[2013] UKFTT 287 (TC)

TC02693

Appeal number: TC/2011/3660

CORPORATION TAX - chargeable gains – s 37 TCGA 1992 - tax avoidance scheme using capital redemption policies – whether surrender proceeds to be excluded from chargeable gains computation – Drummond v RCC considered – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ABBEYLAND LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE PETER KRMPSTER
MR WILL SILSBY

Sitting in public at Priory Courts, Birmingham on 13 September 2012

Mrs Nicola Preston of counsel, instructed by Abbeyland Ltd, for the Appellant

Mr Richard Vallat of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. In its corporation tax return for the period ended 30 June 2004 the Appellant ("Abbeyland") claimed a capital loss of £1,687,207. The transaction resulting in that loss is described below. In June 2005 the Respondents ("HMRC") opened an enquiry into that return. There were also capital losses brought forward and carried forward so that the periods ended 30 June 2005 and 30 June 2006 were also affected. The enquiry was concluded with amendments to the returns for all three periods issued in September and October 2010 – in effect, HMRC disallowed the loss on the transaction. In April 2011 HMRC concluded a formal internal review, upholding their decision. In May 2011 Abbeyland appealed to this Tribunal.

Facts

2. The following facts were either formally agreed between the parties or are uncontroversial.

3. Abbeyland has at all material times been a company resident in the UK for UK tax purposes and carrying on the business of property development, investment and letting.

4. Abbeyland expected a significant capital gain to accrue on the sale of one of its properties in 2004. Abbeyland was advised by its accountants, Shaw & Co, that planning using a capital redemption policy would allow Abbeyland to realise a significant capital loss that could be set against gains arising in the same accounting period or carried forward to set against future gains. Abbeyland acknowledges that the transaction was undertaken solely for the purposes of tax avoidance.

5. The transaction involved the following steps:

(1) On 30 April 2004 Abbeyland Investments ("Investments") was incorporated as an unlimited company with two £1 ordinary shares, one held by Abbeyland and one by Mr Roger Murphy (a director and shareholder of Abbeyland).

(2) On 5 May 2004 a firm of independent financial advisers acting for Investments (Marshall James & Co) wrote on behalf of Investments to a finance house (Hercules Products Limited) indicating that Investments wished to acquire "investment bonds which have been issued by a life assurance company, such bonds not having been issued on the life of any individual" to the value of approximately £1,600,000. On the same date Hercules Products Limited indicated that it had indentified suitable bonds (issued by Isle of Man Assurance Limited) that were available for purchase. The bonds were divided into 50 segments of equal value and the underlying investment was cash. The surrender value was £1,598,445 but the bonds would be sold for 101% of the surrender value with a commission of 4.5% due to Hercules Products Limited. The proposed vendor was a company called GW223 Limited.

(3) On or about 6 May 2004 Marshall James & Co provided a report in respect of these bonds which summarised the terms of the bonds.

(4) On 12 May 2004:

(a) Abbeyland acquired the other £1 share in Investments from Mr Murphy.

(b) Abbeyland agreed to borrow £1,520,000 from Schroder and Co Ltd ("Schroders") and subscribed £1,702,401 (the difference being made up from its own resources) for a further £1 share in Investments. £1,702,400 was credited to Investments' share premium account. The loan was initially secured on the shares in Investments.

(c) Investments acquired bonds of the type specified above ("the Bonds") from GW233 Ltd for £1,615,277 plus commission of £71,930, making a total of £1,687,207. The surrender value of the bonds at that date was £1,599,248.

(5) On 21 May 2004:

(a) Investments reduced its share premium account to nil and transferred £ 1,702,400 to distributable reserves.

(b) Investments declared an interim dividend of £ 1,687,206, which was satisfied by transfer of the Bonds to Abbeyland.

(c) The Bonds were transferred to Schroders as security for the outstanding loan of £1,520,000.

(6) On 7 June 2004:

(a) Investments declared and paid in cash a further dividend of £15,913. This left Investments with issued share capital of £3 and distributable reserves of NiI. Its sole asset was £3 at bank.

(b) Abbeyland resolved to surrender the Bonds.

(7) The surrender proceeds of £1,603,119 were received in June 2004, and were applied first in discharge of the outstanding loan of £1,520,000 made by Schroders (plus the interest thereon) with the balance retained by Abbeyland.

6. Abbeyland filed its corporation tax return for the period ending 30 June 2004 on 7 March 2005. That return claimed a capital loss on the Bonds of £1,687,207 on the basis that (a) the surrender proceeds were £1,603,119 but (b) the cost was £1,687,207 and (c) the surrender proceeds of £1,603,119 were to be left out of the capital gains tax calculation because they had been included in a chargeable event calculation. The attached corporation tax calculation included a chargeable event calculation showing (a) surrender proceeds of £1,603,119 less (b) consideration price of £1,615,277 giving an excess of Nil (and therefore no chargeable event gain). The return showed capital losses brought forward from previous years of £82,527, capital gains of £1,134,685 and capital losses to be carried forward of £635,049.

Law

7. Section 171 TCGA 1992 ("TCGA") provides (so far as relevant):

"**171 Transfers within a group: general provisions**

(1) Where … a company ("company A") disposes of an asset to another company ("company B") at a time when both companies are members of the same group … company A and company B are treated for the purposes of corporation tax on chargeable gains as if the asset were acquired by company B for a consideration of such amount as would secure that neither a gain nor a loss would accrue to company A on the disposal."

8. Section 8 TCGA provides (so far as relevant):

"**8 Company's total profits to include chargeable gains**

...

(4) Subject to subsection (5) below, where the enactments relating to capital gains tax contain any reference to income tax or to the Income Tax Acts the reference shall, in relation to a company, be construed as a reference to corporation tax or to the Corporation Tax Acts; but

(*a*) this subsection shall not affect the references to income tax in section 39(2); and

(*b*) in so far as those enactments operate by reference to matters of any specified description, account shall for corporation tax be taken of matters of that description which are confined to companies, but not of any which are confined to individuals.

(5) This Act as it has effect in accordance with this section shall not be affected in its operation by the fact that capital gains tax and corporation tax are distinct taxes but, so far as is consistent with the Corporation Tax Acts, shall apply in relation to capital gains tax and corporation tax on chargeable gains as if they were one tax, so that, in particular, a matter which in a case involving 2 individuals is relevant for both of them in relation to capital gains tax shall in a like case involving an individual and a company be relevant for him in relation to that tax and for it in relation to corporation tax."

9. Section 37 TCGA provides (so far as relevant):

"**37 Consideration chargeable to tax on income**

(1) There shall be excluded from the consideration for a disposal of assets taken into account in the computation of the gain any money or money's worth charged to income tax as income of, or taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts."

10. Chapter II pt XIII TA 1988 ("TA") (which comprises ss 539 to 554) makes special provisions in respect of life policies, life annuities and capital redemption policies. Section 539 TA provides (so far as relevant):

> "**539 Introductory**
>
> (1) This Chapter shall have effect for the purposes of imposing, in the manner and to the extent therein provided, charges to tax in respect of gains to be treated in accordance with this Chapter as arising in connection with policies of life insurance, contracts for life annuities and capital redemption policies."

11. Section 545 TA provides (so far as relevant):

> "**545 Capital redemption policies**
>
> (1) Subject to subsection (2) below, in this Chapter "chargeable event" means, in relation to a capital redemption policy, any of the following
>
> …
>
> (b) the surrender in whole of the rights conferred by the policy;
>
> …
>
> (3) The provisions of section 541, except subsection (3), shall, so far as appropriate and subject to subsection (4) below, apply to capital redemption policies as they apply to policies of life assurance."

12. Section 541 TA provides (so far as relevant):

> "**541 Life policies: computation of gain**
>
> (1) On the happening of a chargeable event in relation to any policy of life insurance, there shall be treated as a gain arising in connection with the policy
>
> …
>
> (b) if the event is the maturity of the policy, or the surrender in whole of the rights thereby conferred, the excess (if any) of the amount or value of the sum payable or other benefits arising by reason of the event, plus the amount or value of any relevant capital payments, over the sum of the following—
>
> (i) the total amount previously paid under the policy by way of premiums; and
>
> (ii) the total amount treated as a gain by virtue of paragraph (d) below or section 546C(7)(b) on the previous happening of chargeable events;
>
> …"

Abbeyland's Case

13. For Abbeyland Mrs Preston submitted as follows.

14. The surrender of the Bonds was both a chargeable event for corporation tax purposes and a disposal for CGT purposes. The issue for determination is what is the correct tax treatment of the surrender proceeds? Abbeyland says that it is a CGT loss (in round terms) of £1.6m.

15. The effect of s 171 TCGA was that the disposal of the Bonds by Investments to Abbeyland was at no gain and no loss. In other words, Abbeyland is in the same position as Investments in terms of acquisition costs. The receipt of the Bonds by Abbeyland was entered into its accounts as franked investment income. That dividend had no corporation tax consequences.

16. Abbeyland surrendered the Bonds. The surrender proceeds were £1,603,119 and were used to discharge the loan from Schroders. The surrender of the Bonds was a "chargeable event" for corporation tax purposes (see s 545 TA). The fact that it was a chargeable event required Abbeyland to undertake the computation as set out in s 541. On the facts, however, there was no chargeable event gain liable to corporation tax because the surrender value (£1,603,119) was less than the acquisition value (£1,615,277).

17. The surrender of the bonds was also a disposal for capital gains tax purposes. In calculating any gain, s 37(1) TCGA was relevant. In *Drummond v. RCC* [2009] STC 2206, the Court of Appeal held that s 37 consisted of two limbs, namely (i) any money or money's worth charged to income tax and (ii) any money or money's worth taken into account as a receipt in computing income or profits or gains or losses of, the person making the disposal for the purposes of the Income Tax Acts. Further that the two limbs were mutually exclusive.

18. In *Drummond* the surrender value was more than the acquisition cost. Despite submissions to the contrary, the Court of Appeal held that, on the application of the chargeable event provisions, the excess fell within limb (i) of s 37 as it formed part of Mr Drummond' s total income.

19. In the case of Abbeyland, however, there was no excess. The surrender proceeds were entered into Abbeyland's accounts as a receipt and, as there had been no charge to corporation tax under the chargeable event provisions then that must fall within limb (ii). On the natural meaning of s 37, therefore, the surrender proceeds must be excluded from the consideration taken into account in the computation of any chargeable gain or allowable loss.

20. The surrender proceeds had to be taken into account as a receipt of Abbeyland and s 541 required that the calculation must be done. It cannot be argued that the surrender proceeds could be ignored. The fact that there was no gain for CGT purposes is beside the point. That simply means that the case cannot fall within limb (i) as there was no corporation tax due.

21. Further, the statutory regime dealing with life policies and capital redemption policies, as set out in ch II pt XIII TA is highly artificial and does not seek to tax real gains or to provide relief for real losses. It was said in *Drummond* that the statute must be given a purposive construction, following *Barclays Mercantile Business Finance Limited v. Mawson* [2005] STC 1. However, in the later case of *HMRC Commrs v. David Mayes* [2011] STC 1269 where the Court of Appeal had to consider a similar appeal, it was held that the relevant sections in TA (including the sections relevant to this appeal) enacted a special tax regime, which was not dependant on real

gains or losses. Accordingly, it was impossible to view the matter from a commercial standpoint or to adopt a purposive interpretation on those sections.

22. Further or in the alternative, the surrender proceeds fell within limb (ii) of s 37(1) because they were taken into account in computing the income, gains and losses of Abbeyland and they were accordingly included within its accounts and corporation tax computation. This follows from s 8 TCGA. Abbeyland properly included the surrender proceeds in its accounts as a receipt. Section 8(4) provides that the reference to Income Tax Acts shall be construed as a reference to corporation tax. The surrender proceeds were taken into account for the purposes of corporation tax. It follows, therefore, that the surrender proceeds necessarily must fall within limb (ii). Section 37 is in mandatory terms as to what shall be excluded. The actions of Abbeyland, in including the receipt in its accounts so that it was "taken into account as a receipt in computing income ... for the purposes of the Income Tax Acts", are clearly within the purview of the s 37. The mandatory language does not permit of any implied exceptions. It is further the case that s 8(4) is not limited to particular or specific references to the Income Tax Acts. Rather the reverse - the subsection refers to "*any* reference to income tax ... " *(emphasis added)*. Had Parliament intended the subsection to refer to some references to income tax but not to all of them, it would have said so. No purposive interpretation can alter that effect.

23. As was held by the Court of Appeal in *Drummond*, there is no doubt that if this is a limb (ii) case, the rest must follow (*Drummond* at [24]). The fact that the result may appear to be anomalous is beside the point. It is not possible to construe the statutory provisions in any other way. The purchase of the bonds, their transfer by way of a dividend in specie and their surrender were genuine legal events. The court is not entitled to ignore the fiscal consequences of the events (see *Mayes* at [77 -78]). The fact that the events occurred as they did for the purpose of avoiding tax does not entitle the Tribunal to ignore them.

HMRC's Case

24. For HMRC Mr Vallat submitted as follows.

25. HMRC agreed that that Abbeyland and Investments formed a group, and where an asset has been acquired intra-group, the consideration for its acquisition is given by s 171(1) TCGA.

26. HMRC also agreed that if an amount is charged to tax as income of the person making the disposal under the chargeable event regime, that amount is left out of account in the CGT computation on the basis of s 37 TCGA. However, HMRC did not accept Abbeyland's contention that all amounts involved in the chargeable event gain calculation at all must similarly be left out of account for CGT purposes.

27. HMRC challenged the deductibility of the loss on two alternative grounds:

(1) First, that s 37 does not require the exclusion of the surrender proceeds from the consideration for the disposal of the Bonds ("the *Drummond* argument"); and

(2) Secondly, that, taking a realistic view of the facts, there was no capital loss for which relief should be allowed ("the *Ramsay* argument").

The <u>Drummond</u> argument

28. Section 37 should be construed as excluding (i) money or money's worth actually charged to income tax (including corporation tax on income) or (ii) receipts taken into account in computing income or profits for corporation tax purposes (e.g. trading receipts before making allowable deductions).

29. In relation to the chargeable event gain calculation, any amount actually chargeable to tax falls within the first limb of s 37, but one cannot say that the surrender proceeds fall within the second. It is not enough to satisfy the second limb that an amount features somewhere in a statutory calculation. This was the approach adopted by the Court of Appeal in *Drummond.*

30. In *Drummond,* the chargeable event gain calculation showed an excess of surrender proceeds over the premiums paid under the policy. This excess was treated as part of Mr Drummond's total income under s 547 and would therefore have appeared on his tax return. But "The surrender proceeds were not taken into account in computing Mr Drummond's income" – per Court of Appeal (at [26]). Exactly the same analysis applies to the surrender proceeds in the present case.

31. The only differences between Mr Drummond's case and Abbeyland's are (a) that Abbeyland is a company liable to corporation tax and (b) in Abbeyland's case, there was no excess and the charging provisions in s 547 did not apply at all. These are irrelevant: (a) There is no reason on the face of the statute or otherwise to treat companies differently. (b) The Court of Appeal's reasoning in relation to the surrender proceeds did not depend on there being a surplus. If anything, in the absence of a surplus (and therefore the absence of any chargeable event gain), the argument accepted by the Court of Appeal in *Drummond* must be even stronger in Abbeyland's case.

32. Abbeyland's only answer to the *Drummond* argument appears to be that the surrender proceeds were entered into Abbeyland's accounts as a receipt. However:

(1) The surrender proceeds as such do not appear on the face of the accounts for the period to 30 June 2004;

(2) The surrender proceeds do not appear in the corporation tax return for the period; and

(3) Although the surrender proceeds appear in the corporation tax computation for the period, that is simply a prior "statutory calculation" which, as in Drummond, is insufficient to bring the proceeds within the second limb of s 37(1). The fact that the corporation tax computation was attached to the return cannot change this.

33. Abbeyland also refers to *Mayes* in which the Court of Appeal commented that the income tax chargeable events regime was not dependant on real gains or losses. This appeal is not concerned with that regime, however, but with capital gains tax which "was created to operate in the real world, not that of make-belief .. it is a tax on gains (or I might have added gains less losses), it is not a tax on arithmetical differences." (per Lord Wilberforce in *IRC v Ramsay* [1982] AC 300 at 326). If anything, therefore, the emphasis in *Mayes* on the artificiality of the chargeable event regime reinforces HMRC's case that the appearance of a figure in the (artificial/make-belief) chargeable events regime calculation should not affect the computation of the (real-world) chargeable gain under s 37 (or otherwise). As the Court of Appeal said in *Drummond* (at [23]) of ss 37-39, "it is not their purpose to enable the creation of an imaginary loss that the taxpayer can set against a real gain and so reduce a CGT liability."

The <u>Ramsey</u> argument

34. The Bonds were bought and surrendered in the course of a tax scheme in the hope of generating a capital gains tax loss, and without any prospect of any significant economic gain or loss (save for fees and interest). Accordingly, in light of the principle established in *Ramsay*, one should look at the transaction in the round (i.e. the purchase, transfer and surrender of the Bonds), rather than looking at the surrender of the Bonds in isolation. This was supported by the Court of Appeal in *Schofield v HMRC* [2012] EWCA Civ 927 in its consideration of *Ramsay* in the context of a CGT scheme, and also in its comments in *Drummond* (at [23]) on the purpose of s 37.

35. On this basis, the overall transaction is a nullity and cannot give rise to an allowable loss. Even if there is an arithmetic "loss" on the surrender of the Bonds in isolation under s 37, it is not an allowable loss within s 8 TCGA (construed purposively).

Consideration and Conclusions

36. The tax planning scheme used by Abbeyland was very similar to that used by the taxpayer in *Drummond*. Both purport to generate a deductible capital loss from the acquisition and disposal of certain financial investments, which results from the interaction between ch II pt XIII TA and the general CGT provisions of TCGA – in particular the purported effect of s 37 TCGA. In considering whether the two plans produce different results (as contended by Abbeyland) we first review the plan and result in *Drummond*.

<u>Drummond</u>

37. In *Drummond* the taxpayer acquired and disposed of second-hand life policies. That transaction constituted both (i) the disposal of a chargeable asset for general CGT purposes, and also (ii) a chargeable event for the income tax purposes pursuant to ch II pt XIII TA. The taxpayer received surrender proceeds of £1,751,376 (a very slightly different figure is given in the Court of Appeal summary of facts). That figure is common to both the chargeable event calculation (ie the s 541 calculation)

and the chargeable gain calculation (ie the TCGA calculation). The other figure in the chargeable event calculation was a deduction (the "relevant capital payments" as described by s 541, of the aggregate of £1,250 initial premium plus £1,748,750 additional premiums plus £25 assignment gain) of £1,750,025. Thus the chargeable event calculation produced a chargeable event profit of £1,351, subject to income tax (pursuant to s 541). Turning to the chargeable gain calculation, deductible expenditure was taken as £1,962,233. Pausing there, that would give a capital (ie CGT) loss of £210,857; but HMRC successfully contended (after a divergence of views between the Special Commissioner, the High Court and the Court of Appeal) that figure did not constitute deductible incidental expenditure (in effect that it was merely the costs of executing the scheme) – thus reducing the *prima facie* loss to Nil. However, and this was the point of the scheme, the taxpayer contended that, pursuant to s 37, he was also entitled to deduct the surrender proceeds of £1,751,376 to produce a capital loss of £1,962,233 (or £1,751,376 after the disallowance of the scheme costs).

38. We need not examine further the matter of the non-deductibility of the scheme costs because in the current appeal Abbeyland accepts that the various commissions paid do not constitute deductible incidental expenditure. The important point is whether s 37 did operate to give the deduction sought by the taxpayer, and the answer is that the taxpayer lost this point before all of the Special Commissioner, the High Court and the Court of Appeal.

39. Rimer LJ stated that the purposive construction to be given to s 37 was the avoidance of *double* taxation, not the avoidance of taxation by enabling the creation of an imaginary loss:

> [23] … The interpretation of legislation involves more than black letter literalism. In a case such as the present, in which there is a question as to which of limbs (i) and (ii) applies, it is necessary to give the statute a purposive construction; and '… the question is always whether the relevant provision of the statute, upon its true construction, applies to the facts as found' (*Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes*) [2004] UKHL 51 at [32], [2005] STC 1 at [32], [2005] 1 AC 684, per Lord Nicholls of Birkenhead, giving the opinion of the committee). There is no dispute that the *purpose* of ss 37–39 is to prevent the double taxation that might otherwise arise from the circumstance that the disposal of an asset will or may give rise to a charge to income tax and also be a disposal for CGT purposes. Their purpose is to prevent such double taxation by excluding from the computation for CGT purposes amounts that (putting it neutrally) have been taken into account for income tax purposes. It is not their purpose to enable the creation of an imaginary loss that the taxpayer can set against a real gain and so reduce a CGT liability. Their purpose is not the avoidance of taxation, but the avoidance of *double* taxation. It is important to have that in mind when construing s 37(1)."

40. Rimer LJ stated that the interpretation of s 37 sought by the taxpayer would produce an anomalous result, and that the court would ordinarily lean against an interpretation that produced such a result:

> “[24] Mr Way’s [Counsel for the taxpayer’s] submission is that, whilst all that may be so, there is no getting away from the fact that limbs (i) and (ii) in s 37 are mutually exclusive, that the present facts fall more naturally within the language of limb (ii) than that of limb (i), and that the consequences for which he contends therefore necessarily follow. If he is right that this is a limb (ii) case, then no doubt the rest does follow. The consequence is, however, one that can at least be described as anomalous; and one that many would be content to describe as absurd. An interpretation of a statute leading to an anomalous or absurd result may be a correct one. But the court will ordinarily lean against an interpretation that produces such a result on the basis that this is unlikely to reflect the legislative intention.”

41. The taxpayer’s contention on the effect of s 37 was summarised by Rimer LJ as follows:

> “[16] Mr Drummond's case on this is simple. The surrender of the policies was a disposal. The gain (or loss) for CGT purposes was, in essence, the 'consideration' for the disposal of the policies (computed in accordance with s 37) less their allowable acquisition cost (computed in accordance with ss 38 and 39). Apart from s 37(1), the consideration was the surrender proceeds, or £1.751m. The acquisition cost is claimed by Mr Drummond to be £1.962m, but was held by the judge (and for the purposes of the s 37(1) argument can be assumed) to be £1.751m. If the two figures of £1.751m were the relevant ones, the surrender would have resulted in neither a gain nor a loss: and no loss could have been set against the gain on the share sale.
>
> [17] This, however, is to ignore s 37(1). In computing the gain or loss, that subsection requires the exclusion from the 'consideration' for the disposal (the surrender proceeds of £1.751m) of (i) 'any money or money's worth charged to income tax as income of … [Mr Drummond] for the purposes of the Income Tax Acts'; or (ii) 'any money or money's worth … taken into account as a receipt in computing income or profits or gains or losses of, [Mr Drummond] for the purposes of the Income Tax Acts.' I shall call these alternatives 'limb (i)' and 'limb (ii)'. Mr Drummond's case is that they are mutually exclusive and that the one that applies here is limb (ii).
>
> [18] If limb (i) applies, the only exclusion from the 'consideration' would be the £1,351.25 deemed by s 547 of ICTA to be part of Mr Drummond's total income for the year ended 5 April 2001. That would, on the figures assumed in the last sentence of [16], give rise to a loss of £1,351.25 to be set against the gain on the share sale. But Mr Way rejects that and says that limb (i) does not apply because whilst the figure of £1,351.25 was deemed to be part of Mr Drummond's total income for the year, it was neither 'money' nor 'money's worth' within the meaning of limb (i). It was, he said, merely the result of the computation required by s 541(1)(b) of ICTA. Mr Drummond could not, it is said, have gone out and spent what was represented by the figure arrived at by that computation. It is said that 'money' within the meaning of limb (i) means, and means only, pure income profit such as, for example, dividends or building society interest which are

included as part of the taxpayer's total income without being arrived at by computing other figures.

[19] That leaves limb (ii) as the applicable one, and it is said by Mr Way to fit the case. There is, he said, no doubt that the 'consideration' for the disposal of the policies (the surrender moneys of £1.751m) was 'taken into account as a receipt in computing [Mr Drummond's] income or profits or gains …' for income tax purposes: they were brought into account in the s 541 computation which resulted in the chargeable event gain of £1,351.25 which was treated as part of Mr Drummond's total income. Therefore it follows that the entirety of the consideration of £1.751m is required by s 37(1) to be excluded from the consideration for the disposal of the policies, which is thus reduced to nil. Mr Drummond remains entitled to deduct from that his acquisition costs under s 38, with the result that he has incurred an allowable loss of at least £1.751m (and he claims it is in fact the full £1.962m).

42. Rimer LJ then gave the *ratio* for the decision on this point:

"[25] ... First, I have no difficulty at all in regarding the case as falling naturally within limb (i) of s 37: that is, in regarding the chargeable event gain of £1,351.25 as 'money … charged to income tax as income of … [Mr Drummond]'. It may be that the figure was arrived at by a statutory computation; but, once the computation had been performed, the resultant figure was 'money' charged to income tax as his income. It is that figure that would feature in his tax return, in like manner as any dividends or building society interest. Why is it not 'money'? Secondly, I do have a real difficulty in regarding this as a limb (ii) case: that is, in regarding the surrender proceeds as having been 'taken into account as a receipt in computing income … of, [Mr Drummond]' That formula applies most naturally (although not necessarily exclusively) to the case of a trader whose receipts are brought into account in computing the profits of his trade and against which he is entitled to deduct allowable expenditure in computing the profits chargeable to income tax. In such a case the receipts will be excluded from the disposal consideration under s 37(1) and the expenditure will be excluded by s 39 from being deducted under s 38: thus the two elements by reference to which a computation for income tax will have been made will be excluded from account for CGT purposes and double taxation will be avoided.

[26] The limb (ii) formula does not, however, apply at all naturally to the facts of the present case. Quite apart from the fact that the attempt to force this case into limb (ii) produces a financial result that cannot have been intended by the legislation, it requires an interpretation of the language of s 37(1) that it cannot naturally bear. The surrender proceeds were not taken into account in computing Mr Drummond's income. Those proceeds would feature nowhere in his tax return, or in any accounts that he might have to prepare for the purpose of its completion. Their amount was, for the purposes of his tax return, a matter of complete irrelevance. The only figure he would require when making his return is the amount of the chargeable event gain. The fact that that figure was at an earlier stage arrived at by a statutory formula

> in which the surrender proceeds formed one element (and in which the other elements may have had nothing to do with Mr Drummond at all) is neither here nor there. No doubt the surrender proceeds can be regarded as a 'receipt' taken into account in that statutory calculation: but they were not a 'receipt' taken into account in the computation of Mr Drummond's income for income tax purposes. That, in my view, is the beginning and end of Mr Drummond's s 37(1) point.
>
> [27] In my judgment, therefore, the only exclusion from the disposal consideration permitted by s 37(1) is the chargeable event gain of £1,351.25. That produces an entirely just result, namely to avoid the imposing on Mr Drummond of any burden of double taxation arising from the disposal of the policies. ...”

The current appeal

43. Turning to the current appeal, the assets acquired and disposed of were non-life investment bonds. The parties agree (i) that the assets constitute capital redemption policies within s 545 (although this was previously contentious); (ii) that, as Abbeyland and Investments are within a group, the relevant acquisition costs for Abbeyland are those incurred by Investments; (iii) that the intra-group assignment was not a chargeable event for the purposes of s 541; and (iv) that the surrender was a chargeable event for the purposes of s 541. Thus the statutory provisions in point are the same as considered in *Drummond*. Further, as already stated, Abbeyland accepts that the various commissions paid do not constitute deductible incidental expenditure, and so that point (described in *Drummond* as “the s 38 issue”) falls away to leave just the issue of how s 37 applies to Abbeyland’s transaction.

44. The surrender proceeds (common to both the s 541 chargeable event calculation and the capital gain calculation) were £1,603,119. The relevant capital payments for the purposes of the chargeable event calculation were £1,615,277. That gives a *negative* chargeable event “gain” of £12,158. The capital gain calculation deducted acquisition costs (inherited from Investments under the s 171 grouping provision) of £1,687,207; and then made a further deduction of the surrender proceeds purportedly pursuant to s 37. As already noted, that calculation stands to be adjusted because of Abbeyland’s concession concerning the non-deductibility of the various commissions paid. Further, we noted during the hearing that the figures stated as the amounts of interim dividend varied slightly between the company accounts and its corporation tax computations. Taking those points into account, the adjusted capital loss claimed by Abbeyland as the result of the transaction is £1,615,277.

45. We do not accept Abbeyland’s contention that its transaction should be distinguished from that considered in *Drummond* because the subject matter of the transaction was different - investment bonds rather than second-hand life policies. Abbeyland accepts that the relevant statutory framework is the same as that considered in *Drummond* – ie ch II pt XIII TA and the consequent s 541 calculation. The assets were identified and acquired with a view to their falling within the chargeable event rules but outside the life assurance rules in s 210 TCGA – that was the same in *Drummond* (see [14] in *Drummond*). Neither Mr Drummond nor Abbeyland had any particular commercial interest in the nature of the investment

proposed by their respective advisers; the assets were simply the means to the desired tax planning end. Therefore we see no reason to draw any distinction between the two types of assets used in the respective avoidance schemes.

46. We also do not accept Abbeyland's contention that its transaction should be distinguished from that considered in *Drummond* because the personalities of the respective taxpayers were different – Mr Drummond an individual and Abbeyland a company. We consider that s 8 TCGA answers that point – its purpose is to ensure that generally the CGT rules apply equivalently for the purpose of corporation tax, and that s 37 should therefore apply identically for both types of taxpayer.

47. We consider next Abbeyland's contention concerning the two limbs of s 37(1). From *Drummond* (see Rimer LJ at [17] of *Drummond*) the following is clear. Section 37(1) has two limbs, which are mutually exclusive. Limb (i) concerns any money or money's worth charged to income tax as income of Abbeyland for the purposes of the Income Tax Acts. Limb (ii) concerns any money or money's worth taken into account as a receipt in computing income or profits or gains or losses of Abbeyland for the purposes of the Income Tax Acts.

48. We agree with Abbeyland that limb (i) does not apply to the circumstances of its transaction. The chargeable event calculation resulted in a (small) *negative* figure; thus it cannot constitute money or money's worth charged to income tax as income of Abbeyland for the purposes of the Income Tax Acts, and so limb (i) is not applicable. However, we do not agree with Abbeyland's contention that if an item falls outside limb (i) then it must necessarily fall within limb (ii). Instead, it may be that neither limb of s 37(1) is applicable. The two limbs are mutually exclusive (per *Drummond*) but that does not imply that they are collectively exhaustive. Having decided that the inapplicability of limb (i) does not automatically bring the item within limb (ii), the answer to whether the item is indeed within limb (ii) is, we consider, given clearly by *Drummond*. Rimer LJ (at [25] & [26] of his judgment - quoted at [42] above) was clear that "… the surrender proceeds … were not a 'receipt' taken into account in the computation of Mr Drummond's income for income tax purposes." We also respectfully agree with Rimer LJ's view that "Quite apart from the fact that the attempt to force this case into limb (ii) produces a financial result that cannot have been intended by the legislation, it requires an interpretation of the language of s 37(1) that it cannot naturally bear." Accordingly we conclude that the surrender proceeds fall within neither limb of s 37(1) and thus do not fall to be a deductible item in the chargeable gains calculation.

49. The remaining contention of Abbeyland concerns the effect of the *Mayes* case, which was decided after *Drummond*. We do not consider there is any contradiction or conflict between the two cases, or that *Mayes* detracts from the analysis in *Drummond*. The point which Abbeyland seeks to draw from *Mayes* is that ch II pt XIII TA does not permit of a purposive interpretation such as to restrict its application to real gains or losses. It is best expressed in the words of Proudman J in the High Court ([2010] STC 1):

> "[44] I am thrown back on to the wording of Ch II, Pt XIII of the Taxes Act. Again, for the reasons I have already given, I find that a purposive construction does not enable the court to disregard the additional payment of premiums and the partial surrender constituted by steps 3 and 4. This is legislation which does not seek to tax real or commercial gains. Thus it makes no sense to say that the legislation must be construed to apply to transactions by reference to their commercial substance.
>
> [45] I sympathise with the instinctive reaction that such an obvious scheme ought not to succeed. However I cannot extract from the legislation any underlying or overriding purpose enabling me to conclude that parts of the scheme may be ignored. To do so would conflate the definition of a chargeable event with the concept of an actual charge to tax and would, I believe, revert to an acceptance of the type of submission that was roundly rejected in *MacNiven*. I am bound by the ratio of the decision in *MacNiven* and in my judgment it points only one way on the facts of this case.
>
> …
>
> [47] In summary it seems to me that Ch II, Pt XIII of the Taxes Act adopts a formulaic and prescriptive approach. No overriding principle can be extracted from the legislation, or from the authorities, that some types of transaction should be ignored in the application of the chapter. To say that there is no premium and no partial surrender, that those steps should be ignored, is in my judgment simply to sidestep the question of construction altogether. The pre-arranged and self-cancelling nature of the transaction was no different from and no more extreme than that in *MacNiven*."

50. We agree with Abbeyland that *Mayes* confirms that ch II pt XIII TA is not confined to commercial transactions giving rise to real gains or losses. However, we do not consider that assists Abbeyland. The best result it can achieve is that the small negative result of the s 451 calculation (£12,158) does attract "corresponding deficiency relief" – see *Mayes* in the Court of Appeal (Mummery LJ at [78]) – and that point is not before this Tribunal. Although ch II pt XIII TA may not admit of a purposive interpretation, s 37 certainly does and that purposive interpretation was stated by Rimer LJ in *Drummond* as quoted at [39] above: the avoidance of *double* taxation, not the avoidance of taxation by enabling the creation of an imaginary loss. We consider that the outcome of our conclusion that s 37(1) does not give a deduction for the surrender proceeds is entirely in accord with Rimer LJ's interpretation of s 37.

51. For the reasons given above, we decide that s 37(1) TCGA does not exclude the surrender proceeds from the computation of the chargeable gain arising on the disposal of the Bonds.

52. In relation to HMRC's alternative argument concerning *Ramsay*, our conclusion on s 37 does not require a decision on this point. In case it should be relevant in relation to continuation of these proceedings before a higher tribunal or court, we make the following findings of fact:

(1) The acquisition and subsequent disposal of the Bonds were solely for the purposes of a tax avoidance scheme, all the steps of which were preordained, with no commercial motive or effect (other than the necessary incurring of commissions and fees).

(2) HMRC did not before us challenge the documentation used in the execution of the scheme by Abbeyland, Investments, or any third party; save that HMRC contend that Abbeyland did not take "independent financial advice" in relation to the Bonds, as the advisers were concerned solely with a tax avoidance scheme. On that last point we find, from the evidence presented, that the advice taken by Abbeyland in the course of the transaction was directed towards the achievement of the aims of the tax avoidance planning rather than as to the merits of a commercial investment.

Decision

53. The appeal is DISMISSED.

54. 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.

PETER KRMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 3 May 2013

Amended pursuant to rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 21 May 2013