



Neutral Citation: [2026] UKFTT 251 (TC)

Case Number: TC 09787

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

London, Taylor House

Appeal reference: TC/2023/00410

TC/2023/00411

TC/2023/00412

TC/2023/00413

*INCOME TAX – transactions in securities regime – whether distributable reserves of a wholly owned subsidiary were assets available to the parent – yes – whether s698 provides a six year time limit for raising an assessment to make an adjustment under the regime – no – appeal upheld*

**Heard on: 3-4 November 2025**

**Judgment date: 12 February 2026**

**Before**

**TRIBUNAL JUDGE ANNE FAIRPO**

**Between**

**(1) IAN OSCROFT  
(2) PETER GARNETT  
(3) PAUL WESSON  
(4) ANDREW KITCHEN**

**Appellants**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Gordon, of counsel, and Ms Duncan, of counsel, instructed by Magma Chartered Accountants

For the Respondents: Mr Afzal KC, of counsel, and Mr Winter, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

## DECISION

### Introduction

1. The Appellants have appealed against counteraction notices (the “Counteraction Notices”) and assessments (the “Assessments”) issued to them by the Respondents (“HMRC”) pursuant to s698 Income Tax Act (ITA) 2007.

### Facts

2. The Appellants’ appeals were brought on the grounds of points of statutory interpretation: the Tribunal heard no witness evidence. The parties provided an agreed statement of facts, from which the following findings are made.

### Events

3. Whitemeadow Group Holdings Limited (“WMGH”) was incorporated on 14 September 2010 with a share capital of 1 ordinary £1 share. 1 On 13 December 2010, WMGH issued 28,872 shares (28,571 £1 ordinary and 301 A £1 ordinary shares) 2 to the Appellants via a cash subscription. At all material times WMGH was a “close company” for the purposes of the TIS legislation.

4. On 30 December 2011 WMGH acquired the entire issued share capital of a trading company, Whitemeadow Furniture Limited (“WMF”). At all material times, WMF was a “close company” for the purposes of the TIS legislation. Before the acquisition, the shares in WMF were held by the four Appellants.

5. The shares in WMF were acquired by WMGH by way of a share-for-share exchange which resulted in the issue of a further 28,873 shares in WMGH (28,572 ordinary and 301 A ordinary shares) to the Appellants. Following that issue of shares, the share capital of WMGH was held as follows:

- (1) Ian Oscroft – 34,286 ordinary shares (c.59.37%)
- (2) Peter Garnett – 10,286 ordinary shares (c.17.81%)
- (3) Paul Wesson – 10,286 ordinary shares (c.17.81%)
- (4) Andrew Kitchen – 2,286 ordinary £1 shares and 602 ordinary A shares (c.5%)

6. Following the above transactions WMGH recognised a merger reserve in the amount of £1,833,049 in its accounts.

7. In February 2016 it was proposed that WMGH issue bonus shares to the shareholders in the same ratio as their existing ordinary shareholdings and WMGH would then pay £1,861,922 to the shareholders in the form of a repayment of share capital. No clearance was sought by the Appellants from HMRC in relation to the proposed transactions.

8. On 9 February 2016, it was resolved that WMGH’s Articles of Association be amended to provide that a return of assets on a capital reduction would be distributed amongst the holders of the ordinary shares and A ordinary shares.

9. The shareholders of WMGH then authorised the directors to capitalise, by way of bonus issue of shares (the “Bonus Issue”), the sum of £1,833,049 standing to the credit of WMGH’s non-statutory merger reserve by paying up in full and allotting to the shareholders of WMGH at par 32.077716 ordinary shares of £1 each for each ordinary share of £1 held by the relevant shareholder (1,833,049 ordinary shares in total).

10. Also on 9 February 2016 it was resolved that WMGH would reduce its share capital from £1,890,795 to £28,873 by cancelling 1,861,621 4 ordinary £1 shares and 301 A ordinary £1 shares (the “Capital Reduction”). More specifically, the following shares were cancelled:

- (1) Ian Oscroft – 1,116,960 ordinary
- (2) Peter Garnett – 335,094 ordinary
- (3) Paul Wesson – 335,094 ordinary
- (4) Andrew Kitchen – 74,473 ordinary and 301 A ordinary shares

11. The shares were in proportion to the Appellants’ overall percentage share ownership of WMGH, so that the proportion of WMGH owned by each Appellant remained the same as a result of the combined effect of the Bonus Issue and Capital Reduction.

12. The consideration for the capital reduction, to be paid to the Appellants, was £1,861,922 (the “Consideration”).

13. Although the resolutions envisaged that the Consideration would be satisfied partly by way of immediate payment of cash, and partly by way of credit to the Appellants’ loan accounts, the full amount of £1,861,922 was credited to the Appellants’ loan accounts on 26 February 2016 and no cash was paid to them.

14. 26 February 2016 was the legally effective date of the Capital Reduction, being the date the resolutions were approved by Companies House. Completion and therefore payment of consideration (in the form of loan account credits) took place on that day. It is also this transaction that is the subject of the HMRC Counteraction Notice (albeit the First Schedule of each of the Counteraction Notices, refers to this as “the transaction on 9 February 2016”).

15. On 7 March 2016 WMGH borrowed £1,861,922 cash from its subsidiary WMF in order to repay the £1,861,922 that had been credited to the Appellants’ loan accounts (although the accounting entries in the intercompany account were only made on 1 April 2016). Prior to these credits the Appellants’ loan accounts showed money owing from the Appellants to WMGH of £28,873. Following this, £1,861,922 cash was paid by WMGH to the Appellants. That satisfied the amount credited to the Appellants’ loan accounts.

16. On 8 and 14 March 2016 the Appellants paid WMGH £28,873 in cash, thereby returning their loan accounts to nil (although the accounting entries in their loan accounts to that effect were only made on 1 April 2016). The £28,873 was used by WMGH to reduce its intercompany loan account with WMF, with the accounting entries in the intercompany account to that effect being made on 1 April 2016. The remainder of the outstanding intercompany loan account (i.e. the £1,474,891.19 that WMGH still owed WMF) was cleared by way of dividends paid by WMF to WMGH paid between 1 April 2016 and 31 December 2016.

17. In effect, WMF provided funding to WMGH by way of loan to enable the latter to pay the consideration to the Appellants. The loan was repaid by (i) £28,873 received by WMGH from the Appellants from the cash paid to them; (ii) by set off against £358,157.81 owed by WMF to WMGH; and (iii) £1,474,892 dividends from WMF paid between 1 April 2016 and 31 December 2016.

#### ***Distributable reserves of the companies***

18. The parties agreed WMGH’s distributable reserves were £708,105 on 31 December 2015 (according to WMGH’s audited accounts for the year ended 31 December 2015) and were estimated to have been £712,367 on 9 February 2016 (i.e. the date of the Capital Reduction), and £714,348 on 26 February 2016 (i.e. the date of the credits to the Appellants’ loan accounts).

19. WMF's accounts show that it had profit and loss reserves of £4,173,621 as at 31 December 2015, and of £5,132,460 as at 31 December 2016. WMF had profit and loss reserves in excess of £1,861,922 at all material times.

***Procedural background***

20. Each of the Appellants filed a self-assessment return for the tax year ended 5 April 2016 which recognised the Consideration as a capital receipt, and Entrepreneurs' Relief was claimed by three of the four Appellants in relation to the capital gains that arose.

21. On 2 July 2018 HMRC wrote to the Appellants stating that the TIS regime might apply in relation to the Capital Reduction. Following correspondence, on 11 June 2020 HMRC issued a preliminary notification to each of the Appellants under s695 stating that it had reason to believe that s684 might apply in respect of the Capital Reduction. On 8 July 2020 each of the Appellants provided a statutory declaration under s696 stating their opinion that s684 did not apply.

22. On 5 February 2021 HMRC made applications (accompanied by counter-statements) pursuant to s697 for the Tribunal to determine if there was a prima facie case for further action to be taken by HMRC on the basis that s684 applied. On 9 March 2021 the Tribunal issued a conclusion under s697(4) in relation to each of the Appellants, stating that there was such a prima facie case.

23. On 8 April 2021 HMRC issued the Counteraction Notices under s698 to each of the Appellants in relation to the Capital Reduction. HMRC also issued the Assessments to each Appellant in the following amounts:

- (1) Ian Oscroft – £232,974.22
- (2) Peter Garnett – £69,893.63
- (3) Paul Wesson – £69,893.63
- (4) Andrew Kitchen – £5,277.89.

24. On 4 May 2021 the Appellants appealed against the Counteraction Notices and Assessments. The offer of a statutory review was accepted. On 6 January 2023 HMRC issued their review conclusions which upheld the Counteraction Notices and Assessments. On 27 January 2023 the Appellants notified their appeals to the Tribunal.

**Relevant law**

***Relevant consideration: s685***

(1) The circumstances covered by this section are circumstances where condition A or condition B is met.

(2) Condition A is that, as a result of the transaction in securities or any one or more of the transactions in securities, the person receives relevant consideration in connection with—

(a) the distribution, transfer or realisation of assets of a close company,

...

(4) In a case within subsection (2)(a) ... "relevant consideration" means consideration which—

(a) is or represents the value of—

(i) assets which are available for distribution by way of dividend by the company, or

...

(b) is received in respect of future receipts of the company, or

...

***Limitation on amount of relevant consideration: s687***

...

(2) So much of the relevant consideration as exceeds the maximum amount that could in any circumstances have been paid to the person by way of a qualifying distribution at the time when the relevant consideration is received is to be left out of account for the purposes of subsection (1).

...

(4) In this section “relevant consideration” has the same meaning as in section 685.

***Time limits***

***Issue of counteraction notices: s698***

(1) ... the income tax advantage in question is to be counteracted by adjustments.

(2) The adjustments required to be made to counteract the income tax advantage and the basis on which they are to be made are to be specified in a notice served on the person by an officer of Revenue and Customs.

(3) In this Chapter such a notice is referred to as a “counteraction notice” ;.

(4) Any of the following adjustments may be specified–

(a) an assessment,

(b) the nullifying of a right to repayment,

(c) the requiring of the return of a repayment already made, or

(d) the calculation or recalculation of profits or gains or liability to income tax.

(5) Nothing in this section authorises the making of an assessment later than 6 years after the tax year to which the income tax advantage relates.

(6) This section is subject to section 700 (timing of assessments), and section 702(2) (effect of clearance notification under section 701).

(7) But no other provision in the Income Tax Acts is to be read as limiting the powers conferred by this section.

***Ordinary time limits: s34 Taxes Management Act 1970***

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax ... may be made at any time not more than 4 years after the end of the year of assessment to which it relates ...

***Appeals against counteraction notices: s705***

(1) A person on whom a counteraction notice has been served may appeal on the grounds that–

(a) section 684 (person liable to counteraction of income tax advantage) does not apply to the person in respect of the transaction or transactions in question, or

(b) the adjustments directed to be made are inappropriate.

(2) Such an appeal may be made only by giving notice to the Commissioners for Her Majesty's Revenue and Customs within 30 days of the service of the counteraction notice.

(3) On an appeal under this section that is notified to the tribunal, the tribunal may–

(a) affirm, vary or cancel the counteraction notice, or

(b) affirm, vary or quash an assessment made in accordance with the notice.

(4) But the bringing of an appeal under this section does not affect–

(a) the validity of the counteraction notice, or

(b) the validity of any other thing done under or in accordance with section 698 (counteraction notices), pending the determination of the proceedings.

### **Statutory interpretation - approach to be taken**

25. Although the parties did not specifically set out the approach to be taken by the Tribunal in considering the statutory provisions under consideration, these were at least alluded to in the course of the submissions made. I have set out the approach taken below, rather than deal with the principles piecemeal, adopting Judge Popplewell's summary in *Osmond & Allen* [2024] UKFTT 378 (TC).

26. Statutory provisions should be given a purposive construction in order to determine the nature of the transaction to which it is intended to apply and then to decide whether the actual transaction answers to the statutory description. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose.

27. The relevant provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

28. The question is always whether the relevant provisions of the statute upon its true construction apply to the facts as found. Those facts must be viewed realistically and in the round. Tunnel vision should be avoided.

29. The approach involves two components or stages. The first is to ascertain the class of facts (which may or may not be transactions) intended to be affected by the statutory provision. This is a process of interpretation of that provision in the light of its purpose. The second is to discover whether the relevant facts fall within that class, in the sense that they answer to the statutory description.

30. In construing the statute in question words are to be given their ordinary meaning. One must look at what is clearly said in the statute. There is no equity about a tax. Nothing is to be read in and nothing is to be implied. One can only look fairly at the language.

31. Given that the object of the construction of a statute is to ascertain the will of Parliament it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.

### **Dispute as to quantum**

32. The dispute between the parties as to quantum focussed on the meaning of 'relevant consideration' set out in s685(4), as in force before 6 April 2016. It was common ground that s685(4)(ii) and s685(4)(c) were not relevant in this appeal.

### ***Whether ‘relevant consideration’ includes reserves of a subsidiary***

33. HMRC argued that, in assessing “relevant consideration” for the purposes of s685(2), the distributable reserves of WMGH’s wholly owned subsidiary, WMF, should be taken into account as part of the assets available for distribution by WMGH.

#### *Appellant submissions*

34. The Appellants argued that the legislation is focussed on the distributable reserves of the company directly involved in the relevant transaction in securities: in this case, WMGH. The reserves of any subsidiary were irrelevant. It was argued that this was consistent with the purpose of the legislation, to counteract a tax saving arising from a capital transaction where the consideration received could have been paid by way of a lawful dividend and so putting the taxpayer in the same income tax position as if such lawful dividend had been paid.

35. The Appellants contended that s685(4)(a) specifically refers to distribution “by **the** company” (emphasis added by the Appellants). Accordingly, it was WMGH alone that was to be considered in calculating the ‘relevant consideration’. This was, they contended, supported by the separate legal existence of a company from its shareholders: to include a subsidiary’s distributable assets in this context would require piecing the corporate veil and this would require clear wording, such as the changes made to the legislation in 2016 (after the events in this appeal), which inserted s685(7B) to specifically include within ‘relevant consideration’ assets available for distribution to the company by way of dividend by any other company it controls.

36. The Appellants also contended the use of the present tense (“assets which are available”) meant that ‘relevant consideration’ in s685(4)(a) could not be extended to include amounts that would be available if the directors of a subsidiary agreed to pay a dividend to the parent company. The parent company directors could not force the directors of a subsidiary to pay a dividend; that would be asking them to breach their fiduciary obligations. The legislation referred to assets which ‘are’ available to the company, using the present tense: it could therefore not encompass assets which could be, but had not been, obtained from a subsidiary.

37. The Appellants argued that the purposive interpretation called for by HMRC would render the statute incoherent, as it would mean that any deferred or unpaid amounts would be within scope, meaning that the dividend capacity test would be redundant. It would also distort the balance in the legislation between s685(4)(a) and s685(4)(b), removing the clear distinction between reserves and future receipts. *Project Blue* [2018] UKSC 30 had noted that a purposive construction of the legislation must avoid absurd results and that such construction will not always remove lacunas in a statutory regime.

#### *HMRC submissions*

38. HMRC took the view that the purpose of the legislation was put a taxpayer in the same income tax position as if that taxpayer had received a lawful dividend, to account for the possibility of subsidiaries which cannot pay a dividend directly to an ultimate owner but can indirectly do so by passing a dividend up through one or more parent companies.

39. HMRC contended that it was incorrect to disregard the reserves of a wholly own subsidiary and that it was not correct to regard the extraction of subsidiary reserves in capital form rather than by distribution by way of dividends as being permissible within the transactions in securities rules. HMRC contended that there was no rational policy reason for such a fundamental difference in tax treatment arising from the existence of an intervening holding company, which would have been a gaping hole in the legislation from 1960 to 2016. That would, they contended, be an absurd result in the context of an anti-avoidance rule and statute should be interpreted to exclude such a result, citing *Project Blue* at [31], where Lord

Hodge noted that “it is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results”.

40. HMRC contended that s685(4)(a) should be construed purposively, given that it is anti-avoidance legislation, to include assets legally and economically within the control of the company. The reserves of a wholly owned subsidiary were, they contended, assets available to the parent which should be taken into account in considering the assets of the parent: there was nothing in the legislation which restricted the definition to reserves on the parent company balance sheet alone.

41. Accordingly, ‘relevant consideration’ should be interpreted as meaning the maximum amount that could be distributed by way of dividend, including amounts which WMGH had the power to obtain by way of distribution from a subsidiary. This was not, they argued, a case of piercing the corporation veil but rather an application of company law. The changes to the legislation in 2016 were for the purposes of clarification, rather than a change in the meaning of the statute; HMRC referred to the Explanatory Notes for clause 33 of the Finance (No 2) Bill 2016, which stated that the “changes clarify and improve a number of aspects of these rules”.

42. In this case, the Articles of Association of the subsidiary (WMF) incorporated Regulation 102 in Table A which states that “... the company may by ordinary resolution declare dividends in accordance with the respective rights of the members, but no dividend shall exceed the amount recommended by the directors” (although this Regulation is the provisions of the Companies Act 2006, there was no submission that any provisions restricting payment of dividends applied to WMF in this case).

43. HMRC contended that this meant that WMGH as sole shareholder could have compelled, by means of an ordinary resolution, WMF to declare dividends: although the regulation is subject to a directors’ recommendation as to quantum, the Appellants were the majority of the directors of WMF. Further, they contended that WMGH as sole shareholder could rely upon the *Duomatic* principles (set out in *In re Duomatic Ltd* [1969] 2 Ch 365, although dating from much earlier) that the informal approval of all the members of a company is sufficient to ratify a breach of fiduciary duty

44. The High Court in *In re Burnden Holdings (UK) Ltd (in liquidation)* [2019] EWHC 1566 (Ch) specifically stated that “the proviso in paragraph 102 that the company by ordinary resolution could not declare a dividend in a sum greater than that recommended by the directors was one which could be waived by all the shareholders acting unanimously, on the *Duomatic* principle”.

### ***Discussion***

#### *Changes in statute post-April 2016*

45. The Appellants contended that tax advisors had generally been of the view, prior to the changes on 6 April 2016, that there was a gap in the legislation where the distributable reserves of a group were largely in a subsidiary. I do not consider that this is of any particular assistance: in the same way that HMRC guidance is not determinative, neither are the views of tax advisers. The Explanatory Notes to the Finance Bill are also not of particular assistance, as “improving” the rules could equally refer to introducing entirely new provisions as to removing doubts as to their application, and the notes do not explain which changes are for clarification and which are for improvement.

46. For the reasons set out below, I have concluded that the pre-April 2016 legislation could encompass the distributable reserves of a wholly owned subsidiary, such that the changes in the statute in April 2016 did not alter the position but rather provided clarification.

*Meaning of “assets which are available to”*

47. Taking into account the decision in *Project Blue* and the approach to be taken, I do not consider that it is appropriate to interpret “assets which are available to” in the way contended for by the Appellants. The word “available” is, in my view, wide enough to encompass assets which the company controls such that it can, in effect, ‘gather in’ those assets as it chooses.

48. In this case, I agree with HMRC’s contentions regarding the interaction of the Articles of Association of WMF and the *Duomatic* principle: the distributable reserves of WMF were amounts which were available to WMGH at the time of the transaction. The fact that WMGH would have had to resolve, as sole shareholder of WMF, that a dividend to be paid to it and also resolve to waive the restriction in regulation 102 does not mean that these were not assets available to it. Those actions were entirely within WMGH’s control without a third party’s involvement and so, in my view, the distributable reserves of WMF were amounts available to WMGH for distribution by way of dividend.

*Whether absurd result from HMRC’s arguments*

49. I am not persuaded by the Appellants’ argument that this interpretation means that any unpaid or deferred amounts due to the parent company will fall within the meaning of “relevant consideration” thereby distorting the statute and removing the dividend capacity test to produce an absurd result. The statutory wording is that assets must be “available” to the company; whilst a company can, as noted above, control the actions of a wholly owned subsidiary, that does not extend more broadly and so would not bring into scope all unpaid or deferred amounts due to the company. I do not consider that it would distort the statute, or remove the dividend capacity test, to take into account in determining amounts which are available to a company such amounts within a wholly own subsidiary which are available to be paid up to the parent company.

50. Accordingly, I find that the ‘relevant consideration’ in this context could, and in these circumstances did, encompass the distributable reserves of a wholly owned subsidiary.

**Whether consideration received was in respect of “future receipts”**

51. In the alternative, HMRC contended that the consideration received by the Appellants was consideration received in respect of future receipts of WMGH and so fell within s685(4)(b). As I have concluded above that ‘relevant consideration’ did, in these circumstances, include the distributable reserves of WMF, I am not required to reach a decision on this point. However, as the parties argued the point in full, I have considered the submissions made.

*Appellant submissions*

52. The Appellants contended that the consideration received by the Appellants was the credits to their loan accounts. Any later mechanics as to how repayment of those credits was funded did not alter the character of that consideration. There was no real and direct connection between the consideration and the future receipts contended for by HMRC; at the effective date, WMGH did not have predictable or identified future receipts earmarked to satisfy the loan accounts and there was no pre-existing obligation or assignment of future income streams to the Appellants. The advice received had not set out any specific method or timetable for the Appellants to be able to drawdown against the loan accounts credits.

53. It was contended in the hearing that it was only in March 2016, a month or so after the advice was provided, that WMF realised that it was in a position to make the dividends which were paid to WMGH.

54. HMRC’s proposed interpretation of the statute would mean that any debt consideration exceeding available reserves would automatically be treated as being in respect of future

receipts, which the Appellants contended was too broad an interpretation even for anti-avoidance legislation.

#### *HMRC submissions*

55. HMRC submitted that the Appellants had received consideration in the form of a debt owed by WMGH (the credits to their loan accounts), which could only be discharged out of future receipts of the company. The amounts owed to the Appellants were repaid using amounts loaned to WMGH by WMF; given the financial circumstances of the companies, HMRC contended that it was always intended that a loan from WMF would be used to repay the Appellant. HMRC argued that the words “in respect of” should be construed widely given that this was an anti-avoidance provision, such that all that was required was a sufficient factual link to receipts.

56. Further, the loan from WMF could also be regarded as repaid using future receipts of WMGH (being the amount of £28,873 paid by the Appellants to WMGH), the dividends paid to WMGH by WMF and the set-off against amounts owed by WMF to WMGH.

57. HMRC contended that this was supported by a report prepared for the Appellants which stated that it was the advisers’ understanding that as there was insufficient cash in WMGH to pay the Appellants, their loan accounts would be credited and could be drawn against as and when funds were available in WMGH. HMRC submitted that the natural interpretation of this is that future receipt would be used to satisfy the consideration. HMRC contended that the Appellants’ argument that the consideration was received in connection with the realisation of the merger reserve, and that the subsequent realisation of the loan accounts was irrelevant, was incorrect. The existence of a connection between consideration and the realisation of the merger reserve did not mean that the consideration could not also be received in respect of future receipts of WMGH.

#### *Discussion*

58. The Appellants’ contention that the consideration received was the credits to the loan accounts, and that the realisation of those loan accounts is not relevant, is flawed. The mechanism by which debt consideration would be paid to the recipient is clearly a relevant factor to considering whether it is received in respect of future receipts of the company; it is not appropriate to consider such debt consideration without reference to the mechanism by which the debt may be discharged.

59. The legislation refers only to “future receipts” and not a guaranteed income stream nor any specific time frame for such receipts. It is, in effect, dealing with the situation where a person effectively converts future income which would otherwise be distributed by way of dividend into an amount which would otherwise not be subject to income tax.

60. The Appellants’ contention that “future receipts” referred to specific identified (predictable or earmarked) amounts so that it would not apply where the consideration was a debt without such specified connection is, in my view, too narrow a view of the legislation as it contains no such restrictive wording. I do not consider that, where the other criteria of the regime are met, it is impermissibly broad to interpret debt consideration in excess of reserves which is to be funded by unspecified future income as being received “in respect of future receipts” and so being within the scope of relevant consideration.

61. Accordingly, if the distributable reserves of WMF had not been assets available for distribution (as established above), I consider that the consideration received by the Appellants would have been received in respect of future receipts of the company.

### **Whether “the close company” to be considered in s685(2) can only be WMGH**

62. In the further alternative, HMRC argued that WMF could be the company to be considered when assessing “relevant consideration”. s685(2) requires that a taxpayer received relevant consideration in connection with the distribution of assets of “a” close company and HMRC contended that the statute did not require that such close company was the company whose shares were altered by the transaction in securities. The provisions of s685(4), defining ‘relevant consideration’, referred to the company identified in s685(2) which, following this line of argument, was WMF.

63. Again, as I have concluded above that ‘relevant consideration’ did, in these circumstances, include the distributable reserves of WMF, I am not required to reach a decision on this point. However, as the parties argued the point in full, I have considered the submissions made.

64. HMRC submitted that s685 was concerned with economic reality and not only legal form. The funds obtained by the Appellants were derived from WMF assets and so, it was argued, the consideration received was in connection with the distribution or application of assets of WMF and so fell within the provisions. It was submitted that this was supported by the decision in *Bamberg* [2010] UKFTT 333 (TC), where funds were lent by a parent company but consideration paid by a subsidiary company; the Tribunal held (at [17]) that “All that is necessary is that the consideration received by the taxpayer ultimately represents assets that are ... available for distribution by way of dividend”, notwithstanding that consideration had been paid by the subsidiary.

65. To exclude WMF from consideration would create a significant hole in the regime, enabling avoidance simply by interposing a holding company with low reserves above a cash-rich subsidiary; given the anti-avoidance purpose of the regime, the statute should be construed to prevent such an outcome. The Appellants argued that any such hole was a matter for Parliament to resolve, particularly given the length of time during which the legislation operated without express provision for subsidiary reserves and the Finance Act 2016 amendments which created such express provision, indicating that Parliament had recognised the hole and chose to fill it rather than confirm HMRC’s interpretation of the earlier law.

66. The Appellants contended that the transaction in securities concerned only WMGH, as the consideration was received solely in connection with the cancellation of their shares in WMGH and not in connection with any transaction involving shares or securities in WMF. HMRC were not, they contended, permitted to re-characterise matters so that the ‘close company’ in s685 was WMF when WMF’s shares were not the subject of the transaction. They argued that the company whose assets are referred to in s685(4) must be the same company whose assets are distributed or realised as part of the transaction; HMRC’s arguments expanded the statutory language beyond its natural meaning and detached s685 from the transactions actually undertaken. HMRC argued that identifying WMF as the ‘close company’ did not involve re-characterising matters, as s685 permitted analysis of the transaction by reference to the assets of another close company involved in the transaction.

67. The Appellants also contended that there was no sufficient nexus between the relevant consideration and the assets of the close company identified; the consideration in this case arose from a reduction in WMGH’s share capital and the creation of credits to the Appellants’ loan accounts with WMGH. The subsequent involvement of WMF was after the relevant consideration had been received by the Appellants: that subsequent involvement could not retrospectively convert the consideration received into consideration ‘in connection with’ WMF’s assets. HMRC’s approach incorrectly conflated the source of later funding with the nature of the consideration at the time it was received and sought to tax individuals by reference

to the dividend capacity of a company in which they held no shares. It also amounted to hindsight, whereas s685 and s687 require the analysis to be undertaken by reference to the position at the time the relevant consideration was received and not by reference to later funding steps.

68. The Appellants argued that they were not shareholders of WMF and could not receive a dividend from WMF. This was supported by the fact that the cap in s687(2) was set by reference to the maximum that could be paid by way of dividend at the relevant time; as the Appellants were not shareholders, no lawful dividend could have been paid to them by WMF. HMRC contended that there was no statutory requirement that WMF must have been able to pay a dividend directly to the Appellants; the statutory requirement was that assets were available for lawful distribution by WMF.

#### *Discussion*

69. Considering the arguments put forward by the parties, I agree with HMRC that the close company in s685 could be WMF.

70. The statute is not as closely worded as contended for by the Appellants. It requires that consideration is received in connection with the distribution, transfer or realisation of assets of ‘a’ (emphasis added) close company. I agree that ‘the company’ in s685(4) is the same company as ‘a close company’ whose assets are distributed, transferred or realised in s685(2)(a). Neither provision requires that this be specifically the close company whose securities are involved in the relevant transaction in securities

71. The statute also does not require that the ‘distribution, transfer or realisation of assets’ in connection with which relevant consideration is received is the relevant transaction in securities. Some nexus is required between the transaction in securities and the distribution, transfer or realisation of assets (given that the relevant consideration is to be received as a result of the transaction in securities and is to be connected with a distribution etc) but there is nothing in the legislation that requires that the distribution, transfer or realisation by a close company also be the relevant transaction in securities.

72. The statute also requires (as noted in *Bamberg*) that that the consideration received by the Appellants ultimately represents assets that are ... available for distribution by way of dividend. It does not require that such dividend actually be paid or payable to the Appellants specifically.

73. On the facts provided, the Appellants received amounts in connection with distributions paid by WMF to WMGH, and those amounts were (or represented the value of) assets available for distribution by way of dividend by WMF. They were therefore within the definition of relevant consideration. The amounts were received in connection with the transfer of those amounts by WMF to WMGH when WMF loaned those funds to WMGH.

74. The amounts were also received as a result of the transaction in securities: the Appellants did not dispute that a main purpose of the transaction was seeking an income tax advantage. Given the financial positions of the companies, and the choice not to take an immediate cash payment from WMGH, I consider that the only logical conclusion is that it was intended that WMF funds would be paid to the Appellants as a result of the transaction in securities.

75. I do not agree with the Appellants’ submissions that the provisions of s687(2) mean that they must have been able to receive a dividend from WMF for this interpretation to apply; s687(2) refers to the maximum amount that could ‘in any circumstances’ be paid by way of qualifying distribution. It does not state that the distribution would have to be paid by the company paying the relevant consideration. In this context, I consider that ‘in any

circumstances' would encompass the amount of a lawful distribution by WMGH from funds which could be distributed to it by WMF.

76. Accordingly, even if the distributable reserves within WMF were not assets available to WMGH for distribution, the amounts received by the Appellants would still have been relevant consideration as there is nothing requiring s685 to be interpreted by reference solely to WMGH, and the provisions are equally satisfied by WMF.

#### **Whether the assessments were made in time**

77. The dispute between the parties was - put briefly - whether s698(5) sets the time limit for raising an assessment in respect of transactions in securities or whether that subclause is simply a cap on the time limit provisions set out in the Taxes Management Act 1970.

#### ***HMRC submissions***

78. HMRC contended that s698(5) was the only time limit (six years from the end of the relevant tax year) which applied to assessments in respect of transactions in securities: as the assessments had been raised within six years of the end of 2015/16, the assessments had been raised in time.

79. They contended that s698 gave a freestanding power to assess, as it conferred a power and duty to assess and expressly limited that power to six years. The regime was, they argued, a coherent and self-contained regime with all elements necessary for liability, assessment and appeal. Importing provisions from the Taxes Management Act 1970 in respect of time limits would undermine that coherence. It was only where there was a genuine gap in the regime that reliance on TMA 1970 would be required; no such gap existed in respect of time limits.

80. If s34 TMA 1970 were to apply, s698(5) would have been redundant for decades as s34 TMA 1970 had previously set down a six year rule; it would have remained redundant when the ordinary time limit was shortened to four years. HMRC contended that Parliament cannot have intended such a long-standing redundancy to continue in a key anti-avoidance regime.

81. s698(5) also cannot have been intended to limit the longer time limits set out in s36 TMA 1970 because a transaction in securities does not involve a 'loss of tax' caused by incorrect self-assessment: it substitutes an income tax charge for what would otherwise be a correct (lower) tax charge.

82. Further, s698(7) specifically prevents other provisions of the Income Tax Acts from limiting the powers conferred by s698; as s34 TMA 1970 is a provision "relating to income tax" it fell within the definition of the Income Tax Acts and so could not restrict the six year time limit provided by s698.

83. Finally, HMRC contended that the decision in *Osmond & Allen* [2024] UKFTT 378 (TC) which had found that the six year time limit applied in similar circumstances should be followed as a matter of judicial comity; I should only depart from that decision if satisfied that it was clearly wrong. HMRC also argued that this appeal was, in substance, an impermissible collateral appeal against that decision. Although the decision in *Osmond & Allen* was appealed, that appeal was brought only against a different point and not against the decision in respect of time limits.

#### ***Appellant submissions***

84. The Appellants contended that the time limit for raising the assessment was the ordinary time limit of four years imposed by s34(1) TMA 1970. As it was not disputed that the assessments were made more than four years after the end of the relevant tax year (2015/16), the Appellants submitted that the assessments were raised out of time and so were invalid. They

further argued that the decision of the FTT in *Osmond & Allen* in respect of time limits was wrong in principle and that I was therefore entitled to depart from that decision.

85. s698(5) provides only a long-stop cap on the time limit for assessment, as it is restrictive rather than permissive. As such, it does not displace the ordinary four year time limit in s34 TMA 1970. A review of the discussions in Hansard when predecessor legislation was enacted indicated that the purpose of the six year wording was to prevent unlimited assessments and not to displace existing time limits.

86. The Appellants argued that the transactions in securities rules were not a self-contained regime, as they lacked essential features relating to, for example, the mechanics of assessment, collection or postponement of tax and enforcement. These were all matters which were governed by TMA 1970 and as such the TMA time limits should also apply unless specifically displaced. The rules also did not provide, for example, for appeals on time limit grounds or set out appeal provisions: the limited provisions of s705 were insufficient without also looking to TMA 1970.

87. The effect of s698(7) was not to exclude s34 TMA 1970; that clause was intended to preclude other substantive charging provisions and not procedural rules. TMA 1970 is, in any case, not part of the Income Tax Acts.

### ***Discussion***

88. I deal first with HMRC's contention in the hearing that the proper forum for a challenge to the decision on time limits in *Osmond & Allen* would have been by appeal to the Upper Tribunal, rather than repeating similar arguments in this case. This appeal does not involve any of the same Appellants as *Osmond & Allen*: instructing the same barrister does not, in my view, mean that other unconnected Appellants are precluded from raising the same or similar arguments. The choice made by the Appellants in *Osmond & Allen* as to what they did, and did not, appeal to the Upper Tribunal does not impose any restriction on these Appellants.

#### *Whether the transactions in securities rules are a self-contained regime*

89. HMRC's contention that the transaction in securities regime is a coherent and self-contained regime is not supported even by their own submissions, as they accept that there are substantial matters which are not covered by the regime rules and for which it is necessary to look to TMA 1970.

90. Nevertheless, looking at the statutory provisions of the regime to consider whether it might still be arguable that there is a coherent regime such that the provision of TMA 1970 are not required to be considered: s698(1)-(4) contain an express power for HMRC to make adjustments to counteract a tax advantage by issuing a counteraction notice. Various types of adjustment are specified, only one of which is "an assessment". The duty imposed on HMRC by s698 is to make an adjustment from the range of permitted adjustments and to specify which adjustment is to be made. An assessment is, as noted, one of the specified adjustments that HMRC are given the ability to make. It is not the only adjustment which is permitted by s698, even if it may be the only practical adjustment available in a particular situation.

91. In my view, it is clear that the transactions in securities regime, via s698, imposes a duty on HMRC to make an adjustment to counteract a tax advantage and requires HMRC to use one of a range of existing powers set out elsewhere in statute in order to make that adjustment: the effect is that the regime gives HMRC the power to use an existing power in circumstances where it would otherwise not be able to do so. The regime is therefore clearly not self-contained.

92. It follows that I do not agree with the decision in *Osmond & Allen* that the regime is self-contained: viewed as a whole, I consider that the regime is intended to provide (in appropriate

circumstances, with appropriate safeguards) HMRC with the power (and duty) to counteract a tax advantage by way of one of a number of specified adjustments. All of the adjustments set out in s698(4) involve powers which are defined and the procedural aspects set out elsewhere in statute and not in the transaction in securities regime: the regime allows those powers to be used in circumstances where they would otherwise not be available to HMRC. In the context of this appeal, in my view the regime does not create a new power to raise an assessment. It enables the existing power to raise an assessment to be used in circumstances where it would otherwise not be available to HMRC.

93. Accordingly, as s698 does not create a new assessment power but only create a new power to use the existing assessment powers, in my view this means that the procedural framework of those existing powers in the provisions of TMA 1970, including the time limits provisions, will apply to the making of an adjustment which is an assessment.

*Whether s698(5) extends the time limits in TMA 1970*

94. s698(5) states that “Nothing in this section authorises the making of an assessment later than 6 years after the tax year to which the income tax advantage relates”. That wording is, in my view, restrictive rather than permissive; the wording imposes a cap on a potentially longer time limit that would otherwise apply. I consider that, if this section had been intended to provide the only time limit for issue of an assessment in order to make an adjustment under this regime, it would have specifically stated that such an assessment could be made at any time not more than six years after the end of the year of assessment.

95. This is supported by the fact that the reference to a time limit here is only in respect of an assessment; I consider that it would be absurd to conclude that Parliament intended to limit the time in which an assessment could be raised whilst allowing the other potential adjustments to be capable of being made without time limit.

96. Further, the wording of s698(5) also indicates that one looks elsewhere for the applicable time limits: “nothing in *this* section authorises...” (emphasis added). That indicates that other sections of tax statute can and will set a time limit for raising an assessment, and that the ability to use the existing assessment powers does not include an ability to override the time limits in those powers.

97. This view of the wording of s698(7) is consistent with the discussion in Hansard at the time of the introduction of the (predecessor) clause, which stated that the wording was intended to ensure that the regime “shall not operate to authorise the making of an assessment after the lapse of the usual six-year time limit”. The reference to the “usual ... time limit” indicates that the usual time limit provisions relating to assessments were expected to apply to adjustments made by way of assessment.

98. The discussion then goes on to confirm that any reading of the proposed clause (which otherwise contained no mention of time limits) as allowing a longer time limit than the usual time limit was unintentional. The usual provisions regarding the time limits within which an assessment could be made were therefore clearly expected to apply where the assessment was being made as an adjustment to counteract a tax advantage.

99. In my view, the wording in s698(5) was intended to provide reassurance that HMRC would not be able to use longer than usual time limits (such as those relating to matters of fraud) in the assessment provisions, rather than to create a separate time limit to apply instead of the usual time limits. Wording that is intended to provide such reassurance will often result in redundancy; the failure to change this clause when the time limit was reduced to four years may have perpetuated that redundancy, but I do not consider that principles of statutory interpretation preclude acknowledging that mistakes in drafting occur. Interpreting this

wording as permitting a longer time limit would involve rather more strain on the statute and the regime as a whole than simply acknowledging that this clause was overlooked in when the “usual time limit” referred to in Hansard was changed.

*Whether s698(7) prohibits the application of TMA 1970 time limits*

100. This subclause states that “... no other provision in the Income Tax Acts is to be read as limiting the powers conferred by this section”.

101. As set out above, in my view the power conferred by s698 is the power to counteract an income tax advantage by way of an adjustment; that adjustment may be made by the issue of an assessment. There is no power conferred to raise an assessment outside the usual time limits, only a restriction (arguably of long-standing redundancy) on the time limit within which an assessment may be made. S698 therefore confers a power on HMRC to use its normal assessment powers within the normal procedural framework for those powers in circumstances where HMRC would otherwise not be able to use those assessment powers.

102. As there is no power to raise an assessment outside the usual time limits conferred by s698, the usual time limits within those assessment powers are not a limitation on the power conferred by s698, they are a part of the procedural framework of the powers which may be used in the exercise of the power conferred. To read s698(7) otherwise would be to drive a coach and horses through the procedural framework relating to assessments (and the other forms of adjustment permitted): HMRC’s contention would mean that they could effectively raise assessments as they chose without regard to any of the provisions within the procedural framework, subject only to the restrictions in s700 and s702(2). That cannot have been the intention of Parliament.

103. I therefore conclude that s698(7) does not prohibit the application of the usual time limits for raising an assessment. As it is not disputed that the assessments were raised outside the usual time limits for making an assessment, I find that the assessments were raised out of time and so were not validly raised.

**Conclusion**

104. For the reasons set out above, I conclude that the distributable reserves of WMF were part of the assets available to WMGH for distribution and so would be taken into account in calculating relevant consideration for the purposes of making adjustments to counteract an income tax advantage under the transactions in securities regime.

105. However, as the assessments were raised outside the time limit within which an assessment can be made, and the transactions in securities regime did not extend that time limit, the assessments were not validly raised.

106. The appeal is therefore upheld.

**Right to apply for permission to appeal**

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

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