the loss.

(2) The relief is due only if the person makes a claim before the end of twelve months from the 31st January following that year.

(3) For the purposes of this paragraph a person sustains a loss from the discount on a strip where—

(a) he transfers the strip or becomes entitled, as the person holding it, to any payment on its redemption, and

(b) the amount paid by him for the strip exceeds the amount payable on the transfer or redemption (no account being taken of any costs incurred in connection with the transfer or redemption of the strip or its acquisition).

The loss shall be taken to be equal to the amount of the excess, and to be sustained in the year of assessment in which the transfer or redemption takes place.

(4) In sub-paragraph (3) above the reference to a transfer in paragraph (a) includes a reference to a deemed transfer under paragraph 14(4) above (and paragraph (b) shall be read accordingly).

(5) This paragraph does not apply in the case of—

(a) any transfer of a strip for the time being held under a settlement the trustees of which are not resident in the United Kingdom, or

(b) any redemption of a strip which is so held immediately before its redemption.'

The parties' submissions

[**46**] I have summarized the parties' submissions below without going into detail on their submissions on the various case law authorities, as I will address these in my discussion below.

Mr Andrew's submissions

[**47**] Mr Yates, on behalf of Mr Andrew, puts his case quite simply.

[**48**] He says that, in relation to any transaction in gilt strips, para 14A(3) Sch 13 FA 1996 sets out a statutory formula which defines the amount of any loss as the amount by which the amount paid by an individual for the strip (Amount A) exceeds the amount payable on a transfer or redemption of the strip (Amount B). He accepts that para 14A(3) is susceptible to analysis under the line of cases beginning with the House of Lords' decision in *WT Ramsay Ltd v IRC* [1981] STC 174, [1982] AC 300 (the '*Ramsay* principle') – see the decision of Lewison J in *Berry v Revenue and Customs Comrs* [2011] UKUT 81 (TCC), [2011] STC 1057 ('*Berry*') at [36] – but, he says, the *Ramsay* principle can only be applied to para 14A(3) for the purpose of interpreting the inputs (i e Amount A and Amount B) into the statutory formula. Once those amounts have been determined, the formula as set out in the legislation defines the amount of the loss.

[**49**] So, he says, in determining the amount paid by Mr Andrew for the gilt strips and the amount payable on the subsequent transfer of the gilt strips, it is necessary to apply the legislation purposively to the facts viewed realistically in accordance with the case law forming part of the *Ramsay* principle. However, having done so, it is not permissible to test the result of the formula to determine whether or not it represents a 'real' loss. That approach, he says is

the product of the analysis by Lewison J in *Berry* of the decision of the Special Commissioners in *Campbell v IRC* [2004] STC (SCD) 396, 7 ITLR 211 ('*Campbell*') – see *Berry*: [42] and [43].

[50] Mr Yates says that the scheme involved in this case is more analogous to the scheme involved in *Campbell* than the scheme in *Berry*. *Berry* involved a scheme in which the relevant transactions were self-cancelling. There was no real detriment suffered by the taxpayer. In *Campbell*, the taxpayer suffered a real detriment through a gift of the relevant securities to his wife.

[51] Mr Yates also challenges any analogy between this case and cases of *Bretten v Revenue and Customs Comrs* [2013] UKFTT 189 (TC), [2013] SFTD 900 ('*Bretten*') and *Audley v Revenue and Customs Comrs* [2011] UKFTT 219 (TC), [2011] SFTD 597 ('*Audley*'). Those cases involved a challenge to the scheme in question by reference to whether or not the taxpayer had paid a given amount for the relevant securities or whether the payment which had been expressed to be made for the securities had in fact been made at least in part for another purpose. The point at issue in *Bretten* and *Audley* concerned the amount paid by the taxpayer to acquire the securities (ie Amount A). In the present case, as in *Campbell*, there was no dispute between the parties about the amount paid by the taxpayer, here Mr Andrew, to acquire the gilt strips. In this case, that amount was £1,874,987.94. The question in this case was what was the 'amount payable on the transfer' (ie Amount B)?

[52] Mr Yates says that the amount payable on the transfer (Amount B) is the amount that Investec paid Mr Andrew to purchase the gilt strips, ie £30,740.

HMRC's submissions

[53] For HMRC, Mr Davey stresses the point that the *Ramsay* principle does apply to the interpretation of para 14A Sch 13 FA 1996 (*Berry*: [36]). It is therefore necessary in interpreting that provision to construe the legislation viewed purposively to the facts viewed realistically (*Barclays Mercantile Business Finance Ltd v Mawson* (*Inspector of Taxes*) [2004] UKHL 51, [2005] STC 1, [2005] 1 AC 684 ('*BMBF*')).

[54] The purpose of para 14A(3) is clear and is to be found in para 14A(1). It is to give relief for real losses arising from real commercial outcomes (*Berry*: [51] and [52]).

[55] Mr Davey says that, adopting this approach, Mr Andrew did not make a real loss that answers to the statutory description in para 14A. In determining whether or not Mr Andrew made a real loss, it is necessary to take into account the position of the NA Trust. At the beginning of the scheme Mr Andrew held £1.88m in his bank account. At the end of the scheme, Mr Andrew held £30,740 in that bank account and the NA Trust, of which he was the principal beneficiary, held the sum of approximately £1.84m for the benefit of Mr Andrew and his family.

[56] The powers under the trust to make distributions to Mr Andrew demonstrated an intention that those funds would be available to Mr Andrew. Distributions were in fact made to him. The scheme was planned and implemented as a single composite scheme. It must therefore be permissible to take account of the funds held by the trust in determining whether or not Mr Andrew made a real loss as a result of the transactions that formed part of the scheme.

[57] The theoretical chance that the NA Trustee might not make distributions to Mr Andrew did not affect the ultimate analysis. The relevant enquiry is to examine the composite effect of the scheme as it was intended to

operate and then to apply the legislation accordingly. (Mr Davey referred to the judgment of Lord Hodge in *RFC 2012 plc (in liq) (formerly Rangers Football Club plc) v A-G for Scotland* [2017] UKSC 45, [2017] STC 1556, [2017] 1 WLR 2767 ('*Rangers*') at [65] where he quotes from the judgment of House of Lords in *IRC v Scottish Provident Institution* [2004] UKHL 52, [2005] STC 15, [2004] 1 WLR 3172 ('*SPI*').)

[58] Even if it was not intended that the funds would necessarily return to Mr Andrew personally from the NA Trust, it was not the case that Mr Andrew made a loss which answered to the statutory description. The marketing material for the scheme disclosed that the intention was to generate a tax loss without any real commercial loss for the participant other than the cost of participating in the scheme. Paragraph 14A requires that the taxpayer makes a real commercial loss. On this hypothesis, the effect of the scheme in economic reality was that Mr Andrew made a settlement of £1.87m. That is not a commercial loss within the terms of the legislation (see Judge Mosedale in *Bretten* at [135]).

[59] Mr Davey's second argument is that the amount 'payable on the transfer' for the purposes of para 14A(3) must include the cash cancellation payment that was paid by Investec to the NA Trustee. He says that, viewed realistically, and with regard to the transaction's composite whole, the total amount paid by Investec to acquire the gilt strips was the sum of the cash cancellation payment and the £30,740 purchase price paid to Mr Andrew. There was no genuine transfer of the gilt strips to Investec until the option was cash cancelled and the charge in favour of the NA Trustee was released. Until that time, Investec could not deal with the gilt strips without the consent of the NA Trustee and, therefore, in the real world, Investec had no beneficial entitlement to the gilt strips until the cash cancellation price was paid.

Mr Andrew's response to HMRC's submissions

[60] In response to HMRC's argument that Mr Andrew did not make a 'real loss' because it was necessary to take into account the receipt of funds by the NA Trust, Mr Yates points out that Mr Andrew did alter his economic position to his own detriment in a manner similar to that of the taxpayer in *Campbell*. Mr Andrew's rights under the trust were limited to those of a life tenant subject to the exercise of discretion by the trustees in his favour. It was not necessary for Mr Andrew to make a 'commercial' loss in order to fall within para 14A. In this respect, Mr Yates disagreed with the comments of Judge Mosedale in *Bretten* at [135].

[61] HMRC's argument involved ignoring the position of the trust. However, HMRC had not sought to argue that the NA Trust was a 'sham'. There was no evidence that it was. The risk that the NA Trustees would not exercise their discretionary powers in Mr Andrew's favour was not a contingency that could be ignored for the purposes of para 14A. This was in contrast to the FTSE condition, which Mr Andrew accepted did fall within the principles of the judgment of House of Lords in *SPI* (*SPI*: [23]).

[62] As regards the argument that the 'amount payable on the transfer' must include the cash cancellation payment made by Investec to the NA Trustee, Mr Yates referred to the wording of para 14A(3) and in particular to the words 'payable on the transfer' (my emphasis). He said that it was implicit in the wording of the legislation that any payments taken into account must be made at the time of the transfer of the gilt strips to the person by whom the transfer was made. He also referred to the provisions of para 4(3) (meaning of transfer),

para 8 (transfers between connected persons) and para 14B (strips of government securities: manipulation of acquisition, sale or redemption price) – the last of which was incorporated in the legislation in the Finance Act 2004 – all of which, he said, were consistent with that analysis. HMRC's argument required the concept of 'transfer' to be read as wider than the transfer of the gilt strips pursuant to the sale agreement. That was not a permissible interpretation on the basis of the legislation.

Discussion

[**63**] The parties' arguments on this first issue focussed on the proper construction of para 14A(3) of Sch 13 FA 1996.

[**64**] The parties agreed that para 14A is susceptible to interpretation under the *Ramsay* principle. That is hardly surprising given that the *Ramsay* principle is a general principle of purposive and contextual construction of all legislation. It follows that the question that I must ask myself is whether the relevant statutory provision (in this case, para 14A(3)), construed purposively, was intended to apply to these facts viewed realistically (to adopt the words of Ribiero PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46, (2003) 6 ITLR 454 (at [35])).

The case law authorities

[**65**] The parties, however, differ in their application of para 14A(3) to the facts of this case. I have been referred by the parties to various authorities in support of their arguments, but there were three main cases to which I was referred, all of which related to tax avoidance schemes designed to take advantage of the provisions of Sch 13 FA 1996. They are *Campbell*, *Berry* and *Bretten*. I will begin by reviewing those cases, the parties' arguments in relation to them and the principles that I take from them.

[**66**] I will start with the Special Commissioners' decision in *Campbell*. This case also involved the interpretation of the wording of Sch 13 FA 1996. In *Campbell*, the taxpayer, Mr Campbell, set up a special purpose company through which he made investments. On 23 December 1999, Mr Campbell borrowed £3.9m from a bank. On the following day, he subscribed £3.75m for loan notes in the company. On 15 March 2000, he made a gift of the loan notes to his wife. It was agreed that the loan notes were relevant discounted securities. HMRC also accepted that Mr Campbell had paid £3.75m to acquire the loan notes even though it was acknowledged that that price was an over value.

[**67**] The decision in *Campbell* concerned the construction of para 2 Sch 13 FA 1996 in the form that it stood at the time. Paragraph 2 contained several provisions which were similar in many respects to those in para 14A of Sch 13 which is in point in this case. Paragraph 2(1) provided that a person who sustained a loss on a relevant discounted security was entitled to relief from income tax for that year in an amount equal to the amount of the loss (in much the same way as para 14A(1)). Paragraphs 2(2) and (3) provided that: a person sustained a loss from the discount on a relevant discounted security where the amount paid by that person in respect of his or her acquisition of the security exceeded the amount payable on the transfer or redemption; and that the amount of the loss should be taken to be equal to the amount of the excess (in that case, increased by the amount of any relevant costs). So their provisions were similar to para 14A(3).

[**68**] By virtue of para 8 of Sch 13, Mr Campbell was treated as having received the market value of the loan notes on the occasion of the gift. The market value of the loan notes at that time was £1.5m. So he claimed that the difference between the amount of his subscription and the market value of the loan notes on the date of the gift was a loss on which he was entitled to tax relief. HMRC's argument was that Mr Campbell's subscription for the loan notes and the gift to his wife were entirely tax motivated and should be disregarded. If they were disregarded, Mr Campbell had suffered no loss.

[**69**] The Special Commissioners found that, although his main purpose was to obtain the tax relief, Mr Campbell did have a commercial purpose for setting up the company and subscribing for loan notes, namely to make investments through the medium of the company (*Campbell*: [65] and [66]). However, the gift of the loan notes to his wife was entirely tax motivated (*Campbell*: [67]). Having discussed the case law concerning the operation of the *Ramsay* principle as it stood at the time, the Special Commissioners concluded as follows:

> '[86] In this case, we are concerned with the terms of Sch 13, para 2 in circumstances in which the Inland Revenue accepts that the subscription price was entirely paid in respect of the acquisition of the Loan Notes and that there was a transfer by the Appellant to a connected person. Paragraph 2(3) is an entirely mechanistic provision which calculates the "loss" by deducting the subscription price "paid in respect of [the] acquisition of [the Loan Notes]", within para 2(2)(a), from the market value deemed by para 8 to be obtained on the "transfer", within para 2(2)(b), and deducting any relevant costs.
>
> [87] Once an amount paid in respect of a relevant discounted security is ascertained and the amount received (or deemed to be received) on transfer or redemption is determined, there is a "loss" where the former exceeds the latter. There is no room for the purpose of the holder of the relevant discounted security to inform the construction of the term "loss". In other words, once the terms "amount paid … in respect of [an] acquisition of [a relevant discounted security]" and "amount payable on … transfer or redemption [of the relevant discounted security]" have been construed in the context of para 2(2), the "loss" is also automatically ascertained. This is confirmed by the terms of para 2(3) which provides that "For the purposes of [Sch 13] the loss *shall be taken … to be* equal to the amount of the excess increased by the amount of any relevant costs …". Paragraph 2(3) confirms that the term "loss" is, to use the terminology of The Lord President … (at para 43) in *Scottish Provident* a "construct which has a specific statutory meaning", so that, like s 155 of the Finance Act 1994, in *Scottish Provident*, para 2(2), of Sch 13 is "an artificial framework … [which] does not indicate that a commercial meaning falls to be given to '"loss"'.
>
> [88] The artificial (legal) meaning of the term "loss" in Sch 13, para 2(1), (2) is further reinforced by the statutory mechanism which quantifies a "loss" for these purposes. Firstly, the "loss" is increased by the "relevant costs" incurred by a taxpayer (being the costs incurred "in connection with the acquisition of the [relevant discounted security]" and costs incurred "in connection with [any] transfer or redemption of the [relevant discounted security]": see Sch 13, para 1(4) and para 2(3)(a). Secondly, as we have already observed, the transferor of a relevant

discounted security is deemed to receive an amount equal to its market value, when the transfer is to a connected person, even though he may receive no such sum. These factors, while not at all conclusive in themselves, confirm that the term "loss", in the context of para 2(1) and (2), is far removed from any "commercial" sense of the term,

[89] Here, the amount paid by the Appellant in respect of the Loan Notes exceeded the amount which he was treated as obtaining on the transfer to his wife. It follows that by the express words of para 2(2) he sustained a loss for the purposes of Sch 13.' (Original emphasis.)

[70] As I have discussed above, Mr Yates relies on the decision in *Campbell*, and in particular the paragraphs to which I have just referred, in support of his argument that although para 14A is susceptible to interpretation under the *Ramsay* principle, the wording of para 14A(3) is such that once the amounts of the price paid by Mr Andrew to acquire the gilt strips and the amount payable to him on the transfer of the gilt strips have been determined, the statute dictates the amount of the loss to which Mr Andrew is entitled.

[71] I will address that point in due course, but before I leave *Campbell*, I should note two further points. The first is that *Campbell* is based on legislation which had been repealed by the time of the transactions in Mr Andrew's case. The second is that the Special Commissioners decided the case before the decisions of the House of Lords in *BMBF* and *SPI* and the Supreme Court's decision in *UBS* and so their decision is framed in language that reflects the leading case law at the time, principally the decision of the House of Lords in *MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd* [2001] UKHL 6, [2001] STC 237, [2003] 1 AC 311. However, the House of Lords in *BMBF* did refer to the Special Commissioners' decision in *Campbell* as 'perceptive' (*BMBF*: [38]).

[72] The next case to which I should refer is the case of *Berry*. Once again this case involved the interpretation of Sch 13 FA 1996, but in this case the provisions of para 14A with which we are concerned. The taxpayer, Mr Berry, entered into a series of transactions in gilt strips which were designed to produce a 'loss' within para 14A. In summary, he agreed to purchase gilt strips for a price of £6,496,308 plus a spread component under a forward purchase contract with a special purpose company. At the same time, he granted a call option to the special purpose company for a premium of £390,000 pursuant to which the special purpose company could buy the gilt strips from the taxpayer for a price equal to the purchase price of the gilt strips less the premium for the option. Arrangements were put in place to ensure that completion of both the forward purchase contract and the exercise of the call option were close to simultaneous and that neither the taxpayer nor the special purpose company, nor the bank that funded the arrangements, could suffer an economic loss from the transactions.

[73] The nominal amount of the gilt strips to be bought and sold was driven entirely by the tax loss that Mr Berry wanted to create. Whether or not the option was exercised, Mr Berry's overall economic position would not change apart from the cost of the scheme.

[74] Mr Berry argued that the transactions gave rise to a loss under the provisions of para 14A equal to the difference between the amount paid by him to acquire the gilt strips under the forward purchase contract and the amount received by him on the sale price of the gilt strips following the exercise of the option (ie the amount of the premium paid for the grant of the option). This

was on the basis that the grant of the option was a separate transaction from the acquisition and disposal of the gilt strips and so the amount paid as a premium for the grant of the option was not an 'amount payable on the transfer of' the gilt strips under para 14A(3).

[75] Mr Berry's appeal was dismissed by the First-tier Tribunal ([2009] UKFTT 386 (TC)) and on appeal by Lewison J in the Upper Tribunal.

[76] At [31] in his judgment, Lewison J summarized the principles that he derived from the case law on the *Ramsay* principle. He then turned to the question of identifying the purpose of para 14A.

[77] He dismissed an argument on behalf of Mr Berry that the *Ramsay* principle could not apply to para 14A (*Berry*: [36]). (As I have mentioned, that is not a proposition that Mr Andrew has advanced in this case.) He then addressed the argument that the purpose of para 14A was to be found in the prescriptive way in which the legislation was drafted ie the statute identified when a loss was sustained and the amount of the loss so there could be no wider statutory purpose.

[78] On this point, Lewison J agreed with the First-tier Tribunal in *Berry* that the purpose of para 14A was to be found in para 14A(1) and that the reference to a 'loss' in para 14A(1) must be to a 'real commercial outcome'. He said ([2011] STC 1057 at [51] and [52]):

> '[51] As I have said, the FTT held that the purpose of para 14A was the general proposition stated in sub-para (1) viz:
>
> > "A person who sustains a loss in the year of assessment from the discount on a strip shall be entitled to relief from income tax on the amount of his income for that year according to the amount of loss."
>
> [52] In my judgment the FTT were right to identify the purpose of the paragraph in that way. This is not a case in which Parliament has used algebra (amount A and B) to create a notional profit or loss. It has used words which have a recognised commercial meaning; and it is to be expected that Parliament intended to tax (or relieve) real commercial outcomes. The FTT were right not to adopt a slavishly literal "tick-box" interpretation of the legislation. This is precisely how the *Ramsay* principle is meant to operate. I thus conclude that the FTT made no error of law in identifying the purpose of the legislation.'

[79] In arriving at that conclusion, Lewison J set out his analysis of the Special Commissioners' decision in *Campbell* and in particular his interpretation of the paragraphs in the decision to which I refer at [69] above which included the conclusion that 'There is no room for the purpose of the holder of the relevant discounted security to inform the construction of the term "loss" ' (*Campbell*: [87]). In short, Lewison J agreed (at [43] and [45]) with the submission of counsel for HMRC, Malcom Gammie QC, that that conclusion must be seen in the context of the reality of the facts of the *Campbell* case. On the facts of *Campbell*, Mr Campbell made a real acquisition of the loan notes and a real disposal of them. But that conclusion did not mean that the provisions of Sch 13 were too closely articulated to permit the application of the *Ramsay* principle to determine the reality of the facts in another case.

[80] Lewison J said this at [43]:

> '[43] The ground of the decision, as I read it, is that "There is no room for the *purpose of the holder* of the relevant discounted security to inform

the construction of the term 'loss'". In other words Mr Campbell's motivation did not automatically deny him his tax relief. They were not saying that the fact-finding tribunal should ignore the reality of the transactions that in fact took place. Moreover, as they went on to point out, the Commissioners' finding of fact that Mr Campbell had a commercial purpose in subscribing for the loan notes meant that HMRC's argument failed on the facts (para 92). At the start Mr Campbell was the holder of the loan notes, for which he had paid in real money borrowed from the bank. At the end, Mr Campbell no longer owned the loan notes; but he still owed the money to the bank. His economic position had changed for the worse. In ordinary terms, he had suffered a loss. The loan notes had not disappeared. They still existed, but they were owned by his wife. There were, therefore, two real events separated by several months which existed in the real world. In his written submissions Mr Gammie QC submitted:

> "Thus, once the Commissioners had decided (or the Revenue had conceded) that no part of the £3.75m was in reality a gift to the company, there was only one possible answer to the statutory question posed by paragraph 2(2)(b) of Schedule 13—what amount did Mr Campbell pay to subscribe the securities? Similarly, once it had been determined (or conceded) that the reality of the arrangement was that Mr Campbell subscribed the securities and then, as a separate matter, gave them to his wife, paragraph 8 of Schedule 13 supplied the answer to the question—what amount did Mr Campbell receive on transferring the securities? Paragraph 8 directed that this was their market value.
>
> The relevant point about *Campbell* is that the provisions of Schedule 13 were too closely articulated *in relation to the reality of the taxpayer's transactions in that case*. It is not that the provisions of Schedule 13 are too closely articulated to exclude the application of the *Ramsay* principle and to prevent one deciding in any other case what is the tax reality of the taxpayer's transactions." ' (Original emphasis.)

[**81**] On that basis, Lewison J was able to conclude, on the facts of *Berry*, that the First-tier Tribunal was correct to conclude that no loss was sustained by Mr Berry. This was because, on the facts viewed realistically, Mr Berry took no real risk; it was a self-cancelling scheme. In so far as Mr Berry bought and sold gilt strips, the acquisition price and the sale price were the same and he could not therefore have sustained any loss.

[**82**] Lewison J sets out this conclusion at [58]:

> '[58] Ms Nathan said that the FTT had recognised that Mr Berry had a liability to the Bank to discharge, and that there was therefore a real transaction. She said that accounting entries were the normal way in which changes in credit and debit balances in bank accounts were recorded; and that in the case of securities held in CREST accounting entries in sub-accounts were the normal way in which changes of ownership were recorded. Accordingly she submitted that the FTT were wrong to conclude (at [63]) "that no loss was sustained by Mr Berry; nor was any amount paid by him for the gilt strips, nor was there any transfer of the strips." In my judgment it is really only the first of these conclusions that matters, having regard to the purpose of para 14A that the FTT (rightly in my judgment) identified. Once the FTT had reached the conclusion that there was no element of real risk and that the anti-*Ramsay* device (consisting of the

possibility that the option would not be exercised) could be disregarded because that is how the parties had proceeded, the FTT was left with a self-cancelling scheme. Looked at realistically, if and in so far as Mr Berry bought and sold gilt strips the purchase price and the sale price were the same. The option fee was no more than a refundable deposit. His overall economic position before and after had not changed (apart from the fact that he had paid the fees required to participate in the scheme).'

[**83**] The principles that I derive from *Berry* are therefore as follows:

(1) First, the *Ramsay* principle must be applied in construing para 14A. This is not in dispute between the parties.

(2) Second, the purpose of para 14A is to be derived from para 14A(1) namely that a person who sustains a loss from a discount on a strip should be entitled to relief from income tax for that loss, but that 'loss' in that context should reflect what Lewison J describes as 'real commercial outcomes' (*Berry*: [52]). (I will return to the meaning of this phrase below.)

(3) Third, although the motivation of the taxpayer may not be relevant to the application of para 14A(3) once the inputs into the calculation required by that sub-paragraph have been determined, regard must be had to the reality of facts of the particular case in determining those inputs. It is therefore necessary to determine the 'amount paid [by the taxpayer] for the strip' and the 'amount payable on the transfer' in the context of the facts viewed realistically, bearing in mind that the purpose of the provision is that any loss should reflect the economic outcome.

(4) Finally, Lewison J reaches his conclusion (*Berry*: [58]) on an analysis of the effect of the scheme as a composite whole. Lewison J finds that the scheme was a self-cancelling scheme. On that basis, Mr Berry could not have made a loss within para 14A; the purchase price and sale price of the gilt strips were the same.

[**84**] Before I leave the case law, I should also refer to the decision of the First-tier Tribunal (Judge Mosedale) in *Bretten*. This case also concerned the use of loan notes, which were treated as relevant discounted securities, to generate a loss under para 2 Sch 13 FA 1996.

[**85**] In summary, the facts were as follows.

(1) Mr Bretten established two trusts with £10 each. Mr Bretten was the life tenant of the first trust and his daughter was the life tenant of the second trust.

(2) On 24 February 2003, Mr Bretten paid £500,000 for loan notes issued by an unconnected company. The terms of the loan notes contained various provisions regarding their redemption price which were designed to ensure that the loan notes constituted relevant discounted securities for the purposes of Sch 13.

It was a condition precedent to the issue of the loan notes that the company had to grant a call option to the first trust which entitled the trust to be substituted as debtor in return for being paid an amount equal to the redemption price of the loan notes.

(3) On 5 March 2003, the first trust exercised the call option and was substituted as debtor in place of the company in respect of the loan notes. The company paid the first trust £499,500 (the then understood redemption price).

(4) Also on 5 March 2003, Mr Bretten made a gift of the loan notes to the second trust. It was agreed that the market value of the loan notes at this

stage was £25,000. This was because the terms of the loan notes restricted the redemption price to £25,000 on a redemption of the notes before their final maturity in 2043 but more than after 14 days after the issue date.

[86] The gift of the loan notes to the second trust was deemed to take place at market value under para 8 of Sch 13. Mr Bretten claimed a loss under para 2 of Sch 13 equal to the excess of the amount that he had paid for the loan notes (£500,000) over the amount he was deemed to receive when he made the gift (£25,000). HMRC rejected his claim.

[87] The First-tier Tribunal (Judge Mosedale) dismissed Mr Bretten's appeal. Judge Mosedale reached her conclusion primarily on the basis that, viewed realistically, Mr Bretten only 'paid' £25,000 for the loan notes and so Mr Bretten did not make a loss within para 2 of Sch 13 (*Bretten*: [124] to [135]). She also expressed her agreement with HMRC's alternative arguments that viewed realistically Mr Bretten never acquired the loan notes and that the proper analysis was that the first trust issued loan notes to the second trust (*Bretten*: [136] to [148]); and that the anti-avoidance provisions in para 9A of Sch 13 applied (*Bretten*: [149] to [167]).

[88] The important point for the purposes of this appeal is Judge Mosedale's analysis of the Special Commissioners' decision in *Campbell* in the light of the Upper Tribunal's decision in *Berry*, which forms part of her reasoning for her primary conclusion. The relevant passage begins at [78] in Judge Mosedale's decision. Having referred to Lewison J's judgment in *Berry* (and in particular to his conclusions at [51] and [52]), Judge Mosedale summarized her conclusions ([2013] SFTD 900 at [89] to [92]):

> '[89] In summary, where the intention of Parliament is only to tax real gains, then the courts and tribunals are free only to recognise real losses.
>
> [90] I find that *Campbell* is not authority that para 2(2) should be given a mechanistic interpretation: in so far as that was the basis of the decision, it was wrongly decided (see the citation from *Berry* above). However, Lewison J considered that the case was correctly decided. As both the Court of Appeal in *Astall* and the Upper Tribunal in *Berry* decided that provisions related to and very similar to para 2(2) were intended to apply to commercial reality, the explanation for this view is that the formula "A minus B" must be applied mechanistically, as it was in *Campbell*, once the figures for "A" and "B" are known, but the calculation of "A", at least, and perhaps "B", must be consistent with commercial reality. The calculation must have been intended to give effect to the notion of a "real" loss envisaged by Parliament when it legislated the phrase "… a person sustains a loss …"
>
> [91] Is it right that *Campbell* is to be distinguished solely because HMRC conceded the figures for "A" and "B", and would the outcome [of] the case have been different if they had not? Lewison J did refer to the fact (see para [86] above) that the taxpayer in *Campbell* made a "real" loss in the sense he was worse off after the planned series of transactions than he was before. Is this also a point of distinction?
>
> [92] I think not. The logic of a loss being a "real" loss is that it can't have been a loss that was intended to arise. If a party intends to give away some of his assets, the act of giving away is not a commercial loss as it is intentional. The situation of a taxpayer choosing to give away assets as part of tax avoidance scheme arose in the recent FTT case of *Audley*.'

[**89**] Judge Mosedale's conclusion at [90] is similar to that which I have reached at [83] above. Mr Yates, however, criticised the subsequent paragraphs ([91] and [92]), to the extent that Judge Mosedale appears to suggest that having performed the calculation in para 2(2) Sch 13 (which is similar to that in para 14A(3)) it is necessary to test whether any loss that is given by the calculation is a 'real' loss before it can be relieved. He says this is not consistent with her analysis in [90] and furthermore it is inconsistent with Lewison J's analysis in *Berry* of the Special Commissioners' decision in *Campbell*.

[**90**] It is not clear to me that Judge Mosedale's conclusions go that far. What is clear is that, in Judge Mosedale's view, a planned or intentional loss cannot be a 'real' loss for these purposes (and so does not attract relief under Sch 13). Having reviewed the decision of the First-tier Tribunal in *Audley*, Judge Mosedale reiterates this conclusion at [96] and further at [135].

[**91**] I disagree with that conclusion to the extent that it suggests that a loss which arises on a planned transaction with a connected person cannot, in appropriate circumstances, be a 'real commercial outcome' (to use the words of Lewison J in *Berry* (at [52])) and so potentially relievable under para 14A(3). People who are connected, such as the members of a family, will often deal with one another on terms which are not overtly commercial. It does not mean that those transactions are not real or that they do not involve real economic consequences. In my view, in appropriate circumstances, those transactions may give rise to a loss within para 14A. They did so in *Campbell*. Indeed, the very fact that para 8 of Sch 13 includes a market value rule, for transactions between connected persons, demonstrates that such transactions are within the scope of para 14A. It is simply that the tax consequences are adjusted in such circumstances.

[**92**] In my view, this approach is consistent with the approach of Lewison J in *Berry*. Lewison J acknowledged in *Berry* (at [43]) that, in *Campbell*, Mr Campbell had entered into real transactions in subscribing for the loan notes and making the gift to his wife and that Mr Campbell had suffered real economic consequences as a result. The fact that those steps were planned and would inevitably give rise to a loss (and so were not 'commercial' in the narrow sense used by Judge Mosedale in *Bretten* at [92]) did not of itself deprive them of their consequences. When Lewison J used the phrase 'real commercial outcomes' (*Berry*: [52]) he would have included within its ambit the type of loss made by Mr Campbell (on the basis of the facts as determined, or conceded, in that case). Indeed in *Berry* (also at [43]) Lewison J accepts that Mr Campbell's own economic position had changed for the worse as a result of the transactions in the scheme and that, in ordinary terms, he had made a loss (even though that loss was clearly intended to arise).

[**93**] In conclusion, a purposive interpretation of para 14A should, as identified by Lewison J in *Berry*, seek to give relief to a person who sustains a loss from a discount on a strip where that loss reflects a real commercial outcome. This will normally involve a taxpayer suffering some real economic detriment. In practical terms, in the context of a transaction (such as in *Campbell*) which is not self-cancelling, the way in which this is achieved is by ensuring that the inputs into the formula in para 14A(3) reflect the reality of the transaction (as described in the extract from Malcom Gammie QC's submissions to which Lewison J refers in *Berry* at [43]). In the case of a self-cancelling scheme (as in *Berry*), there is clearly no economic detriment and so no loss within para 14A. Whether that conclusion is reached by the application of a purposive interpretation of para 14A(1) (i e there is no loss that

meets the description in that paragraph) or through the application of para 14A(3) as informed by para 14A(1) (so that the price paid to by the holder to acquire the security and the amount payable on its transfer are in reality the same) does not really matter; the result is the same.

The facts viewed realistically

[**94**] Before I turn to the construction of the relevant paragraphs of Sch 13, I will first make a few comments on the nature of the facts in this case, which, to my mind, are relevant to how the facts should be viewed realistically in the context of the statutory provisions. I will refer to some of them again as I approach the arguments on para 14A itself. As Lewison J acknowledged in *Berry* (at [11](ii) and [11](iii)), the whole process may be an iterative one.

[**95**] As a starting point, and as I have mentioned, this was a pre-planned tax avoidance scheme. It was designed and implemented as a whole. In applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme, it is legitimate for me to look at the composite effect of the scheme as a whole as it was intended to operate (*BMBF*: [*35*]).

[**96**] Mr Andrew set up the NA Trust. There has been no argument on the part of HMRC that the trust was a 'sham'. It was properly constituted and it entered into valid transactions. Mr Andrew was the principal beneficiary. He was the life tenant and the trust contained powers of appointment that could have resulted in the funds in the trust being appointed to him. The evidence is, however, that, although Mr Andrew did benefit from the trust, significant funds remained in the trust for the benefit of Mr Andrew's family.

[**97**] Mr Andrew acquired the gilt strips for £1,874,987.94. This was a real purchase and had real consequences.

[**98**] Mr Andrew entered into various arrangements with the NA Trust in relation to those gilt strips; principally the grant of the Call Option which included the possibility for the NA Trust to cash cancel the option.

(1) The exercise of the Call Option was subject to the FTSE condition. As I have mentioned, it was agreed by the parties that the inclusion of the FTSE condition in the scheme was simply designed to enable the parties to claim that the scheme did not involve a composite transaction. It was a form of 'commercially irrelevant contingency' of the kind referred to by the House of Lords in *SPI* (at [*23*]) which should be ignored for the purposes of determining how the parties intended the scheme to operate.

(2) As regards the Call Option itself, as I have mentioned, although the NA Trust acquired the right to acquire the gilt strips under the Call Option, it was never intended that NA Trustees would exercise that option and acquire the gilt strips. It was always intended that the NA Trustees would elect to cash cancel the option and receive the cash cancellation price once the gilt strips had been transferred by Mr Andrew to Investec (subject to the Call Option).

[**99**] BDO sought tenders from various banks to acquire the gilt strips.

(1) The arrangements were choreographed by BDO. BDO had sought preliminary indications from the banks of their willingness to participate in the scheme. The banks were aware in advance that BDO would request tenders for the acquisition of gilt strips from participants in the scheme.

(2) The banks made their tenders on the assumption that they would acquire the gilt strips outright. Once Investec was selected as the preferred purchaser, although measures were put in place to protect Investec's

position if the trustees did not elect to cash cancel the Call Option, it was always the intention of the parties that the NA Trustee would elect to cancel the Call Option and Investec would pay the cash cancellation price and acquire gilt strips outright.

[**100**] For the purposes of the scheme, the Call Option (and its cash cancellation feature) was designed to devalue Mr Andrew's interest in the gilt strips at the time of the transfer to Investec by providing a valuable right to the NA Trust, but the NA Trust never had any intention of acquiring the gilt strips and, in reality, the arrangements were simply a means of ensuring that a proportion of the value of the gilt strips accrued for the benefit of the NA Trust.

Was the scheme a self-cancelling scheme?

[**101**] With all of that in mind, I will turn to the question of the interpretation of para 14A itself and to Mr Davey's first argument, which is that I must take into account the funds received by the NA Trust and when I do so Mr Andrew did not make a 'real' loss.

[**102**] In summary, Mr Davey says that the terms of the NA Trust were designed so that funds accruing to the NA Trust would be available to Mr Andrew. So I should treat the funds as having been received by Mr Andrew and accordingly I should treat the scheme as a self-cancelling transaction similar to that in *Berry*.

[**103**] I reject this argument. I accept that the position in this case is not perhaps as clear as it was in *Campbell*, but, in my view, this was not a self-cancelling transaction as in *Berry*. The argument requires me to treat a receipt by the NA Trust as, in effect, a receipt by Mr Andrew. On the facts of this case, I cannot do so.

(1) First, as I have mentioned above, HMRC accepts that the trust is not a sham. The funds that are held in the NA Trust are held on the terms of the trust. Although Mr Andrew is the primary beneficiary, he is not the only beneficiary. Mr Andrew does at least suffer some detriment as a result of the operation of the scheme in that funds in the trust are available to other beneficiaries.

(2) Second, whilst it is true that funds from the NA Trust could have been paid to Mr Andrew as the principal beneficiary, that did not happen in relation to a substantial proportion of the funds in the trust. In applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme, it is legitimate to look at the composite effect of the scheme as it was intended to operate. While that principle requires me to look at the effect of the scheme as a whole, it does not entitle me to contemplate transactions that could have but did not happen. In my view, the scheme was designed to put funds into the trust. The trust was a valid trust and I cannot simply ignore it in construing para 14A.

[**104**] Mr Davey referred me to the decision of the Supreme Court in *Rangers* in support of his argument. However, in *Rangers*, the Supreme Court came to the view that the funds paid to the trust had the character of emoluments or earnings of the relevant employee when they were paid to the trust (*Rangers*: [65]). The funds already had their taxable character at that point. The fact that the funds were diverted through the trust did not alter the nature of the payment for tax purposes. The fact that the funds were invariably attributed to sub-funds and were available to the employees was an important factor in the

Supreme Court arriving at its conclusion that the payments to the trust had the character of emoluments or earnings. But the Supreme Court's view was not dependent on treating the receipt by the trust as a receipt by the employee.

Is the loss of a character to which paragraph 14A applies?

[**105**] Mr Davey's second argument was that the transactions in the scheme should be viewed as giving rise to a contribution of funds to the NA Trust. If so, the nature of any loss which accrued to Mr Andrew was not of a kind which answers to the description in para 14A.

[**106**] He says that the purpose of para 14A is to give effect to 'real commercial outcomes' (*Berry*: [52]) and that any 'loss' which accrues to Mr Andrew because of a contribution of funds to the NA Trust cannot be a 'commercial' outcome. He refers to the decision of Judge Mosedale in *Bretten* (*Bretten*: [135]) in support of his argument that a loss which is planned and which arises from a transaction with a connected person cannot be a real commercial outcome.

[**107**] For the reasons that I have given above (at [91] to [92]), I reject the argument that para 14A only extends to 'commercial' losses in the narrow sense used by Judge Mosedale in *Bretten*. I cannot therefore reject Mr Andrew's claim to relief solely on the basis that the loss arises from a planned transaction with a connected person.

Paragraph 14A(3): the inputs into the formula

[**108**] I will now turn to the analysis of para 14A(3) itself. As I have described above, I have to have regard to the reality of the facts in determining the inputs into para 14A(3).

(a) The amount paid by Mr Andrew for the strip

[**109**] There is no issue on this point. The parties agree that the amount paid by Mr Andrew for the gilt strips was £1,874,987.94.

(b) The amount payable on the transfer

[**110**] On the question of the interpretation of the inputs into the calculation required by para 14A(3), there is a difference between the parties.

[**111**] Mr Yates says that the amount payable on the transfer must be the amount of £30,740 that was paid by Investec to Mr Andrew to acquire the gilt strips pursuant to the Call Option. He refers to the wording of para 14A(3) and to various other paragraphs of Sch 13 which, he says, support his argument that it is not permissible on a proper construction of para 14A(3) to take into account any other payments made as part of the scheme.

[**112**] Mr Davey says that I must view the scheme as a composite whole and adopt a purposive construction of para 14A(3). On doing so, it is clear that both the amount paid by Investec to the NA Trust in order to cash cancel the Call Option and the amount received by Mr Andrew from Investec on the transfer of the gilt strips should be treated as amounts payable on the transfer of the gilt strips within para 14A(3).

[**113**] On this question, I agree with Mr Davey.

[**114**] This is a pre-planned scheme, which in accordance with the authorities that I have discussed, I should treat as a composite whole.

[**115**] Mr Andrew acquired the gilt strips. Following the implementation of the steps in the scheme, it was always intended that Investec would acquire the entire interest in the gilt strips free of any rights under the Call Option. Under

the terms of the scheme, it did so by the means of two steps: the acquisition of the gilt strips subject to the Call Option from Mr Andrew; and the cash cancellation of the Call Option by the NA Trust.

[**116**] The payment of the cash cancellation price was an integral part of the arrangements for the transfer of the gilt strips to Investec. When Investec acquired the gilt strips from Mr Andrew and paid him £30,740, it was always the case that it would also make the cash cancellation payment. That is how parties intended the scheme to operate and that is how it did in fact operate. There was a theoretical possibility that the NA Trust would not elect to cash cancel the Call Option, but it was no more than that.

[**117**] Against that background, I regard the cash cancellation payment as part of the 'amount payable on the transfer' of the gilt strips for the purposes of para 14A(3). Furthermore, in my view, that approach is consistent with a purposive interpretation of para 14A. As I have described, the purpose of the provision is to give effect to real economic outcomes. It would defeat that purpose if, on a transfer of gilt strips, a part of the purchase price which the transferor of gilt strips directs to be paid to a third party is not taken into account in determining the amount of any loss. In my view, there could be little argument that such a payment must be an 'amount payable on the transfer' of the gilt strips. The amount paid by way of cash cancellation in this case was, in reality, much the same. The scheme operated to transfer the entire interest in the gilt strips to Investec. The cash cancellation payment was just a part of the overall price paid by Investec to acquire the gilt strips which, through the design of the Call Option, was diverted to the Trust.

[**118**] For these reasons, in my view, the amount payable on the transfer for the purposes of para 14A(3) is the aggregate of the amount paid by Investec to Mr Andrew (£30,740) and the amount of the cash cancellation payment paid by Investec to the NA Trust (£1,840,442). On that basis, Mr Andrew made a loss of £3,805.94 for the purposes of para 14A(3).

[**119**] I should address Mr Yates's arguments on this issue. He made two main points.

[**120**] His first point was that para 14A(3) requires that the amount that is taken into account must be payable 'on' the transfer. He referred to para 4(1) (which defines a 'transfer' for the purposes of Sch 13) and para 4(3) (which determines when a transfer is treated as taking place when it is made pursuant to an agreement). Mr Yates says that it is clear from para 4(1) and para 4(3) that the references to 'transfer' in Sch 13 are to the transfer to Investec pursuant to the sale agreement and that it is only amounts that are payable on that transfer that must be taken into account.

[**121**] I disagree. Paragraph 4(1) provides a broad definition of a transfer. There is nothing in that sub-paragraph which confines the interpretation of 'transfer' in the present context to the transactions with Investec that take place pursuant to the sale agreement. Paragraph 4(3) is simply a timing rule and does not bear the weight that Mr Yates seeks to put upon it. On a purposive construction of the provision, a 'transfer' must include all the elements of a pre-planned scheme that are intended to pass the interest in the gilt strips to the intended transferee.

[**122**] Mr Yates's second point was that it is implicit within para 14A(3) that it is only amounts which are payable to the transferor of the gilt strips (i e Mr Andrew) that should be taken into account for the purposes of deciding the amount payable on the transfer for the purposes of para 14A(3). It is not permissible, he says, to include a payment made to a third party (such as the

NA Trust). He says para 14A(3) focuses on the consideration to which the holder of the gilt strip becomes entitled on the transfer. He referred to para 8 and para 14B of Sch 13 which, he says, adopt a similar approach.

[**123**] Once again, I disagree. Paragraph 8 and para 14B are special computational rules that apply to impose a deemed consideration on the transfer of a gilt strip. It is necessary for these purposes to treat a receipt as arising to or a payment as being made by a particular person in order for the deeming rule to be given full effect for tax purposes. These rules do not inform the interpretation of para 14A. Paragraph 14A is dealing with circumstances in which a calculation of the amount of a loss is determined by reference to the actual transactions that took place (before the application of any special rules). It has to encompass circumstances where the consideration for a transfer may be directed to another person. This is why, for example, although the amount paid for the gilt strips is restricted to an amount paid 'by' the holder, there is no similar restriction on the 'amount payable on the transfer' in para 14A(3) (ie there is no requirement that those amounts are payable 'to' the holder).

[**124**] In my view, this interpretation is consistent with a purposive construction of para 14A in accordance with the principles that I have set out above.

WERE THE AMOUNTS RECEIVED BY THE NA TRUST 'INCOME' ON WHICH MR ANDREW IS ASSESSABLE UNDER S 660A OR S 739 ICTA 1988?

[**125**] I will now turn to the second issue before the Tribunal.

[**126**] HMRC asserts that Mr Andrew is subject to income tax on profits arising to the NA Trust as a result on the scheme either under s 660A ICTA or s 739 ICTA. Section 660A ICTA treated income arising under a settlement in which the settlor retained an interest as the income of the settlor during the life of the settlor. Section 739(2) ICTA was an anti-avoidance provision (now to be found in s 720 and s 721 of the Income Tax Act 2007) which treated income of a person resident or domiciled outside the United Kingdom as income of an individual ordinarily resident in the UK if the individual had power to enjoy that income and it arose as a consequence of the transfer of assets abroad.

[**127**] There was no dispute between the parties in relation to the application of either s 660A ICTA or s 739 ICTA to income arising in the NA Trust as a result of the transactions in the scheme. The issue before the Tribunal was whether any 'income' arose to the NA Trust to which those provisions might apply.

[**128**] HMRC asserted that income arose to the NA Trust on one of two bases:

(1) first that the NA Trustee realized a profit from the discount on the gilt strips which fell within Sch 13 FA 1996;

(2) second that the NA Trustee realized a profit which was subject to tax as income under Sch D Case VI.

[**129**] I will deal with these arguments in turn.

Did the NA Trustee realize a profit from the discount on the gilt strips within Schedule 13 FA 1996?

The relevant legislation

[**130**] Paragraph 1 Sch 13 FA 1996 provides that, where a person realizes a profit from the discount on a relevant discounted security, the profit is treated as income of that person. A gilt strip is treated as a relevant discounted security by para 14 of that Schedule.

[**131**] Paragraph 1(2) Sch 13 FA 1996, defines a profit from the discount in a form similar to the definition of a loss from the discount on a strip in para 14A. It provides:

> 'For the purposes of this Schedule a person realises the profit from the discount on a relevant discounted security where—
>
> (a) he transfers such a security or becomes entitled, as the person holding the security, to any payment on its redemption; and
>
> (b) the amount payable on the transfer or redemption exceeds the amount paid by that person in respect of his acquisition of the security.'

HMRC's submissions

[**132**] Mr Davey makes the following submissions for HMRC.

(1) The effect of the Call Option Agreement was to transfer 98% of the value of the gilt strips to the NA Trust for nominal consideration. Under the Call Option Agreement, the NA Trustee received the right, for the sum of £100, either to purchase the gilt strips for 2% of their market value, or to receive a sum of 98% of their value, upon the cancellation of the Call Option.

(2) The NA Trustee then cancelled the option and received the cash cancellation price from Investec, who received the gilt strips unencumbered following the release by the NA Trustee of the charge in its favour.

(3) The position would have been materially the same had Mr Andrew simply transferred the gilt strips to the NA Trust for nominal consideration, and the NA Trust then sold them on to Investec unencumbered for the sum of £1,871,182 (ie the total consideration paid by Investec Bank: £30,740 paid to him, and £1,840,442 paid to the NA Trustee).

(4) This was just an elaborate way to sell the gilt strips. In reality, the NA Trustee acquired the gilt strips under the Call Option Agreement for £100; transferred them to Investec upon the release of the charge for the cash cancellation price; and made a profit within the meaning of para 1(2) Sch 13 FA 1996.

(5) That profit (ie the cash cancellation price less £100) was income for tax purposes and was assessable on Mr Andrew, by virtue of s 660A ICTA 1988 or s 739 ICTA 1988.

Mr Andrew's submissions

[**133**] Mr Yates's response to this argument is straightforward. He says that para 1 of Sch 13 is a special rule that applies to the holder of a gilt strip. At no stage did the NA Trustee acquire or dispose of any gilt strips. Rather the NA Trustee acquired a call option over the gilt strips and then received money for the cash cancellation of that option. HMRC's 'realistic view' of the facts is an impermissible attempt to rewrite the transactions the parties actually entered into.

Discussion

[**134**] On this point, I agree with Mr Yates.

[**135**] Paragraph 1 Sch 13 FA 1996 is a special rule that treats certain transactions in relevant discounted securities and strips as giving rise to income in circumstances where they might otherwise not do so.

[**136**] The wording of para 1(2) itself provides some support for Mr Yates's argument. In particular, the wording of sub-para (a) suggests that a profit from a relevant discounted security or a strip only falls within para 1 where the person in question transfers the security or strip or receives redemption proceeds 'as the holder of' the security or the strip. As Mr Yates says, at no point did the NA Trustee hold an interest in the gilt strips which it could 'transfer' other than its rights under the deed of charge (which, as I have described above, were not registered when Mr Andrew transferred the gilt strips to Investec).

[**137**] As with para 14A, however, this provision must be applied purposively to the facts viewed realistically. However, even when this is done, in my view, the 'profit' made by the NA Trust does not answer to the statutory description of a 'profit from the discount' on the gilt strips.

[**138**] Although I see some force in Mr Davey's argument that the effect of the Call Option Agreement was to place in the NA Trust in an amount broadly equivalent to the value of the gilt strips, the NA Trust did not hold an interest in the gilt strips. It held an option under the Call Option Agreement, which gave it rights to acquire the gilt strips, and its rights under the deed of charge. Furthermore, as I have described above, this was a pre-planned scheme. It was never intended that the NA Trust would acquire the gilt strips or sell the gilt strips. It was clear from the outset that the NA Trust would elect to cash cancel the Call Option. For all of these reasons, in my view, the NA Trust did not realize a 'profit from the discount' on the gilt strips within para 1. In reality, it simply received a proportion of the proceeds of sale of the gilt strips.

[**139**] Mr Davey described the scheme as 'an elaborate way to sell the gilt strips'. I agree with that description, but, in my view, it was an elaborate way for Mr Andrew to sell the gilt strips not the NA Trustee. That view has the benefit of being consistent with my approach to the first issue.

Did the NA Trustee realize a profit which was subject to tax as income under Schedule D Case VI?

[**140**] The other basis on which HMRC assert that Mr Andrew is subject to tax on income arising to the NA Trust is that the transactions entered into by the NA Trust as part of the scheme gave rise to a profit in the NA Trust which is subject to tax under s 18 ICTA, in particular, under what was at the time Case VI of Sch D.

Relevant legislation

[**141**] At the time, s 18 ICTA was, so far as relevant, in the following form:

> **'18 Schedule D**
>
> (1) The Schedule referred to as Schedule D is as follows:—
>
> *SCHEDULE D*
>
> Tax under this Schedule shall be charged in respect of—
>
> (a) the annual profits or gains arising or accruing—
>
> (i) to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere, and
>
> (ii) to any person residing in the United Kingdom from any trade, profession or vocation, whether carried on in the United Kingdom or elsewhere, and

(iii) to any person, whether a Commonwealth citizen or not, although not resident in the United Kingdom from any property whatever in the United Kingdom or from any trade, profession or vocation exercised within the United Kingdom, and

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule A or under ITEPA 2003 as employment income, pension income or social security income, and not specially exempted from tax.

(2) Tax under Schedule D shall be charged under the Cases set out in subsection (3) below, and subject to and in accordance with the provisions of the Tax Acts applicable to those Cases respectively.

(3) The Cases are—

Case I: tax in respect of any trade carried on in the United Kingdom or elsewhere but not contained in Schedule A;

…

Case VI: tax in respect of any annual profits or gains not falling under any other Case of Schedule D and not charged by virtue of Schedule A or by virtue of ITEPA 2003 as employment income, pension income or social security income.'

HMRC's submissions

[**142**] Mr Davey submits that the NA Trust received income for tax purposes as a result of its participation in the trust and that income is taxable under Case VI. He says so on the following grounds.

(1) First, under the arrangements for the scheme, the NA Trustee acquired a short-term asset (either the gilts themselves or the contractual rights under the Call Option Agreement), and, as was always intended, shortly thereafter disposed of that asset at a substantial profit.

That profit was of an income, as opposed to capital, nature: the short term nature of the asset and the transactions in which the NA Trust engaged is a strong indicator that the profit should be characterized as income, rather than capital (*IRC v John Lewis Properties plc* [2002] EWCA Civ 1869, [2003] STC 117, [2003] Ch 513 ('*John Lewis*') per Dyson LJ at [80]). It is not relevant that the NA Trustee was not otherwise carrying on a trade (*Cooper* (*Inspector of Taxes*) *v Stubbs* [1925] 2 KB 753, 10 TC 29).

(2) Second, the NA Trustee made a profit on the provision of a service to Mr Andrew by facilitating the tax avoidance scheme in which it played a central part (*Scott* (*Inspector of Taxes*) *v Ricketts* [1967] 2 All ER 1009, [1967] 1 WLR 828).

[**143**] That income is assessable on Mr Andrew by virtue of s 660A or s 739 ICTA.

Mr Andrew's submissions

[**144**] Mr Yates submits that the profit of the NA Trustee cannot fall within Sch D Case VI.

(1) Where a person makes a profit from an isolated transaction by buying and selling an asset, that profit can only be taxable either as the profit of a trade (under Sch D Case I) or as a capital gain. It cannot be taxed under Sch D Case VI (see the decisions of Rowlatt J in *Pearn v Miller* (*Inspector of Taxes*) (1927) 11 TC 610 and the House of Lords in *Leeming v Jones* [1930]

AC 415, 15 TC 355). HMRC accepts that the NA Trustee was not carrying on a trade or an adventure in the nature of a trade and so any profit cannot be taxed under another Case of Sch D.

The duration of the gilt strips and the period for which the Call Option was exercisable cannot convert the receipt of £1,840,442 into taxable income; the option was inherently valuable when the Call Option Agreement was entered into. The transaction is not comparable to a trader buying and selling assets in short order.

(2) The profit is not a 'reward' for playing a part in a tax avoidance scheme. The NA Trust was not 'rewarded' in return for performing any action; the NA Trust acquired an option and subsequently realized value from it (*Manduca v Revenue and Customs Comrs* [2015] UKUT 262 (TCC), [2015] STC 2002, *Versteegh Ltd v Revenue and Customs Comrs* [2013] UKFTT 642 (TC), [2014] SFTD 547 (at [133] to [138])).

Discussion

[145] The question is whether the profit that was made by the NA Trust as a result of its participation in the scheme is subject to tax under Sch D Case VI.

[146] I was referred by the parties to various case law authorities. I will start by setting out some of the principles that I draw from them.

[147] Case VI applies to 'annual profits or gains' that are not taxed under the other Cases of Sch D. However, as Viscount Dunedin pointed out in *Leeming v Jones*, it does not extend to every profit that is not otherwise subject to tax. He said ([1930] AC 415 at 422, 15 TC 355 at 359):

> 'Now, Case VI. sweeps up all sorts of annual profits and gains which have not been included in the other five heads, but it has been settled again and again that that does not mean that anything that is a profit or gain falls to be taxed. Case VI. necessarily refers to the words of Schedule D, that is to say, it must be a case of annual profits and gains, and those words again are ruled by the first section of the Act, which says that when an Act enacts that income tax shall be charged for any year at any rate, the tax at that rate shall be charged in respect of the profits and gains according to the Schedules.'

[148] Viscount Dunedin then goes on to explain that the word 'annual' in the phrase 'annual profits or gains' does not require that a receipt or profit recurs year after year. However, it does require that the receipt must be of the nature of income. Furthermore, the phrase 'profits and gains' within Case VI must be profits and gains that are 'ejusdem generis with the profits and gains specified in the preceding five cases'.

[149] On that basis, and as the House of Lords held in *Leeming v Jones* itself, a profit arising from an isolated purchase and sale of an asset could not fall within Sch D Case VI. Such a profit could only be subject to tax as income if the transaction was in the nature of a trade and so within Case I (see also Rowlatt J in *Pearn v Miller*). If not, the profit arising would be of a capital nature and so not within Case VI.

[150] The same may not apply where the transaction is not an isolated transaction but is repeated over a number of years (see *Cooper v Stubbs*).

[151] As I have mentioned, the profit also has to be ejusdem generis with profits and gains specified in the other five Cases in Sch D. Case VI cannot therefore apply to a gratuitous payment. However, where a receipt is of an income rather than a capital nature and it is paid pursuant to a binding contract

in return for some kind of service (and so is not gratuitous), the receipt will be subject tax under Case VI. If this is the case, there is no need to consider what the taxpayer actually did in performance of the agreement in order to receive the payment (see Rose J, as she then was, in *Manduca* at [35]).

[**152**] If I turn to the facts of the present case, the NA Trustees entered into the Call Option Agreement and acquired the benefit of the Call Option for £100. The trustees then disposed of their rights under the Call Option Agreement by electing to cash cancel the Call Option and received the cash cancellation payment of £1,840,442. HMRC accepts that these transactions were not entered into as part of a trade or in the nature of a trade.

[**153**] On that basis, in my view, the transactions are akin to the isolated transaction which was the subject of the House of Lords' decision in *Leeming v Jones*. The NA Trustee acquired rights to the Call Option and disposed of its rights in a single transaction by electing to cancel the Call Option for the cash cancellation price. There is no evidence before the Tribunal that these transactions were part of a repeated pattern of behaviour (as in *Cooper v Stubbs*). The receipt of the cash cancellation price was capital in nature and so cannot fall within Sch D Case VI. The timing of the transactions, and in particular the short timeframe between the acquisition and disposal of the option rights, and the short term nature of the option rights themselves do not disturb that conclusion.

[**154**] Mr Davey argued that the profit obtained by the NA Trustee should be regarded as a reward for the provision of a service of participating in the scheme and so analogous to receipts that would fall within Case I or Case II of Sch D. He referred me to the decision of the Court of Appeal in *Scott (Inspector of Taxes) v Ricketts* [1967] 2 All ER 1009, [1967] 1 WLR 828 in support of this submission. I do not find much in the decision of the Court of Appeal in that case to support his conclusion.

[**155**] In the present case, the NA Trustee was provided with a valuable asset (its rights under the Call Option Agreement) and then realized its value. The provision of the valuable asset to the NA Trust was a key aspect of the scheme, but I find it difficult to characterize the provision of that asset to the trust or the subsequent realization of that asset through its cancellation as a reward for a separate service beyond the transactions themselves that would fall within the principles of cases such as *Manduca* (and cases to which Rose J refers in her decision in that case).

[**156**] For these reasons, in my view, the profit realized by the NA Trustee was not subject to tax as income under Sch D Case VI.

CONCLUSIONS

[**157**] My conclusions on the issues before the Tribunal are therefore as follows.

(1) The amount of any loss within para 14A(3) of Sch 13 FA 1996 suffered by Mr Andrew has to be calculated by treating the amount of the cash cancellation price paid by Investec to the NA Trust as an amount payable on the transfer of the gilt strips.

(2) The amounts received by the NA Trust as a result of the transactions that formed part of the scheme did not constitute income on which Mr Andrew was subject to tax under either s 660A or s 739 ICTA.

[**158**] It follows that I allow this appeal in part. I assume that my decision on these issues will enable the parties to finalize the amounts of tax payable by Mr Andrew in the year in question. If that proves not to be possible, the parties may reapply to the Tribunal.

Rights to appeal

[**159**] 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 r 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.

Appeal allowed in part.

APPENDIX 1

Draft Statement of Agreed Facts

Definitions

1. In this Statement of Agreed Facts the following expressions have the following meanings:

(1) **BDO**: BDO Stoy Hayward.

(2) **HMRC**: The Commissioners for Her Majesty's Revenue and Customs.

(3) **Investec**: Investec Bank (UK) Limited.

(4) **NA Trust**: Neville Andrew 2003 No 2 Settlement.

(5) **SG Hambros Bank**: SG Hambros Bank & Trust (Jersey) Limited.

The Planning

2. The appeal concerns planning that was referred to at the time as 'AmberBox Income Tax Shelter Arrangements'. Two presentation documents produced by BDO were used to market the arrangements.[1]

The NA Trust

3. On 7 February 2003, the Appellant entered into a deed of settlement ('**Deed of Settlement**') with the NA Trustee creating the NA Trust in respect of initial property of £1,000. The deed of trust provided that the trustee was to be BDO Fidecs Trust Company Limited ('**the NA Trustee**').

4. The Deed of Settlement included the following provisions:

(1) Clause 1.3: the 'Life Tenant' was defined as the Settlor (the Appellant);

(2) Clause 1.4: the 'Beneficiaries' were defined as the Life Tenant, the spouse of the Life Tenant, the children and remoter issue of the Life Tenant, Charities (as defined) and any objects/persons added under cl 3;

1 Reference to HMRC Statement of Case omitted.

(3) Clause 4.1: there was a power of appointment under which the NA Trustee could appoint the whole or any part of the income and/or capital for the benefit of the Beneficiaries as the Trustees in their discretion thought fit;

(4) Clause 5: in default of any exercise of any power of appointment under cl 4.1 by the NA Trustee:

i. the NA Trustee was to hold the Trust Fund (as defined) upon trust to pay the income to the Life Tenant during his lifetime (cl 5.1);

ii. there was an additional power of appointment during the Trust Period (as defined) to pay the whole or any part of the Trust Fund in which the Life Tenant was then entitled to an interest in possession to him or for his advancement or otherwise for his benefit as the Trustees in their discretion thought fit. In exercising this power, the Trustees were entitled to have regard solely to the interest of the Life Tenant and to disregard all other interests or potential interests in the Trust Fund (cl 5.2);

iii. subject to that to pay the income to the Beneficiaries in existence in such shares and such manner as the NA Trustee in its discretion thought fit. However this was subject to a discretion to accumulate during the Accumulation Period (cl 5.3).

(5) Clause 6: subject to the exercise of any power of appointment under cl 4.1, the NA Trustee was to hold the capital and income of the Trust Fund upon trust absolutely for the children and remoter issue of the Life Tenant in equal shares per stirpes provided that no issue was to take whose parent was alive.

(6) Clause 7: there was an ultimate default trust in favour of such Charities and in such shares as the NA Trustee would determine, failing which the National Society for the Prevention of Cruelty to Children.

Acquisition of the Gilt Strips and dealings with the NA Trustee

5. On 13 October 2003, the Appellant's bank account […] ('**the Appellant's Account**') with SG Hambros Bank was credited with £1,879,687.50. The Appellant in a letter of 13 October 2003 requested that SG Hambros Bank use all (or as near to all as possible) of these funds to acquire UK Treasury Principal Gilt Strip 7 December 2003.

6. SG Hambros Bank effected the Appellant's order and acquired 1,883,842 (nominal) of UK Treasury Principal Gilt Strip 7 December 2003 ('**the Gilt Strips**') for £1,874,987.94 as well as charging commission of £4,687.47. A 'transaction advice' document addressed to the Appellant from SG Hambros Bank refers to the trade date as 14 October 2003 and the settlement date for the trade as 15 October 2003.

7. On 16 October 2003, BDO wrote a number of letters:

(1) an engagement letter to the NA Trustee;
(2) a conflict of interest letter to the Appellant;
(3) a conflict of interest letter to the NA Trustee;
(4) a letter of advice to the NA Trustee in relation to 'tax issues';
(5) a letter of advice to the NA Trustee in relation to 'non-tax issues'.

8. The Appellant wrote to the NA Trustee enclosing a proposed call option agreement and deed of charge. Both documents were signed on behalf of the NA Trustee.

9. Under the call option agreement dated 17 October 2003 ('**the Call Option Agreement**'):

(1) In return for £100, under cll 2 & 3 the Appellant granted the NA Trustee an option to acquire the Gilt Strips for 2% of the market value of the Gilt Strips on the date of exercise.

(2) In addition, under cl 7, the NA Trustee could, at any time when it could serve a valid Call Exercise Notice, make a Cash Cancellation Election instead of exercising the option. The Cash Cancellation Election required the Appellant to pay the Cash Cancellation Price (the market value of the Gilt Strips at the time less the Exercise Price (2%) and Notional Dealing Costs) in cash.

(3) Under cl 5, the option lapsed on the earlier of the following times: (i) at 11.59 pm on the third Business Day (as defined) after the date of the Call Option Agreement if by the close of business on the third Business Day the FTSE 100 index had risen more than 3% compared with the FTSE 100 index the close of business on the date of the Call Option Agreement and (ii) 11.59 pm GMT on the 45th day of the Call Option Agreement.

10. Under the terms of the deed of charge, the obligations of the Appellant in respect of the Call Option Agreement were secured as against the Gilt Strips. In addition, the NA Trustee was also appointed as being the Appellant's attorney in respect of the Gilt Strips under a power of attorney dated 17 October 2003.

11. On 22 October 2003, Ann Gurney of BDO sent an email to the Appellant stating: 'Just dropping you a line to confirm that the FTSE-100 index closed at 4285.6 which is 58.4 points lower than on 17 October, the date on which you entered into the option agreement with the Trustees. This means that the option remains exercisable by the Trustees and we can move ahead with the planning.'

12. On 24 October 2003, BDO emailed the Appellant to explain that BDO had put the Gilt Strips out to tender and had received responses back from Gerrards Private Bank and Investec with discounts of 0.3875% and 0.36% respectively in relation to the market value of the gilts as at the date of sale.

13. On 28 October 2003, the Appellant wrote to the NA Trustee stating: 'In order for the tax planning, which I have entered into, to successfully conclude I am requesting that you provide me with the written consent required under clause 8.1 of the Option agreement to allow me to transfer the Gilt Strips to Investec Bank (UK) Limited.'

14. On 28 October 2003, NA Trustee wrote to the Appellant consenting to the transfer provided that Investec enter into a deed of adherence and deed of charge essentially replicating the Appellant's obligations under the Call Option Agreement and deed of charge.

15. Also on 28 October 2003:

(1) the Appellant and the NA Trustee entered into a deed of release from charge;

(2) Investec, the Appellant and the NA Trustee entered into a deed of adherence;

(3) the Appellant and Investec entered into a sale and purchase agreement whereby the Appellant agreed to sell the Gilt Strips to Investec for £30,740;

(4) Investec and the NA Trustee entered into a deed of charge;

(5) Investec transferred £30,740 to the Appellant's Account.

16. A document headed 'minutes of a meeting of the Trustee of the Neville Andrew 2003 No 2 Settlement' states that a meeting of the NA Trustee took

place on 3 November 2003 attended by Elizabeth Plummer and Timothy Revill, with Ann Gurney of BDO attending by telephone for part of the meeting. The minutes state:

> 'It was noted that the trustee was in possession of a copy of the option agreement ("the Option") granted to the Trust by Neville Andrew and also a deed of adherence entered into by Investec Bank (UK) Limited, Neville Andrew and the Trust subsequent to the Option.
>
> It was noted that the Option had a limited life, as it was currently exercisable, the Directors were mindful that a choice needed to be made or else the Option would expire.
>
> It was explained by Ann Gurney that Neville Andrew who is life tenant of the Trust had sold the Gilt Strip, over which the trustee had the Option, to Investec Bank (UK) Limited who had duly completed a deed of adherence and a deed of charge in favour of the trust.
>
> It was noted that the above two choices were broadly economically neutral apart from firstly, the tax impact on the settlor and life tenant and secondly, the fact that to cash cancel would obviate the need to raise funds so as to be able to exercise the Option, thereby saving costs and minimising the administrative burden upon the Trust. The trustee was of the view that the factors just mentioned were compelling reasons for exercising the cash cancellation option. It was also noted that to cash cancel was consistent with advice received previously from BDO Stoy Hayward.
>
> …
>
> In all the circumstances, the trustee concluded that its choices were either to exercise or cash cancel the Option. Given the two factors mentioned above (i.e. beneficial tax consequences for the life tenant and the cost saving and lessening of the administrative burden) the trustee concluded that it would be preferable to cash cancel the Option in accordance with Clause 7.1.'

17. On 3 November 2003 the NA Trustee wrote to Investec stating that pursuant to cl 7 of the Call Option Agreement they were electing to receive a Cash Cancellation.

18. On 7 November 2003:

> (1) Investec paid the NA Trustee the Cash Cancellation Price of £1,840,442.
>
> (2) The NA Trustee and Investec entered into a deed of release from charge.
>
> (3) The NA Trustee wrote to SG Hambros Bank stating that: (i) on that day the Deed of Release of Charge had been executed releasing Investec from the charge over the Gilt Strips and (ii) in the circumstances, SG Hambros Bank should deal with the Gilt Strips according to Investec's wishes.

APPENDIX 2

Relevant provisions of Schedule 13 Finance Act 1996 in force at the time of the transactions in the scheme

> **'1**
>
> (1) Where a person realises the profit from the discount on a relevant discounted security, he shall be charged to income tax on that profit under Case III of Schedule D or, where the profit arises from a security out of the United Kingdom, under Case IV of that Schedule.

(2) For the purposes of this Schedule a person realises the profit from the discount on a relevant discounted security where—

(a) he transfers such a security or becomes entitled, as the person holding the security, to any payment on its redemption; and

(b) the amount payable on the transfer or redemption exceeds the amount paid by that person in respect of his acquisition of the security (no account being taken of any costs incurred in connection with the transfer or redemption of the security or its acquisition).

(3) For the purposes of this Schedule the profit shall be taken—

(a) to be equal to the amount of the excess; and

(b) to arise, for the purposes of income tax, in the year of assessment in which the transfer or redemption takes place.

…

4

(1) Subject to sub-paragraph (2) below, in this Schedule references to a transfer, in relation to a security, are references to any transfer of the security by way of sale, exchange, gift or otherwise.

(2) Where an individual who is entitled to a relevant discounted security dies, then for the purposes of this Schedule—

(a) he shall be treated as making a transfer of the security immediately before his death;

(b) he shall be treated as obtaining in respect of the transfer an amount equal to the market value of the security at the time of the transfer; and

(c) his personal representatives shall be treated as acquiring the security for that amount on his death.

(3) For the purposes of this Schedule a transfer or acquisition of a security made in pursuance of an agreement shall be deemed to take place at the time when the agreement is made, if the person to whom the transfer is made, or who makes the acquisition, becomes entitled to the security at that time.

(4) If an agreement is conditional, whether on the exercise of an option or otherwise, it shall be taken for the purposes of this paragraph to be made when the condition is satisfied (whether by the exercise of the option or otherwise).

(5) This paragraph is without prejudice to paragraph 14(2) to (4) below.

…

6

(1) Where, on a transfer or redemption of a security by trustees, an amount is treated as income chargeable to tax by virtue of this Schedule—

(a) that amount shall be taken for the purposes of Chapters IA and IB of Part XV of the Taxes Act 1988 (settlements: liability of settlor etc.) to be income arising—

(i) under the settlement of which the trustees are trustees; and

(ii) from that security;

(b) that amount shall be taken for the purposes of Chapter IC of Part XV of that Act (settlements: liability of trustees) to be income arising to the trustees; and

(c) to the extent that tax on that amount is charged on the trustees, the rate at which it is chargeable shall be taken (where it would not otherwise be the case) to be the rate applicable to trusts for the year of assessment in which the transfer or redemption is made.

(2) Where the trustees are trustees of a scheme to which section 469 of the Taxes Act 1988 (unauthorised unit trusts) applies, sub-paragraph (1) above shall not apply if or to the extent that the amount is treated as income in the accounts of the scheme.

(3) Without prejudice to paragraph 12 below, paragraph 1(1) above does not apply in the case of—

(a) any transfer of a security for the time being held under a settlement the trustees of which are not resident in the United Kingdom; or

(b) any redemption of a security which is so held immediately before its redemption.

(7) Where a relevant discounted security is transferred by personal representatives to a legatee, they shall be treated for the purposes of this Schedule as obtaining in respect of the transfer an amount equal to the market value of the security at the time of the transfer.

(8) In this paragraph "legatee" includes any person taking (whether beneficially or as trustee) under a testamentary disposition or on an intestacy or partial intestacy, including any person taking by virtue of an appropriation by the personal representatives in or towards satisfaction of a legacy or other interest or share in the deceased's property.

…

8

(1) This paragraph applies where a relevant discounted security is transferred from one person to another and they are connected with each other.

(2) For the purposes of this Schedule—

(a) the person making the transfer shall be treated as obtaining in respect of it an amount equal to the market value of the security at the time of the transfer; and

(b) the person to whom the transfer is made shall be treated as paying in respect of his acquisition of the security an amount equal to that market value.

(3) Section 839 of the Taxes Act 1988 (connected persons) shall apply for the purposes of this paragraph.

…

12

For the purposes of sections 739 and 740 of the Taxes Act 1988 (prevention of avoidance of tax by transfer of assets abroad), where a person resident or domiciled outside the United Kingdom realises a profit from the discount on a relevant discounted security, that profit shall be taken to be income of that person.

…

14

(1) Every strip is a relevant discounted security for the purposes of this Schedule.

(2) For the purposes of this Schedule, where a person exchanges a security for strips of that security, the person who receives the strips in the exchange shall be deemed to have paid, in respect of his acquisition of each strip, the amount which bears the same proportion to the market value of the security as is borne by the market value of the strip to the aggregate of the market values of all the strips received in exchange for the security.

(3) For the purposes of this Schedule, where strips are consolidated into a single security by being exchanged by any person for that security, each of the strips shall be deemed to have been redeemed at the time of the exchange by the payment to that person of the amount equal to its market value.

(4) A person who holds a strip on the 5th April in any year of assessment, and who (apart from this sub-paragraph) does not transfer or redeem it on that day, shall be deemed for the purposes of this Schedule—

(a) to have transferred that strip on that day;

(b) to have received in respect of that transfer an amount equal to the strip's market value on that day; and

(c) to have re-acquired the strip on the next day on payment of an amount equal to the amount for which it is deemed to have been disposed of on the previous day.

(5) Without prejudice to the generality of any power conferred by section 202 of this Act, the Treasury may by regulations provide that this Schedule is to have effect with such modifications as they may think fit in relation to any relevant discounted security which is a strip.

(6) Regulations made by the Treasury under this paragraph may—

(a) make provision for the purposes of sub-paragraphs (2) to (4) above as to the manner of determining the market value at any time of any security;

(b) make different provision for different cases; and

(c) contain such incidental, supplemental, consequential and transitional provision as the Treasury may think fit.

(7) References in sub-paragraphs (2) and (3) above to the market value of a security given or received in exchange for another are references to its market value at the time of the exchange.

14A

(1) A person who sustains a loss in any year of assessment from the discount on a strip shall be entitled to relief from income tax on an amount of his income for that year equal to the amount of the loss.

(2) The relief is due only if the person makes a claim before the end of twelve months from the 31st January following that year.

(3) For the purposes of this paragraph a person sustains a loss from the discount on a strip where—

(a) he transfers the strip or becomes entitled, as the person holding it, to any payment on its redemption, and

(b) the amount paid by him for the strip exceeds the amount payable on the transfer or redemption (no account being taken of any costs incurred in connection with the transfer or redemption of the strip or its acquisition).

The loss shall be taken to be equal to the amount of the excess, and to be sustained in the year of assessment in which the transfer or redemption takes place.

(4) In sub-paragraph (3) above the reference to a transfer in paragraph (a) includes a reference to a deemed transfer under paragraph 14(4) above (and paragraph (b) shall be read accordingly).

(5) This paragraph does not apply in the case of—

(a) any transfer of a strip for the time being held under a settlement the trustees of which are not resident in the United Kingdom, or

(b) any redemption of a strip which is so held immediately before its redemption.

15

(1) In this Schedule—

"deep gain" shall be construed in accordance with paragraph 3(3) above;

"excluded indexed security" has the meaning given by paragraph 13 above;

"market value" (except in paragraph 14 above) has the same meaning as in the Taxation of Chargeable Gains Act 1992;

"relevant discounted security" has the meaning given by paragraphs 3 and 14(1) above;

"strip" means anything which, within the meaning of section 47 of the Finance Act 1942, "is a strip of a security, or would be if that section had effect with the substitution in subsection (1B) of 'issued by or on behalf of the government of any territory'" for "issued under the National Loans Act 1968."

(2) Where a person, having acquired and transferred any security, subsequently re-acquires it, references in this Schedule to his acquisition of the security shall have effect, in relation to—

(a) the transfer by him of that security, or

(b) the redemption of the security in a case where he becomes entitled to any amount on its redemption,

as references to his most recent acquisition of the security before the transfer or redemption in question.'