TC04092

Appeal numbers: TC/2011/02616 & 02618 and TC/2012/05052 & 05039

INCOME TAX – whether discovery assessment valid – share loss relief claim founded on extinction of company – whether claim invalid as a result of company's restoration to the register – if not, whether new shares issued – if issued, whether for money or money's worth – whether transferred to appellants – whether qualifying shares for share loss relief purposes – appeal on share loss relief dismissed and assessments upheld – appellants in receipt of interest – whether tax deducted by company – whether appellants entitled to credit for interest – held, no – whether penalty determinations can be raised when the discovery assessment did not rely on TMA s 29(4) – whether invalid because of manuscript amendments – whether appellants negligent – whether mitigation percentages should be changed – appeals dismissed and one penalty determination increased

FIRST-TIER TRIBUNAL
TAX CHAMBER

REBECCA THOMAS & SARAH THOMAS **Appellants**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MRS SONIA GABLE

Sitting in public at the Tribunals Service, Bedford Square, London on 29 and 30 July 2014

Mr Roderick Thomas for the Appellants

Ms Harry Jones of HM Revenue and Customs' Appeals and Reviews Unit, for the Respondents

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DECISION

1. Mrs Sarah Thomas and Mrs Rebecca Thomas filed self-assessment ("SA") tax returns for the year 2007-08. They each claimed (a) income tax share loss relief of £100,000 and (b) that their liability should be reduced to take into account tax which had either been deducted, or should have been deducted, from interest received.

2. HMRC raised discovery assessments, disallowing the share loss relief claims and treating the interest as being gross rather than net. They also issued penalty determinations on both appellants for negligently making incorrect returns, with Mrs Sarah Thomas being charged £26,070 and Mrs Rebecca Thomas £32,066.

3. Mrs Sarah and Mrs Rebecca Thomas appealed the discovery assessments and penalty determinations.

4. We upheld the discovery assessments on both appellants. We confirmed the penalty determination on Mrs Rebecca Thomas, and increased that on Mrs Sarah Thomas to £32,587.50.

5. Mrs Sarah Thomas is married to Mr Roderick Thomas ("Mr Thomas"), who acted for both appellants in these proceedings. Mrs Rebecca Thomas is married to Mr Stuart Thomas ("Mr S Thomas"). Mr Thomas and Mr S Thomas have litigated a number of issues before the First-tier Tribunal, and in other courts, as individuals, as partners and as directors of various companies, notably Spring Salmon and Seafood Ltd ("SS&S") and Spring Capital Limited ("SCL"). Where appropriate, we make reference to certain of these other decisions, but the matters before us are largely free-standing.

Outline of the case

6. This case is fairly complicated, and we begin by setting out a broad outline of the parties' main contentions. The detail can of course be found in the main body of the decision.

7. The appellants' case on the share loss relief claims is that:

(1) The entire share capital of SS&S, being 200,000 shares, was transferred to Mr Thomas and Mr S Thomas.

(2) A further 200,000 shares were then issued to Mr Thomas and Mr S Thomas ("the new shares") in exchange for "money's worth," being a reduction in the director's loan account with SS&S.

(3) The new shares were transferred to the appellants.

(4) SS&S was struck off the register. The appellants therefore had a capital gains tax ("CGT") loss under the Taxation of Chargeable Gains Act 1992 ("TCGA") s 24(1) on the basis of the "extinction" of their shares.

(5) The conditions in Income Tax Act 2007 ("ITA") s 131 were satisfied, allowing the appellants to make a share loss relief claim against other income.

8. HMRC's case was that:

(1) SS&S had been restored to the Register of Companies, so there was no "extinction" of the shares within the meaning TCGA s 24(1).

(2) In any event, the new shares had not been issued or, if issued, no "money's worth" had been given.

(3) No shares had been transferred to the appellants.

(4) The ITA s 131 conditions were not satisfied.

9. Both appellants included net interest from loans made to companies of which their husbands were directors. They argued that the tax deducted or deductible from the interest should be taken into account when calculating their overall liability.

10. HMRC's case was that no tax had been deducted from the interest, and the companies' failure to deduct the tax did not give the appellants a right to deductions which had not been made.

11. A preliminary point in relation to both the loss relief and the interest issues was whether the discovery assessments were valid. A number of points also arose in relation to the penalties.

12. The following section sets out the issues in the case in a more formal manner.

The issues

13. The following issues arose in relation to the appellants' share loss relief claims, made under ITA 131:

(1) whether HMRC had satisfied the requirements of the Taxes Management Act 1970 ("TMA") s 29, so as to make discovery assessments; and if so

(2) whether the assessments were otherwise invalid; and if not

(3) whether the restoration of the SS&S to the Register of Companies meant that the claims failed; and if not

(4) whether the shares had been issued;

(5) if issued, whether money's worth had been given for them;

(6) whether the shares had been transferred to the appellants; and if so

(7) whether the conditions of ITA s 131 were satisfied.

14. The issues in relation to the interest received were as follows:

(1) whether the discovery assessments were valid; and if so

(2) whether the appellants had received certificates of tax deducted;

(3) whether the companies had deducted tax from the interest paid; and if not

(4) whether the appellants had the right to include the interest net on their returns, even though no tax had been deducted; and

(5) whether later payment of the tax by the company affected the outcome.

15. The following issues arose in relation to the penalties levied under TMA s 95:

(1) whether negligence penalties were possible, given that HMRC had defended the discovery assessments on the basis of TMA s 29(5) rather than on the basis of negligence under TMA s 29(4); and if so

(2) whether the determinations were invalid because of manuscript amendments; and if not

(3) whether either or both appellants had been negligent in relation to the share loss relief claim and/or the interest; and if so

(4) whether the quantum of the penalties should be upheld, reduced or increased by the Tribunal.

The legislation and the evidence

16. The legislation, so far as relevant to the issues raised by these appeals, is set out in the Appendix.

17. The Tribunal received a bundle of documents for each appellant, which included:

(1) the correspondence by and on behalf of the parties between each other, and with the Tribunal;

(2) the appellants' SA tax returns for 2007-08 and the SA Tax Return Guide for that year;

(3) the statutory accounts for SS&S for the 18 month period ending 31 January 2005;

(4) the statutory accounts for Spring Seafoods Limited ("SSL") for the year ending 30 April 2007 together with certain pages from the accountant's working papers for those statutory accounts;

(5) SSL's statutory accounts for the years ending 30 April 2008 and 2009;

(6) various submissions and other documents relating to the hearing of the petition to restore SS&S to the Register of Companies ("the restoration proceedings");

(7) a letter from Companies House dated 18 March 2011 confirming that SS&S was restored to the Register of Companies on 16 March 2011;

(8) Form SH01 Return of Allotment of Shares stating that £200,000 shares were issued by SS&S on 15 February 2007; share certificates for £100,000 of the same date and an annual return for SS&S dated 12 August 2011;

(9) a document from SSL which states that it is tax certificate;

(10) a letter from Spring Capital Ltd (the new name for SSL) dated 19 April 2013; and

(11) schedules of bank interest received by the appellants.

18. In addition, Mrs Sarah Thomas's documents included the accounts of Thomas McLennan Limited ("TML") for the year ended 31 October 2008.

19. The Tribunal was provided at the hearing with the following further documents:

(1) a letter dated 24 May 2004, described as a "side-letter" to a contract settlement made between HMRC of the one part, and Mr Thomas, Mr S Thomas, SS&S, and two other parties on 24 May 2004 ("the Contract Settlement");

(2) HMRC's letter of the same date in response to that side-letter;

(3) a letter dated 29 January 2008 from Mr Stewart to Mr Thomas, headed "Maclennan Trust";

(4) copies of negligible loss claims made by the appellants dated 28 November 2011; and

(5) a printout from Companies House giving the date on which SS&S had been struck off the Register of Companies.

20. Although Mrs Rebecca and Mrs Sarah Thomas were the appellants in this case, neither attended the hearing and neither provided a witness statement. Mr Thomas said that their attendance was unnecessary as he was fully able to put their case.

21. Mr Stewart provided a witness statement. For the most part, this introduces and summarises the documents in the Bundles. From time to time it includes submissions; we treated these as if they were a supplement to HMRC's skeleton argument. The witness statement also contains evidence of facts, about which Mr Stewart gave oral evidence to the Tribunal, was cross-examined by Mr Thomas and answered questions from the Tribunal. We found him to be an honest witness.

22. Mr Thomas also provided a witness statement. In part this consists of submissions on the matters in dispute, and we treated these as an extension of his skeleton argument. In part it contains hearsay evidence in relation to the appellants. We place little or no weight on this evidence, as neither appellant attended the tribunal to be cross-examined. Finally, the witness statement also sets out Mr Thomas's evidence as to the key issues of fact which are in dispute, on which he also gave oral evidence, was cross-examined by Mr Stewart and answered questions from the Tribunal. We did not find him to be a credible witness. He was vague and imprecise about some of the key factual matters in issue and some of his evidence was implausible and inconsistent with the accounting records of the companies.

Initial findings of fact

23. From the evidence provided, we find the following facts. We begin with those which relate to the loss issue; these are common to both appellants. We then set out our findings on the interest and discovery issues for each appellant separately, as the facts diverge. Further findings of fact are set out later in our decision. Findings which relate specifically to the penalty appeals are dealt with at the end.

Bala and the Contract Settlement

24. The accounts of SS&S for the 18 month period ending 31 January 2005 state that its trade was as seafood suppliers, although it was not in dispute that the company also carried out financial business.

25. During that same period, it had 200,000 issued £1 shares. These were owned by Bala Limited ("Bala"), a company registered in the British Virgin Islands. Bala's single share had been issued to the Maclennan Trust ("the Trust"), which at that time was registered in Guernsey. The Trust therefore owned SS&S through its shareholding in Bala.

26. In *Spring Salmon & Seafood* [2014] UKFTT 887 ("*SS&S 2014*"), a differently constituted First-tier Tribunal refers at [24] to an email from Mr Thomas to Mr Stewart, in which Mr Thomas accepts that he and Mr S Thomas were settlors of the Trust. However, Appendix 1 of the same decision records that this issue is itself under appeal under references TC/2010/6253 and TC/2010/6254. We make no finding of fact as to the identity of the settlor(s) of the Trust; it does not affect the outcome of the appeals before us.

27. On 24 May 2004 the Contract Settlement was agreed between HMRC of the one part and Mr Thomas, Mr S Thomas and other parties on the other. The Tribunal was not supplied with a copy of the Contract Settlement, but it is not in dispute that it provided for £525,000 to be paid to HMRC in settlement of various liabilities.

28. On the same day, 24 May 2004, a side letter was sent by Mr Thomas and Mr S Thomas to HMRC. It says that, subject to the Contract Settlement being agreed, and without prejudice to any other enquiries etc. which might be raised by HMRC in respect of periods other than those covered by the Contract Settlement:

(1) Mr Thomas will require "the trustee of Bala" to resign and appoint UK resident trustees;

(2) Mr Thomas and Mr S Thomas "will request that" the new trustees cause the transfer of all the assets held by Bala, including its holding in SS&S, to the Trust;

(3) Mr Thomas and Mr S Thomas will thereafter "request that the new trustees distribute all the assets to Roderick and Sarah Thomas, and, Stuart and Rebecca Thomas, in equal proportion by 31 December 2004."

29. The side-letter ends by saying that:

> "in consideration of this undertaking and on the basis that the assets of the trust are distributed by 31 December 2004, no liability to UK taxation in respect of any person or company shall arise in executing the steps 1-3 above. Furthermore, for the purposes of determining any future liability to UK capital gains tax, the beneficiaries named in clause 3 above shall be treated as having acquired any asset distributed to him/her at the date of acquisition of any such asset by the original trustee."

30. Mr Simon Read, HM Inspector of Taxes, replied to that letter on the same day. He confirmed that, providing the Contract Settlement was not repudiated and the steps numbered (1) to (3) above were "executed by 31 December 2004" then:

> "(i) No liability to income tax or capital gains tax will crystallise on the Settlors or on the Beneficiaries at the time that the Maclennan Trust becomes a UK resident trust by virtue of the appointment of one or more UK resident trustees.
>
> (ii) No liability to income tax or capital gains tax will crystallise on the Settlors or the Beneficiaries on the event of a distribution in specie of the assets of Bala Limited to the trustees of the Maclennan Trust (whether or not the Maclennan Trust is UK resident at the time of the distribution) in consequence of the winding up of the company.
>
> (iii) No further liability to income tax or capital gains tax will crystallise on the Settlors or the Beneficiaries in respect of the distribution of the entire assets of Maclennan Trust by the trustees subsequent to the Maclennan Trust becoming a UK resident trust.
>
> (iv) Assets previously owned by the Maclennan Trust or by Bala Limited will be treated, for future capital gains purposes, as if they were acquired by the relevant beneficiary, on the date that the asset was first acquired by the trustees of the Maclennan Trust or the directors of Bala Limited on behalf of the company."

31. Mr Thomas sought to rely in this hearing on paragraph (iv) above and we set out his submissions at §185.

32. Mr Thomas told the Tribunal, and we accept as a fact, that the assets of the Maclennan Trust were not distributed by 31 December 2004.

33. A further letter relating to the Contract Settlement was sent to Mr Thomas by Mr Stewart on 29 January 2008, and this is discussed at §188.

The transfer of SS&S's trade to SSL

34. SS&S's accounts for the 18 months ending 31 January 2005 show that Mr Thomas was its sole director during that period. As at the balance sheet date, SS&S owed "its director Mr RC Thomas and his brother, Mr SJ Thomas, £1,557,991 on a director's loan account."

35. On 22 September 2004, SS&S's trade was transferred to SSL, a new company. Mr S Thomas was its sole director and owned 100% of the shares. His wife, Mrs Rebecca Thomas, was the company secretary until 12 February 2007, when Mr Thomas took on that office.

36. Mr Thomas told the Tribunal that there were a number of "tidying up" issues after the transfer of business from SS&S – in particular, SSL was not initially accredited to carry out certain financial business – but that SS&S had "completely stopped" trading by 31 January 2005. This evidence was unchallenged and we accept it.

37. SSL's 2007 accounts show that it held goodwill at cost of £1,577,991. We heard no evidence on the make up of this figure and make no finding of fact as to whether this amount was in fact goodwill. Appendix 1 of *SS&S 2014* records that an appeal relating to "goodwill" was heard by a differently constituted First-tier Tribunal in May 2014 under reference TC/2011/1784. That judgment had not been published by the date our own decision was finalised.

38. We find as a fact that the "goodwill" was transferred to SSL in the year ended 30 April 2007, because there was no goodwill in the balance sheet for the previous year.

39. This finding is also supported by the accountant's working papers for the 2007 accounts. These show an amount of £1,557,991 transferred from SS&S to SSL as goodwill "together with the liability of the director's loan accounts," also of £1,557,991. The accounting entries were:

(1) Debit: goodwill £1,557,991

(2) Credit: director's loan account £1,557,991

40. The director's loan account balance transferred from SS&S of £1,557,991 during the calendar year ended 30 April 2007 is precisely the same figure as the loan balance shown as due to Mr Thomas and Mr S Thomas in SS&S's accounts for the period ended January 2005.

41. Mr Thomas denied that the full loan account balance had been transferred from SS&S and said it was a coincidence that the numbers were the same. We do not accept this. We rely on the working papers and the accounts themselves and find as a fact that the loan balance was transferred in full from SS&S to SSL at some point during the calendar year ended 30 April 2007. We return to this again at §175-181 below.

The transfer of SS&S shares

42. Mr Thomas's Minute of Amendment in the restoration proceedings states that 100,000 shares in SS&S were transferred to him from Bala. This is repeated in Mrs Rebecca and Mrs Sarah Thomas's Answers in those proceedings. SS&S's Annual Return submitted to Companies House on 12 August 2011 records that the 100,000 shares were transferred from Bala to Mr Thomas on 14 February 2007, and that the other 100,000 shares were transferred to Mr S Thomas on the same day. Mr Thomas said the same in oral evidence.

43. We note that the side-letter to the Contract Settlement said at (2) that Mr Thomas and Mr S Thomas would request that Bala's assets (ie including its 100% shareholding in SS&S) be transferred first to the Trust and then to the Beneficiaries. However, there was no sign that SS&S's shares had been transferred to the Trust. Rather, the consistent evidence is that that they were transferred from Bala directly to Mr Thomas and Mr S Thomas.

44. Although Companies House was not notified of the transfers to Mr Thomas and Mr S Thomas until 12 August 2011, HMRC nevertheless accepted that the transfers had been validly made on 14 February 2007, and we therefore heard no argument or submissions as to whether this was correct as a matter of fact and/or law. We have proceeded on the basis that this issue was not before us, and have accepted that the 200,000 shares were transferred directly from Bala to Mr Thomas and Mr S Thomas on 14 February 2007.

The strike off and the restoration

45. On 8 August 2007, SS&S was struck off the Register of Companies.

46. HMRC subsequently petitioned to have SS&S restored to the Register. On 24 May 2010, Mr Thomas submitted a "Minute of Amendment" setting out why he was aggrieved by the company's proposed restoration.[1] The Minute said, *inter alia*:

> (1) He was one of four members of SS&S and had received £100,000 shares from Bala on 14 February 2007. On the following day he had subscribed for a further 100,000 shares, paid for by "a corresponding debit in his loan account with the company." On the same day, he transferred "the said 100,000 shares" to his wife, Mrs Sarah Thomas.
>
> (2) At the date SS&S had been struck off, Mrs Rebecca Thomas had also held 100,000 shares.
>
> (3) Mr Thomas had claimed a CGT loss of £3.5m following the striking off of the company and "had reasonably relied on the company's dissolution as entitling him to relief for that loss."

47. For the avoidance of doubt, we make no finding at this stage about any matter set out in the Minute of Amendment other than that Mr Thomas and Mr S Thomas each received 100,000 shares from Bala on 14 February 2007, see §42-44 above.

48. On 14 July 2010 Lord Glennie granted HMRC's restoration petition. His judgment is referenced as *The Advocate General for Scotland for an Order under s.653 of the Companies Act 1985 that the name of SPRING SALMON & SEAFOOD LTD be restored to the Register of Companies* [2010] CSOH 117 ("the restoration decision").

49. The restoration decision was appealed to the Inner House of the Court of Session, and upheld. SS&S was restored to the Register on 16 March 2011.

50. We have already found that SS&S had not traded since 31 January 2005. However, we observe that at [14] of the restoration decision, Lord Glennie records that "it was admitted that at the time the Company was struck off the Register it was still in operation." We make no finding as to what activities were being carried out,

[1] It appears from the judgment that the Minute was not accepted by Lord Glennie. He says "I refused the motion of the third respondent for leave to reclaim my refusal to allow receipt of his Minute of Amendment" see [2] of his decision.

so that the company was still "in operation" on 8 August 2007, but accept Mr Thomas's unchallenged evidence that they were not trading activities.

The loss claims made in the appellants' SA returns

51. Mr Thomas completed both appellants' 2007-08 SA returns as their agent; the returns were signed by the appellants and submitted to HMRC on 24 October 2008. The CGT Summary Pages included the figure of £100,000 in Box 4, being "total losses of the year."

52. Box 26 of the CGT Summary Pages is headed "if you are making any claim or election, put an X in this box." Both appellants put an X in that box, and completed the white space as follows:

> "I refer to helpsheet 286. I wish to claim to have the loss of £100,000 in respect of my shares in Spring Salmon and Seafood Ltd set against my income for the year 2007-08 and for my income tax liability to be reduced accordingly. The loss was made on a disposal by way of a dissolution of the company on 8-8-07 at which time the shares were of negligible value."

Mrs Rebecca Thomas's loan to SSL and her SA return

53. Both parties accepted that Mrs Rebecca Thomas had made a loan to SSL of £1,000,000 at some point before 1 May 2007 and we find this to be a fact.

54. SSL's 2008 accounts show an opening balance for "debenture loans" of £1,000,050 and we find that this includes the £1m loan from Mrs Rebecca Thomas. The closing balance was £1,150,050, an increase of £150,000 during the year. The figure for interest payable is also £150,000. We find as a fact that the £150,000 relates to the interest arising on Mrs Rebecca Thomas's £1m loan.

55. In those accounts, the heading "creditors (amounts falling due within one year)" shows a nil balance under the subheading "other taxes and social security" and the comparable figure for the previous year was £7,859.

56. Box 1 of the 2007-08 SA return is headed "UK bank, building society, unit trust etc income/amount which has been taxed already – *the net amount after tax*" (italics in original).

57. Mrs Rebecca Thomas's SA return for 2007-08 included £122,280 in Box 1. Of this, £120,000 related to the net interest on her loan to SSL, being £150,000 x 80%. The remainder consisted of interest from various banks and building societies.

58. Under the heading "other tax reliefs" Mrs Rebecca Thomas claimed qualifying loan interest of £50,210. This relief was not in issue before us and we had no evidence or submissions. We make no finding in relation to this sum, other than that it was included in her return and has not been challenged by HMRC.

Mrs Rebecca Thomas's tax calculation and assessments

59. Mrs Rebecca Thomas's SA return did not include a self-calculation of the tax due. HMRC carried out the calculation, but did not offset the share loss claimed against Mrs Rebecca Thomas's income. As a result, tax was shown as unpaid and a surcharge was levied.

60. On 6 August 2009, Mrs Rebecca Thomas asked for a review of the surcharge decision. On 4 September 2009, a Mrs Doherty of HMRC replied, saying:

> "I have looked at the 2008 tax return. The losses claimed were entered into the wrong box when the return was processed. I have now corrected this. I have returned the papers to your district so that the claim for relief on shares of negligible value can be dealt with. The surcharge will then be reviewed."

61. On 21 September 2009, HMRC repaid tax of £30,310 to Mrs Rebecca Thomas, plus repayment supplement. In outline, the repayment arose because:

(1) earnings of £5,000 were covered by her personal allowance;

(2) the gross interest of £150,000 was covered by the share loss relief of £100,000, together with the qualifying loan interest relief of £50,210; and

(3) as a result, the tax which was treated as having been deducted from the loan interest exceeded the calculated liability.

62. On 22 January 2010, Mr Stewart wrote to Mr Thomas (as agent for Mrs Rebecca Thomas), saying he was opening an enquiry under TMA s 9A into her 2007-08 SA return. On 10 February 2010, not having had a response, he sent a Notice of Enquiry to Mrs Rebecca Thomas.

63. Mr Thomas replied on 11 February 2010, saying that the Notice was invalid. The returns had been submitted on 24 October 2008 and Mr Stewart had not sent out his enquiry letter within the following twelve months. As a result, the enquiry was out of time.

64. Mr Stewart checked Mrs Rebecca Thomas's SA return against the information provided to HMRC by the banks: this showed only relatively small amounts of interest arising. He subsequently carried out further research and was unable to find evidence that tax had been paid over to HMRC in relation to any other interest arising.

65. On 10 February 2010 he asked Mrs Rebecca Thomas for copies of the certificates of tax deducted. He repeated this request on 22 February 2010, 19 April 2010 and 14 October 2010. No certificates were provided.

66. On 24 May 2010, as we have already seen, Mr Thomas submitted a "Minute of Amendment" in relation to the restoration of SS&S. This included the statement that as the date SS&S had been struck off, Mrs Rebecca Thomas held 100,000 shares in that company. Mr Stewart received a copy of that Minute of Amendment.

67. On 22 October 2010, after considerable correspondence, Mr Stewart issued Mrs Rebecca Thomas with a Notice of Assessment, together with an amended tax calculation. This reversed the repayment of £30,310 and brought into charge a further sum of £33,823 as a result of removing the share loss relief and recategorising the interest as gross rather than net. The total tax assessed was £64,133. The Notice was addressed to Mrs Rebecca Thomas; it was dated, and it informed her that any appeal must be made within 30 days.

68. Mr Stewart's covering letter said that the assessment was a discovery assessment under TMA s 29, and that the conditions in TMA s 29(4) and (5) were both met. The assessment was appealed, and following a statutory review, notified to the Tribunal on 29 March 2011.

Mrs Sarah Thomas: the interest issue and the discovery issue

69. TML's accounts for the year ended 31 October 2008 state that:

(1) Mr Thomas is the company's director;

(2) the company's activity is "monetary intermediation, business and management consultancy and artistic and literary creation";

(3) creditors include shareholder loans of £1,759,480. In the previous year they had been £1,281,797;

(4) cost of sales is £150,500; the cross-reference in the accounts for this figure is Note 3, which gives the interest payable on shareholder loans as £150,000. The comparable figure for the previous year was £91,891; and

(5) under "creditors (amounts falling due within one year)" a nil balance is shown for "other taxes and social security"; the comparable figure for 2007 was £37,935.

70. Both parties accepted that Mrs Sarah Thomas had made a loan to TML of £1m at some point before 6 April 2007 and we find this to be a fact.

71. We also find as a fact, based on the accounts provided, that loan interest of £150,000 was payable to Mrs Sarah Thomas in the year to 31 October 2008 and that this was included in the company's cost of sales figure set out above. We infer from the existence of the loan in the previous accounting period, that interest at the same rate was payable for the period from April 6 2007 to 31 October 2007, and that this interest is included in the comparative figure of £91,891. We therefore find as a fact that interest of £150,000 arose to Mrs Sarah Thomas on the £1m loan for the year 2007-08.

72. Mr Thomas completed Mrs Sarah Thomas's 2007-08 SA return as her agent, and she signed the return before submission. Box 1 contained the figure of £124,211 as being interest "which has been taxed already." We find as a fact that £120,000 of this amount related to the interest arising on her loan to TML.

73. Under the heading "other tax reliefs" Mrs Sarah Thomas claimed qualifying loan interest of £49,825. As with the similar claim by Mrs Rebecca Thomas, this

relief was not in issue before us. We make no findings in relation to this sum, other than that the claim was included in her return and has not been challenged by HMRC.

74. Mrs Sarah Thomas did not self-calculate the tax due, and HMRC did not offset the share loss claimed against her other income. As a result, her SA account showed unpaid tax, and a surcharge was levied. On 3 November 2009, Mrs Sarah Thomas appealed the surcharge, saying:

> "please recalculate the figures and remit the refund I am due to my account [details provided]…Now that I have provided you with the evidence that proves I am due a refund of tax and have no liability for the year, would you kindly agree (for the purposes of section 54 TMA 1970) that the surcharges are zero and amend my SA statement accordingly."

75. On 15 January 2010, Mrs Miller of HMRC responded, making the amendments requested and cancelling the surcharge. A tax repayment of £30,233 was authorised, but was delayed for an unknown reason and later blocked following Mr Stewart's intervention.

76. Mr Stewart's correspondence with Mr Thomas as to whether or not a TMA s 9A enquiry could be opened, and his research on the interest arising, summarised above in relation to Mrs Rebecca Thomas, also extended to Mrs Sarah Thomas. Again, as with Mrs Rebecca Thomas, Mr Stewart asked repeatedly for evidence that tax had been deducted from the loan interest, but none was provided.

77. Mr Stewart obtained a copy of the "Minute of Amendment" at some point after 24 May 2010. This included the statement that Mr Thomas had transferred 100,000 newly issued shares to Mrs Sarah Thomas.

78. On 22 October 2010, Mr Stewart issued a Notice of Assessment for £34,942.20, together with a calculation of the tax due. It reversed Mrs Sarah Thomas's share loss relief and treated the interest on the TML loan as gross. The quantum of the assessment was lower than that assessed as due from Mrs Rebecca Thomas, because Mrs Sarah Thomas's repayment had been inhibited.

79. The Notice was addressed to Mrs Sarah Thomas; it was dated, and it informed her of her appeal rights. The covering letter stated that it was a discovery assessment and that both TMA s 29(4) and (5) were satisfied.

80. The assessment was appealed, and following a statutory review, notified to the Tribunal on 29 March 2011.

81. Meanwhile, on 28 October 2010, Mrs Sarah Thomas amended her 2008-09 SA return (ie that for the following year), by taking the net interest of £120,000 out of box 1 and including £150,000 in Box 2. Box 2 is headed "untaxed interest – amounts that haven't been taxed at all."

After the notification of the appeals

82. On 19 August 2011 Mr Thomas wrote to Mr Stewart enclosing:

(1) An Annual Return Declaration for SS&S, dated 12 August 2011. As already mentioned, this recorded the share transfer from Bala to Mr Thomas and Mr S Thomas on 14 February 2007. It also increased the number of shares issued from 200,000 to 400,000, and the total nominal value from £200,000 to £400,000. Mrs Rebecca and Mrs Sarah Thomas are recorded on the form as each owning 100,000 £1 shares.

(2) A share certificate stating that Mrs Rebecca Thomas owned 100,000 £1 shares in SS&S, and a second stating that Mrs Sarah Thomas owned 100,000 £1 shares in the same company. The certificates are dated 15 February 2007 and signed by Mr Thomas. Mr Thomas described them in his covering letter to Mr Stewart as "copies of the relevant duplicate share certificates."

(3) Two SH01 Return of Allotment of Shares forms. These are not dated but the bottom right hand corner of each says "03/11 Version 5.0" and we therefore find as a fact that they were completed after February 2011. One states that 100,000 £1 shares in SS&S were allotted to Mrs Rebecca Thomas on 15 February 2007; the other is identical except that the allotment is to Mrs Sarah Thomas.

83. On 19 April 2013, Mr Thomas sent HMRC a cheque from SSL (which had by then changed its name to Spring Capital Ltd) for £40,000. Of this, £30,000 was stated to be the tax on Mrs Rebecca Thomas's 2007-08 interest of £150,000, being 20% of that sum, and the balance of £10,000 to be the tax on her gross interest of £50,000 for the following year (which is not part of this appeal).

84. On 20 November 2013, Judge Berner held a case management hearing on these appeals. On the following day he issued directions, which included a list of issues between the parties. Issue 8 was "is the absence of a tax deduction certificate decisive against the Appellants, or either of them?"

85. On 14 March 2014, Mr Thomas sent HMRC a certificate for Mrs Rebecca Thomas. The covering email says that it is "a copy of the relevant tax certificate." The certificate is on SSL's headed paper and states that on 5 April 2008 an amount of net interest, being £120,000, was paid to her after tax of £30,000 had been deducted. The certificate is not signed and does not give a date on which it was issued.

THE DISCOVERY ISSUE: LOSS RELIEF

Discovery issue: loss relief – the parties' submissions

86. Although Mr Stewart had initially sought to open enquires into the appellants' 2007-08 returns under TMA s 9A, Ms Jones said that he had later accepted that he was out of time. This was because the returns had been submitted on 24 October 2008 and the enquiry letter was not sent out until 22 January 2010, more than twelve months later. As a result, TMA s 9A(2)(a), which was amended for 2007-08 and subsequent years, operated to prevent the enquiry.

87. The assessments were raised under TMA s 29. Where, as here, a taxpayer had made an SA return, an assessment could only be validly made under TMA s 29 if there had been a "discovery." Ms Jones said that there was no doubt that HMRC had made a "discovery" within the meaning of s 29(1): the threshold for this was low.

88. It was also a requirement that either TMA s 29(4) or (5) be satisfied. Although Mr Stewart had made reference to both subsections in the letters sent with the assessments, Ms Jones said that HMRC were not now relying on TMA s 29(4). This is satisfied if the insufficiency etc "was brought about carelessly or deliberately." They were only relying on TMA s 29(5), which applies if the HMRC officer "could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware" of the insufficiency etc.

89. In her submission, the statute only required that one subsection be satisfied. The fact that HMRC had decided to rely only on TMA s 29(5) did not prevent them also arguing that there had been careless or negligent behaviour in the context of a penalty determination. We return to that issue at §250 below.

90. Ms Jones said that TMA s 29(5) was satisfied, because the white space disclosure on the appellants' returns did not make clear that the SS&S shares for which a loss was being claimed were new shares allegedly issued in 2007 and then immediately transferred to the appellants, after the company's trade had moved to SSL. No new shares, and no transfer of shares, were recorded on the Register at Companies House, until shortly before these proceedings, and the appellants did not make HMRC aware of these facts when they filed their returns.

91. Ms Jones relied on the words of Auld LJ in *Langham v Veltema* [2004] STC 544 ("*Veltema*") at [36]:

> "…the key to the [self-assessment] scheme is that the Inspector is to be shut out from making a discovery assessment under the section only when the taxpayer or his representatives, in making an honest and accurate return or in responding to a s 9A enquiry, have clearly alerted him to the insufficiency of the assessment."

92. She said that the Inspector had not been clearly alerted to the insufficiency. HMRC had only become aware of the alleged new share issue after 24 May 2010, the date of the Minute of Amendment provided as part of Mr Thomas's attempted challenge to SS&S's reinstatement to the Register of Companies.

93. Mr Thomas responded by saying that the claims had been clearly shown on the face of the appellants' returns, with the relevant box marked with a cross. However, his main argument was that the assessments were not validly made because:

(1) they do not refer to TMA s 29 on their face;

(2) they do not mention that the claimed share loss relief has been refused;

(3) there is no mention of an insufficiency – as required under TMA s 29(5).

94. He submitted that the requirements for a valid assessment, as recently set out by this tribunal in *Nijjar Dairies v HMRC* [2013] UKFTT 434(TC) ("*Nijjar Dairies*"), had not been satisfied

95. By way of reply, Ms Jones said that the facts of *Nijjar Dairies* were significantly different. In that case, the only HMRC record of the discovery determination was a letter to the taxpayer advising that a protective assessment had been made. The taxpayer was not notified of its appeal rights. In contrast, the appellants had received formal notices of assessment informing them of their appeal rights. They had also been sent revised calculations. The covering letters made explicit reference to TMA s 29 and the appellants could have been in no doubt, from the correspondence, that discovery assessments were being raised.

Discussion and decision on the discovery issue in relation to the loss claims

96. The first issue is whether Mr Stewart (who made the assessments which are under appeal) made a "discovery." In *Charlton v HMRC* [2012] UKFTT 770 (TCC), [2013] STC 866 ("*Charlton*"), the Upper Tribunal (Norris J and Judge Berner) said at [37]:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

97. Mr Stewart became aware of the loss claims after the time limit for opening enquiries under TMA s 9A. At some time after 24 May 2010, he received a copy of the Minute of Amendment, which said that there had been a new issue of shares and a transfer to Mrs Sarah Thomas. This was new information. We have no doubt that this new information caused Mr Stewart, acting honestly and reasonably, to come to the view that the original assessment was insufficient, and this opened the gateway to that discovery assessment.

98. The information in the Minute of Amendment relating to Mrs Rebecca Thomas was less detailed: it said only that she owned 100,000 shares. This was not new information, it had been included on the SA return. But as the Upper Tribunal said in *Charlton*, new information is not required for a discovery; it is only necessary that there is a change of opinion by the officer, acting honestly and reasonably.

99. The Minute of Amendment also said that there were four shareholders in SS&S. This new fact, taken together with Mr Thomas's transfer of 100,000 new shares to Mrs Sarah Thomas; the near-identity of the two SA returns and the mirror-image wording in the white space relating to the share loss claim, was more than sufficient for Mr Stewart, acting honestly and reasonably, to come to the view that Mrs Rebecca Thomas's share loss claim was based on the transfer of new SS&S shares, just as it was for Mrs Sarah Thomas.

100. The second issue is whether the requirements of TMA s 29(5) have been met. We agree with Ms Jones that we must decide whether the information provided to the

inspector as specified by TMA s 29(6) and (7) "clearly alerted him to the insufficiency of the assessment," as Auld LJ put it in *Veltema*. It is an objective test, so we have to consider the hypothetical officer, not Mr Stewart himself.

101. The white space disclosure in the appellants' tax returns merely informs HMRC that the "loss was made on a disposal by way of a dissolution of the company" and names the company. It does not set out any information about the issue of new shares, their transfer on the day following their issuance, or the dates on which these transactions were said to have occurred. It does not explain the basis of valuation and no documentation was provided. In *Veltema* Chadwick J asks:

> "On the basis of the information which was actually made available to him – or which must be treated as made available to him, because he could reasonably be expected to infer that it existed and was relevant-- of what could the inspector have been reasonably expected to be aware?"

102. We find that the hypothetical reasonable inspector would only be aware that a company called SS&S had been dissolved, and that the appellants had held shares in that company valued at £100,000. Again, we have no hesitation in finding that the hypothetical inspector could not have been reasonably be expected, on the basis of the information provided, or inferences he could make from that information, that the loss claims were excessive, or that the assessments were insufficient. In other words, the condition in TMA s 29(5) has been met.

103. Mr Stewart's view, when he raised the assessments, was that both TMA s 29(4) and (5) were satisfied. At this tribunal, HMRC relied only on TMA s (5). We agree with Ms Jones that for the assessments to be valid, it is enough that only one of these subsections be met. There is no need for us to consider, in the context of the discovery provisions, whether TMA s 29(4) would also have been satisfied, given that HMRC did not seek to rely on that subsection.

104. The third issue is whether the assessments were validly made. Our starting point is the statute. TMA s 29(1) says:

> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

105. Once there has been a discovery, the officer "may…make an assessment" providing that the conditions in either subsection (2) or (3) have been satisfied.

Assuming that one of these conditions have been satisfied – we consider that point in the next part of this decision – what does the officer have to do to "make an assessment"?

106. The answer is in TMA s 30A, which is headed "assessing procedure." So far as relevant to this case, it reads as follows:

> (1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.
>
> (3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.
>
> (4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.

107. TMA s 30A therefore makes a clear distinction between making the assessment and serving the Notice of that assessment. That this is the statutory position was also the finding of the Court of Appeal in *Honig v Sarsfield* [1986] STC 246 ("*Honig*") when it considered the earlier version of TMA s 30A, at that time contained within s 29. At page 247 Fox LJ, with whom Mustill and Stocker LJJ agreed, says:

> "The first question to be dealt with is: Is an assessment effectively made until notice of it has been given to the taxpayer? Section 29 of the Taxes Management Act 1970 enacts as follows:
>
> '(1) Except as otherwise provided, all assessments to tax shall be made by an inspector ...
>
> (5) Notice of any assessment to tax shall be served on the person assessed and shall state the time within which any appeal against the assessment may be made.
>
> It seems to me that the words in s 29(5) 'notice of any assessment to tax' necessarily imply that there is a difference between the notice and the assessment. One cannot have a notice of an assessment until there has been an actual and valid assessment. In sub-s (6) one finds the words 'After the notice of an assessment has been served on the person assessed'. The reference there to 'the person assessed' implies to my mind that there has been an assessment. It is clear that that subsection contemplates that an assessment is different from and will be followed by the notice of assessment and that its validity in no way depends on the latter. They are two wholly different things…The giving of notice has nothing to do with the making of a valid and effective assessment. The statute clearly distinguishes between the assessment and notice of it and contains no provision which makes the validity of the assessment in any way conditional on the notice."

108. The Court of Appeal in *Honig* went on to find that an assessment had been made when the inspector signed the certificate in the assessment book stating that he had made an assessment. In *Corbally-Stourton v HMRC* [2008] UKSPC SPC00692

("*Corbally-Stourton*") at [91] the Special Commissioner, Mr Charles Hellier, records that that this is no longer the position:

> "Dr Branigan told me that no longer is an assessment book maintained. HMRC's practice now is that the relevant officer will write to the taxpayer indicating that an assessment is to be made and will key into HMRC's computers the amount of the assessment."

109. He concluded at [92] that "Dr Branigan made the assessment when, having decided to make it, he authorised the entry of its amount into the computer. I find that the assessment was made."

110. The appellants in this case were provided with computerised calculations of the revised sum due. Before such a computerised calculation could be produced, the assessments must have been "made" by being input into the HMRC computer, and we find that they were so made.

111. Attached to the computerised calculations are Notices of Assessment. These meet the requirements in TMA s 30A: they are addressed to the appellant in question, they are dated, and they advise that an appeal must be made within 30 days. That is all the statute requires. They are therefore valid.

112. Mr Thomas sought to rely on *Nijjar Dairies.* Having considered both *Honig* and *Corbally-Stourton,* that tribunal summarises that case law, saying at [44]:

> "the making of the determination is separate from its notification. The making of the discovery determination is a two-stage process. The first stage is the decision by an officer of HMRC to amend a tax return. The second stage is the creation of an appropriate record of that decision. The notification of the determination is not part of the process of making the determination but is entirely separate."

113. In passing, we observe that nothing turns on the reference to "determinations." *Nijjar Dairies* concerned a determination rather than an assessment, but the law on which that tribunal was relying dealt only with assessments and [39] of the judgment states that the tribunal is taking the same approach to determinations as earlier courts and tribunals have taken when considering assessments.

114. At [46] the tribunal goes on to say:

> "Although, there is no prescribed form for a discovery determination, we consider that the appropriate record, whether in electronic or physical form, must state expressly and clearly that a discovery determination has been made on a taxpayer and in what amount."

115. This is the passage on which Mr Thomas relies. He submits that the assessments made by Mr Stewart are invalid because the Notices do not refer to there having been a "discovery" or to the relevant statutory provision, being TMA s 29, or to there being an insufficiency in the appellants' self assessments, or to the denial of the relief for capital losses other than by inference from the calculations.

116. However, these arguments cannot succeed. There is, as we have seen, no statutory requirement for any of this information to be shown on a Notice. The only requirements are that it "shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made." All of these stipulations were met.

117. We agree with Ms Jones that the facts in *Nijjar Dairies* were wholly different. In that case HMRC sought to argue that a letter informing the taxpayer that a "protective assessment" had been made was itself "an assessment." At [47] the tribunal says:

> "However, we do not accept that the file copy of the letter of 12 December 2011 addressed to NDL's accountant was an appropriate record in this case. While the letter made clear that HMRC did not accept that NDL was entitled to the losses claimed, it referred only to protective assessments and did not mention a discovery determination or paragraph 41(2) of Schedule 18 to the Finance Act 1998. The letter did not clearly state that HMRC had decided to make a discovery determination but left that to be inferred. The letter did not suggest that there was an appealable determination but referred to assessments that were to be sent separately and invited NDL to appeal them pending resolution of the issue. In our view, the letter did not have the appearance of an official record of a decision to make a determination in relation to a taxpayer but appeared to be part of the ongoing correspondence between HMRC and the NDL's accountant in relation to the tax dispute. The only decision that the letter clearly recorded was the decision to issue protective assessments."

118. In the appellants' case there is no doubt that assessments had been made (as evidenced by the calculations) and the Notices contain everything which TMA s 30A requires. There is no need for HMRC to rely on the letter sent out by Mr Stewart on the same day, explaining the assessment. *Nijjar Dairies* does not assist the appellants.

Conclusion on the discovery issue in relation to the loss claims

119. For the reasons set out above, we find that the discovery assessments were validly made.

THE LOSS ISSUE

Loss issue: the claims before this Tribunal

120. The appellants claimed a CGT loss in their SA returns, and stated, in the white space, that "the loss was made on a disposal by way of a dissolution of the company on 8-8-07 at which time the shares were of negligible value" and that they each "wish to claim to have the loss of £100,000 in respect of my shares in Spring Salmon and Seafood Ltd set against my income."

121. Mr Thomas said that the CGT losses arose under TCGA s 24(1) in that the striking off of SS&S was "the occasion of the entire loss, destruction, dissipation or extinction of an asset." The claims were made under ITA s 131(3)(c) which permits a

claim if there is a disposal within TCGA s 24(1), providing the shares were qualifying shares as defined by ITA s 131(2)(b).

Was there a negligible value claim before the Tribunal?

122. Mr Thomas said that the appellants' claims were not made on the basis of s 24(2), ie on the basis that the shares had become of negligible value, and this was clear from the reference to "the dissolution of the company." He said that the mention of "negligible value" on the face of the returns was wrong, and the Tribunal should ignore it.

123. We think that the wording on the SA returns is unclear: it refers both to "dissolution" and "negligible value." But Mr Thomas did not want to pursue a claim under TCGA s 24(2) based on the wording on the SA returns, and of course it is for the appellants to decide whether or not to pursue a claim on a single basis, or on two alternative bases.

124. However, we noted from HMRC's written submissions that Mr Thomas had submitted a negligible value claim for Mrs Sarah Thomas on 30 January 2013, and for Mrs Rebecca Thomas on 31 January 2013. In response to our questions, Mr Thomas said that these were protective claims in case the appellants were unsuccessful in their share loss relief claims based on TCGA s 24(1).

125. Ms Jones said that she understood that these "protective claims" had been rejected as out of time by HMRC and that no appeals had been made against those decisions. In any event both parties agreed that as no appeal had been made, these claims were not before this Tribunal.

126. In the course of the hearing, we were handed two further letters, both dated 28 September 2011, one of which was stated as being from Mrs Sarah Thomas and one from Mrs Rebecca Thomas. Both set out negligible value claims under TCGA s 24(1A) in respect of the holding of 100,000 shares in SS&S; both claims were for a loss of £3.5m. The parties agreed that these claims, made some sixteen months before those referred to in HMRC's submissions, were also not before this Tribunal.

127. Our task is therefore only to decide on the appellants' claims for income tax share loss relief based on TCGA s 24(1), ie that the losses had arisen on "the occasion of the entire loss, destruction, dissipation or extinction of an asset."

The loss issue: the effect of the restoration of the company on the loss claims

128. SS&S was struck off the register on 8 August 2007 and restored to the register on 16 March 2011. Companies Act 2006 ("CA 2006"), s 1032(1) states that:

> "The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

129. Ms Jones submitted that the effect of CA 2006, s 1032 is that the company is deemed to have continued in existence throughout the period between 8 August 2007

and 16 March 2011. As a result, there has been no "occasion of the entire loss, destruction, dissipation or extinction" of the shares and the claims have to fail.

130. She cited *Joddrell v Peaktone Ltd* [2012] EWCA Civ 1035 ("*Joddrell*") in her support. In that case a Mr Joddrell brought a claim against Peaktone, but that company had already been struck off the register. Mr Joddrell successfully applied for its restoration, and then pursued his claim. The Court of Appeal held that, although Mr Joddrell's claim had commenced before the restoration of Peaktone to the Companies Register, it had been retrospectively validated by that restoration.

131. In Ms Jones's submission, the *Joddrell* case was authority for finding that CA 2006, s 1032 meant exactly what it said, namely that once restored to the register, a company should be treated as never having been struck off.

132. Mr Thomas had three main arguments.

(1) TCGA s 24(1) applied where there was "an occasion" of loss etc, and that the original striking off had been such an "occasion."

(2) He sought to distinguish the facts of the appellants' case from *Joddrell* because that case concerned actions taken against the *company* during the strike-off period, whereas these appeals turned on the value of the shares, which are assets of the *members*.

(3) He said that in a tax context, retrospection was unfair because of the impact of statutory time limits. In the appellants' case, they may now be out of time to make negligible value claims. He said that this unfairness point had been raised during the restoration proceedings but had not been accepted.

133. Ms Jones rejected the first of those arguments, saying that once there had been a restoration, there was no occasion of loss. She responded to the second argument by referring to CA 2006, s 1032(3), which says (her emphasis):

> "The court may give such directions and make such provision as seems just for placing the company *and all other persons* in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register."

134. She submitted that this makes it clear beyond doubt that the restoration of the company has effect, not only in relation to actions by or against the company, but in relation to "other persons." Since almost all companies have shareholders, they must be included in "other persons."

135. She went on to say that the same provision also provides a response to Mr Thomas's third point: it allows the Court to make directions or other provision to deal with any apparent unfairness or injustice which might arise from the restoration, but in this case no directions had been given.

Discussion of the effect of the restoration on the loss claims

136. As SS&S was struck off the register before 1 October 2009, we drew the attention of both parties to the transitional provisions set out in the Commencement

No 8 (Transitional Provisions and Savings) Order 2008 (SI 2008/2860). Neither party had any submissions, but for completeness we record that Schedule 2, para 91(5)(a) of the Order allows a company which had been struck off before the restoration provisions of CA 2006 came into force, to be restored under CA 2006 s 1031, providing that the restoration took place before 1 October 2015. That is the case here.

137. TCGA s 24(1) states that that "the occasion of the entire loss, destruction, dissipation or extinction of an asset shall, for the purposes of this Act, constitute a disposal of the asset." The assets here are the shares in SS&S, which, on the appellants' case, were issued and transferred to them on 15 February 2007.

138. CA 2006, s 1032(1) states that "the general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register."

139. Mr Thomas submitted that there was nevertheless "an occasion" when the shares did not exist. In our judgment, Munby LJ in *Joddrell* at [46] put the position beyond doubt, when he said:

> "the sweeping effect of section 1032(1) is illustrated by section 1032(3), which enables the Companies Court to make directions "for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register." That, as it seems, to me, is a powerful and illuminating indication of the policy which Parliament had in mind. As Sir Raymond Evershed observed in *Tyman's Ltd v Craven* (page 111) of the corresponding provision in section 353 of the 1948 Act, these words 'seem to me seem to me designed, not by way of exposition, to qualify the generality of that which precedes them, but rather as a complement to the general words so as to enable the court (consistently with justice) to achieve to the fullest extent the "as-you-were position," which, according to the ordinary sense of those general words, is *prima facie* their consequence.'"

140. SS&S has been restored to the register, and the purpose of that restoration is to achieve to the fullest extent possible the "as-you-were-position." In other words, the effect of the deeming provision is that the company is treated as never having been struck off the register. There was therefore no "occasion of loss" and Mr Thomas's first submission cannot succeed.

141. His second submission was that the deeming provision applies only to "the company" and not to the assets of the members, ie "the shares." However, companies limited by shares, such as SS&S, are made up of shares. We found it difficult to understand how the statutory deeming provision would operate if it did not encompass the shares. We also agree with Ms Jones that the phrase "and all other persons" must include the members of the company.

142. Mr Thomas's third submission was that using the restoration to prevent the appellants' claims had unfair consequences. Again, we agree with Ms Jones that this is a matter outwith our jurisdiction. CA 2006, s 1032(3) gives the Court deciding the

restoration petition the power to deal with any resulting unfairness. Neither Lord Glennie, nor the Inner House of the Court of Session on Appeal, made any direction or other provision under s 1032(3). We are bound by their decision.

143. As a result of the foregoing, no claim based on TCGA s 24(1) can succeed and the appellants' claims for share loss relief fail. That is enough to dispose of this part of their appeal.

144. However, we were unable to identify any other tax case in which CA 2006, 1032 has been considered, and so have gone on to consider the other submissions made by the parties.

Loss issue: The appellants' case

145. The appellants' case can be summarised as follows:

(1) SS&S was incorporated in 1998 and its shares were owned by Bala.

(2) Bala transferred the shares to Mr Thomas and Mr S Thomas on 14 February 2007.

(3) Mr Thomas and Mr S Thomas were treated as having subscribed for these shares in 1998 because they "stood in the shoes of" Bala, by virtue of the Contract Settlement. Mr Thomas submitted that this remained the case, even though the assets had not been distributed by 31 December 2004 as required by that settlement. In making this submission, he relied on Mr Stewart's letter dated 29 January 2008. We set out the relevant passage at §188 below.

(4) On 15 February 2007, SS&S issued 100,000 new £1 shares Mr Thomas and a further 100,000 new £1 shares to Mr S Thomas.

(5) The meaning of "subscribed" is given by ITA s 135(2) as being shares "issued to the individual by the company in consideration of money or money's worth." Mr Thomas and Mr S Thomas "subscribed" for the new shares because they gave money's worth in the form of a write-down of the director's loan account by £200,000.

(6) Mr Thomas and Mr S Thomas were allotted these new shares in SS&S in respect of and in proportion to their original holdings. As a result, the requirements of TCGA s 126 were satisfied, so there was a "reorganisation."

(7) The new shares and the old shares formed a single asset, which was treated by virtue of TCGA s 127 as having been acquired in 1998.

(8) The base cost of each share was the consideration given for the original shares, together with the consideration given for the new shares, divided by the total number of shares, per TCGA s 127 and 128(1).

(9) The consideration given for the original shares was £14m and that given for the new shares was £200,000, making a total of £14.2m, or £36 per share.

(10) ITA s 131 sets out the conditions for share loss relief. It is only given on "qualifying shares." These are either EIS shares or shares which are "in a

qualifying trading company which have been subscribed for by the individual." SS&S was a qualifying trading company as defined by ITA s 134.

(11) On the same day, 15 February 2007, each brother transferred the 100,00 new shares to their respective spouses.

(12) By virtue of ITA s 135(3), the spouses (i.e., the appellants) were also treated as having "subscribed" for the new shares and so they too satisfy that condition for share loss relief.

(13) On 8 August 2007, SS&S was struck off the register. The appellants claimed share loss relief on the basis that there had been a disposal of their 100,000 shares under TCGA s 24(1), so satisfying the condition at ITA s 135(3)(c).

(14) The claim made by the appellants on their SA returns was only for £100,000, but the true loss was £3.6m, because each share was worth £36.

(15) Mr Thomas said that if the Tribunal disagreed with him on the reorganisation point, the shares were still worth at least £100,000 because that was the value given (by way of the write down of the director's loan account) when the new shares were issued on 15 February 2007.

(16) In correspondence with Mr Stewart, Mr Thomas said the appellants had been unable to produce contemporaneous evidence to support the share loss relief claims because there was no statutory obligation to keep documents after the expiry of the SA enquiry period, and in any event the paperwork had "most likely" been lost in a flood which occurred in 2007.

146. Given that SS&S were not trading in 2007, we asked Mr Thomas why it had issued new shares. Mr Thomas said its aim was to reduce the loan balances because it "had to have a stronger balance sheet for credit insurers." We questioned why this was relevant given that the company was not trading. Mr Thomas said that he and Mr S Thomas were considering "getting the company going again" and that "the stronger you make the balance sheet, the more effective you are in relation to trading."

Loss issue: HMRC's case

147. HMRC's submissions can be summarised as follows:

(1) In *National Westminster Bank v IRC* [1994] STC 580 ("*National Westminster*"), the House of Lords stated that shares are only "issued" when the entire process of application, allotment and registration had been completed. Mr Thomas had not produced any contemporaneous evidence to show that the new shares had been entered onto the company's register of members. The appropriate Company's House return was not made until 2011.

(2) In any event, no payment was made for the shares. It was clear from an examination of the SS&S accounts and those of SSL that the director's loan balance was transferred between the two companies in full, well before February 2007. It was thus not possible that payment for the shares had been effected by reduction of the loan balances in SS&S. As a result, the share loss

relief requirement that "money or money's worth" be given for the shares had not been met.

(3) There is no contemporaneous evidence that shares were ever transferred to the appellants. The only documentation relating to the transfer dates from 2011.

148. HMRC's Statement of Case added the further submission that the new shares (if they existed) were not qualifying shares, because Condition D of ITA s 134(5) was not met. That Condition reads as follows:

> "Condition D is that the company has carried on its business wholly or mainly in the United Kingdom throughout the period—
>
> (a) beginning with the incorporation of the company or, if later, 12 months before the shares in question were issued, and
>
> (b) ending with the date of the disposal."

149. However, before us, Ms Jones said that, having taken advice from an internal technical specialist, HMRC were no longer pressing this point.

Loss issue: the company law provisions and the case law

150. HMRC's case rests on *National Westminster,* and that judgment relies on the company law provisions. We have therefore first set out the relevant company law provisions on the issuance and transfer of shares, followed by the case law, before discussing the parties' submissions in more detail and coming to our conclusion.

The company law provisions

151. Because the actions were said to have taken place in February 2007, the relevant company law provisions are those in Companies Act 1985 ("CA 1985"). They are set out in full in the Appendix and summarised here.

152. CA 1985, s 22 reads as follows:

> **22 Definition of "member"**
>
> (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as such in its register of members.
>
> (2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

153. CA 1985, s 738(1) says that a company's shares "are to be taken for the purposes of this Act to be allotted when a person acquires the unconditional right to be included in the company's register of members in respect of those shares."

154. CA 1985 s 88(2) requires that when a company makes an allotment of its shares, the company shall within one month thereafter deliver to the registrar of companies, in the prescribed form, specified information about the allotment, including the names and addresses of the allottees. Where the shares are not allotted for cash, the company must provide "prescribed particulars" of the consideration provided and any

relevant contractual terms. If those terms were not in writing, s 88(3) requires that they be reduced to writing, also within one month of allotment.

155. CA 1985, s 186, as amended, provides that a certificate under the common seal of the company specifying any shares held by a member is, in England and Wales, *prima facie* evidence of title to the shares, and in Scotland, "sufficient evidence unless the contrary is shown."

156. CA 1985, s 183 states that "[i]t is not lawful for a company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to it, or the transfer is an exempt transfer within the Stock Transfer Act 1982. This applies notwithstanding anything in the company's articles."[2]

The case law

157. The leading authority, as Ms Jones says, is the House of Lords' decision in *National Westminster*. This was a case about whether shares allotted had been "issued" for the purposes of the Business Expansion Scheme.

158. Lord Templeman gave the leading judgment in favour of HMRC. Lord Slynn and Lord Lloyd agreed with him on the basis that in the context of the BES scheme, the term "issue" had the meaning given by company law.[3] Lord Templeman said at page 582:

> "My Lords, the question in the present case is when is a share issued? A company may invite applications for unissued share capital. If an offer for shares is made, a binding contract to issue shares comes into existence when the applicant is informed that shares have been allotted to him. The applicant is neither a member nor a shareholder while his rights rest in contract and until the issue of the shares has been completed by registration. Every company must maintain a register of members. The register must contain, inter alia, the names of the shareholders, an indication of the shares to which each shareholder is entitled, a statement of the amount paid up on the shares and the date when the entry was made…The register is open to inspection by the public. In my opinion shares are issued when an application has been followed by allotment and notification and completed by entry on the register. Once the shares have been issued, the shareholder is entitled to a share certificate."

159. At page 584 he reiterates this, saying:

> "Allotment confers a right to be registered. Registration confers title. Without registration, an applicant is not the holder of a share or a member of the company: the share has not been issued to him…No person can be a shareholder until he is registered. A person who is not a shareholder by registration cannot claim that the share has been

[2] Companies Act 2009 s 207 provided for uncertificated share transfers, subject to compliance with regulations made under that Act, but that is not relevant on the facts of this case.

[3] Lord Lloyd at page 599; Lord Slynn at pages 593-4

> issued to him, but only that the company is bound by contract to issue a share to him."

160. Lord Jauncey and Lord Woolf gave dissenting judgments. However, all the judges (except possibly Lord Templeman) agreed that the term "issue" had "different meanings in different contexts." It is therefore not necessarily the case that "issue" always has a company law meaning.

161. In *Blackburn v HMRC* [2009] STC 188; [2008] STC 242 and [2007] STC (SCD) 519 ("*Blackburn*") the Special Commissioners, the High Court and the Court of Appeal all considered the meaning of "issue" as part of the background to a dispute about whether payment had been made so as to meet the conditions for Enterprise Investment Scheme ("EIS") shares. It was accepted that the company law meaning applied to the EIS provisions, see [28]-[32] of the High Court decision,[4] and [28] to [32] of the Special Commissioner's decision.

162. The same approach was taken in relation to CGT reinvestment relief, see *Inwards v Williamson* [2003] STC (SCD) 355 at [42] ("*Inwards*"), a decision of Special Commissioners Wallace and Ghosh.

Loss issue: issuance and transfer of the new shares - discussion

163. One of the conditions for share loss relief is that the shares "have been subscribed for by the individual," see ITA s 131(2)(b)). ITA s 135(2) prescribes that: "an individual subscribes for shares in a company if they are issued to the individual by the company in consideration of money or money's worth."

164. In this part of our decision we are considering only the first leg of that definition, ie whether the new shares were "issued"; we discuss the second leg at §175 below.

Does the company law meaning of "issue" apply?

165. As we have seen, in *National Westminster* the House of Lords decided that the meaning of "issue" depends on the context, and in the context of the BES legislation, a majority found that the context was company law. The same context was found to exist in the EIS legislation and in CGT reinvestment relief (*Blackburn* and *Inwards*).

166. We therefore considered whether the share loss relief provisions operated in the same context. These rules are carefully defined and circumscribed, taking up an entire Chapter of ITEPA Part 4, which contains 24 sections. The relief is available for EIS shares, which have to meet other particular conditions, and certain other shares. In the context of those other shares, ITA s 135(2) defines "subscribe." The following two subsections extend that meaning to cover shares issued to a spouse and bonus shares. From 6 April 2007, the rewrite process introduced a new rule setting out the issue date in those circumstances, see ITA s 150. In striking contrast to these careful provisions relating to "subscribe", there is no definition of the term "issue."

[4] Although the Court of Appeal allowed the taxpayer's appeal against the High Court decision, this was on the payment issue, and that Court is silent on the company law context of the tax provisions.

167. In the context of these very prescriptive statutory provisions, it seems to us that if parliament had intended the word "issue" for the purposes of share loss relief to mean something other than its normal company law meaning, it would have done so by means of an explicit definition. We therefore agree with Ms Jones that in the context of share loss relief, there is no basis for us to depart from the meaning of "issue" given by company law.

Were the new shares issued?

168. HMRC have put the appellants to proof that the new shares were issued. The normal process of issuance is that shares are allotted for money or money's worth; Companies House informed within one month; the company's register updated and a share certificate issued.

169. Mr Thomas has supplied what he has called "duplicate" copies of the share certificates but the company register has not been produced. He did not inform Companies House of the allotment between the purported issue date of 15 February 2007 and 8 August 2007, the date SS&S was struck off. This is a period of almost six months.

170. The only evidence of issuance is therefore the "duplicate" share certificates, first produced in August 2011 for HMRC. Mr Thomas has said that the appellants did not need to retain the original documents to support their claim because the SA enquiry time limit had expired, and the documents were, in any event "likely" to have been lost in flooding.

171. We asked Mr Thomas why the shares had been issued at all, given that the company was not trading. He said that he and Mr S Thomas were considering reviving the company, and the shares were issued to strengthen the balance sheet. However, there is no evidence, other than this bare assertion, that the brothers were intending to revive SS&S. Indeed, three months later, the company was struck off by the Registrar and Mr Thomas objected to HMRC's restoration petition.

172. Taking into account the absence of any contemporaneous documentation, the failure to make a return to Companies House in the six month period before the strike-off, together with the lack of any credible purpose in issuing new shares, we agree with Ms Jones that the appellants have failed to prove that the new shares were issued on 15 February 2007. We make no finding as to whether new shares were issued in 2011.

Were the new shares transferred?

173. Since no new shares were issued on 15 February 2007, it follows that they cannot have been transferred to the appellants. This finding is also supported by absence of the contemporaneous transfer documentation, required by CA 1985 s 183. Again, although the shares were purportedly transferred on 15 February 2007, six months before the company was struck off on 8 August 2007, Mr Thomas did not inform Companies House of the transfer during this period.

174. We therefore also find that no shares were transferred to the appellants on 15 February 2007.

Loss issue: whether money or money's worth was given

175. As no shares were issued, it follows that no money or money's worth can have been given for those shares.

176. However, for completeness we set out our findings in relation to Mr Thomas's case that the new shares were paid for by a reduction in the director's loan account balance with SS&S. We asked Mr Thomas to identify this account balance and he said it was the £1,557,991 shown in that company's 2005 accounts. We have already found as a fact at §41 that this loan account was transferred in full to SSL before 30 April 2007, because it is shown in the accounts of that company for the year ending on that date. We do not know the exact date when it was transferred.

177. However, on Mr Thomas's case the loan balance must have still been held within SS&S on 15 February 2007 (the date of the purported share issue). Taken together with our finding that the director's loan balance of £1,577,991 was transferred to SSL on or before 30 April 2007, this would mean that:

(1) the balance was reduced to £1,357,991 by the £200,000 written off on 15 February 2007, so as to pay for the new shares; and

(2) subsequently increased again, by way of a further loan of £200,000 so as to restore the balance to £1,577,991, its value on 30 April 2007.

178. This is not a plausible scenario. Further, given that the only reason Mr Thomas has put forward for issuing the shares in the first place was to reduce the loan balance, it makes no sense for him to re-lend the exact same amount of money to the company a few weeks later.

179. We also note that the Forms SH01 "Return of Allotment of Shares", which Mr Thomas submitted to Companies House in 2011, have a box headed "if the allotted shares are fully or partly paid up otherwise than in cash, please state the consideration for which the shares were allotted." This box is blank on both Forms. Therefore the paperwork which does exist fails to support Mr Thomas's contention that he paid for the new shares by reducing the loan balance.

180. On the basis of our assessment of the evidence, we find as a fact that no payment in money's worth was made for the shares. This is of course consistent with our finding that no shares were issued.

181. The absence of any consideration in money or money's worth provides a further reason why share loss relief is not available: ITA s 135(2) makes it a condition that the shares "are issued to the individual by the company in consideration of money or money's worth."

Loss issue: qualifying trading company and the Contract Settlement

182. The qualifying trading company issue is academic given our other findings, but for completeness we record that we also find, on the basis of the evidence provided to us, that SS&S does not satisfy the requirements for share loss relief set out in ITA s 134.

183. This is because it does not meet the "independence" requirement at ITA s 134(2)(ii) and s 139(2)(a). The latter requires that the company not "be a 51% subsidiary of another company." This condition must be met for a continuous period of six years before the disposal of the shares, see ITA s 134(3)(a)[5].

184. SS&S was not a subsidiary of another company between 14 February 2007 (when its shares were transferred to Mr Thomas and Mr S Thomas) and 8 August 2007 (when the company was struck off). However, SS&S was a 100% subsidiary of Bala until 14 February 2007. As a result, the independence condition was not met for a continuous period of six years before the date of disposal.

185. Mr Thomas argued that the side letters to the Contract Settlement had the effect of treating him and Mr S Thomas as if they had, at all times, owned the shares directly, so that Bala's period of ownership was deemed not to exist. In particular, he relied on paragraph (iv) of Mr Read's response to the side letter of 24 May 2004, which said that assets previously owned by Bala or the Trust, "will be treated for capital gains purposes as if they were acquired by the Relevant Beneficiary on the date the asset was first acquired by the trustees of the Maclennan Trust or the directors of Bala Limited on behalf of the company."

186. We were not provided with the Contract Settlement, but the outcomes sought by the side letters are subject to the provisos that the shares in SS&S are transferred first to the Trust and then "to Roderick and Sarah Thomas, and, Stuart and Rebecca Thomas, in equal proportion by 31 December 2004."

187. We have already found that the shares were not transferred to Mr Thomas and Mr S Thomas until 14 February 2007, over two years after the date in the side-letter.

188. Mr Thomas recognised in the course of the hearing that this delay was a problem, and sought to rely on a letter sent to him on 29 January 2008 by Mr Stewart, which he handed up to the Tribunal. The relevant passage reads:

> "I am sorry that my fax of Friday did not progress matters; it was intended to give you the comfort you were looking for…I confirm again what I said on 25 January; that my aim is to arrive back at the agreement reached with Read where the winding up of the Maclennan Trust and Bala are concerned…For the avoidance of doubt [I] confirm what is said in my letter of 27 November. No liability to UK taxation will arise in executing the step of distributing all the assets of the Maclennan Trust and Bala to Roderick and Sarah Thomas and Stuart

[5] The alternative condition, at ITA s 134(3)(b), is not relevant on the facts.

> and Rebecca Thomas notwithstanding that the steps were not undertaken by 31 December 2004."

189. This letter refers to correspondence not provided to the Tribunal by either party. In particular, we were not given the letter of 27 November, or "the fax of Friday", and we do not know what was said between the parties on 25 January. If our decision had turned on this letter from Mr Stewart, we would have directed that the parties provide the missing papers. However, given our other findings in this case, we decided this was not necessary.

190. Even if Mr Stewart's letter of 29 January 2008 changed the terms of the side letter (and we make no finding that this was, or was not, the case) so as to allow the Contract Settlement to hold good even though the assets were distributed after 31 December 2004, it does not change the other steps set out the side letter, that the assets of Bala be transferred first to the Trust and then "to Roderick and Sarah Thomas, and, Stuart and Rebecca Thomas, in equal proportion"

191. This is not what happened. First, the shares were not transferred to the Trust at all. Second, they were not transferred to "Roderick and Sarah Thomas, and, Stuart and Rebecca Thomas" but only to Mr Thomas and Mr S Thomas.

192. All three steps in the side letter were provisos to Mr Read's response. As neither (2) nor (3) of those steps were carried out, it follows that Mr Thomas and Mr S Thomas cannot rely on Mr Reid's response so as to put them in the position, for future capital gains purposes, as if they had acquired the shares on the date they were acquired by Bala.

193. Given our finding in the previous paragraph, together with our decisions on the various aspects of the loss claims, we have not gone on to decide whether Mr Reid's response to the side letter was void and unenforceable, as being *ultra vires* the powers of HMRC, although we observe that in *Al Fayed v Advocate General for Scotland (representing the IRC)* [2004] STC 1703, the Inner House of the Court of Session held that there was no power for the Inland Revenue to contract with a taxpayer as to his future liability. Mr Read's letter says that, if the provisos in the side letter are met, there will be "no future liability" to various taxes, and prescribes the treatment "for future capital gains purposes" of assets previously held by Bala. Whether these undertakings can be reconciled with the *Al Fayed* decision may be a question for another day.

Loss issue: decision

194. On the basis of the findings set out above, the appellants are not entitled to share loss relief of £100,000 for 2007-08 for the following reasons, any one of which is sufficient to defeat their claims:

(1) the restoration of SS&S to the register means that a claim cannot be made under TCGA s 24(1) because that company is deemed to have existed throughout the period;

(2) no new shares were issued on 15 February 2007;

(3) no shares were transferred to the appellants;

(4) no money or money's worth was given by for any new shares; and

(5) SS&S was a 51% subsidiary of Bala Limited until 14 February 2007 and so the company was not a qualifying trading company. On the basis of the evidence provided to us, the side-letter to the Contract Settlement cannot be relied on so as treat Bala as not having held the shares during the six year period before 14 February 2007.

Loss issue: other matters

195. We deal only briefly with the other points raised by the parties.

(1) *Whether there was a reorganisation*: as there were no new shares, there can have been no reorganisation.

(2) *The value of the shares*: no money or money's worth was given for the purported new shares. We were also unable to understand why Mr Thomas asserted that the old shares were worth £14m, while at the same time arguing that he and Mr S Thomas had stepped into the shoes of Bala so as to be a subscriber for the shares. A further difficulty is that the shares were transferred from Bala to Mr Thomas and Mr S Thomas after SS&S's trade had been transferred to SSL, so any valuation would need to take this into account. However, in view of our finding that there was no new issue of shares, we do not need to resolve the question of valuation.

(3) Whether SS&S also failed to meet the qualifying company test because it ceased to trade on 31 January 2005 and so was not "carrying on a business in the United Kingdom" in the twelve months before the shares were disposed of (ITA s 134(5)). This argument had been part of HMRC's case before the hearing, but was abandoned during the proceedings and we have not considered it further.

THE INTEREST ISSUE

Interest issue: outline

196. The second substantive issue is whether the interest arising on the appellants' loans should be treated as net or gross when calculating their 2007-08 tax liability.

197. We have already found as facts that:

(1) Mrs Sarah Thomas loaned £1m to TML and Mrs Rebecca Thomas loaned £1m to SSL;

(2) in 2007-08 interest of £150,000 arose to each appellant as a result of these loans;

(3) both appellants included net interest of £120,000 in their 2007-08 tax returns;

(4) Mr Stewart checked the appellants' SA returns against the information provided to HMRC by the banks, and this showed only relatively small amounts

of interest arising. He then carried out further research and could find no evidence that any tax had been paid over to HMRC in relation to any other interest arising to either appellant. He repeatedly asked the appellants for evidence that the tax had been deducted, but none was provided; and

(5) he then raised discovery assessments on each appellant, treating the interest as being gross and so reversing the £30,000 which had been taken into account as tax deducted in the appellants' 2007-08 tax calculations.

198. We consider first whether those discovery assessments were properly made.

Interest issue: discovery

TMA s 29

199. Ms Jones submitted that Mr Stewart's checks against the information provided by the banks, and his further enquiries into tax deducted from interest paid, were more than sufficient to provide the basis for him to "discover" that there was an insufficiency in the assessment.

200. She said that the requirements of TMA s 29(5) had been met because the hypothetical officer could not have been reasonably expected, on the basis of the information made available to him on the returns, to be aware that the appellants possessed no evidence that any tax had been deducted from the interest. There was no white space disclosure.

201. In response, Mr Thomas said that a taxpayer was not required to have certificates of tax deducted in their possession when they completed their returns. He also repeated his submissions on the invalidity of the assessments, based on *Nijjar Dairies*, set out earlier in this decision and which we have already considered and rejected.

202. We must decide whether the hypothetical officer could reasonably be expected, on the basis of the information provided in the SA returns, to be aware of the insufficiency – ie that the interest was gross rather than net. It is clear that the hypothetical officer would see only the entry in Box 1, and would not know that the interest arose from loans in relation to which the appellants could not produce any evidence that tax had been deducted. We find that the requirements for discovery assessments have been met.

TMA s 30

203. The Tribunal noted that Mrs Rebecca Thomas's assessment was the recovery of an overpayment. We invited submissions on TMA s 30, which is headed "recovery of overpayments of tax." Mr Thomas submitted that in Mrs Rebecca Thomas's case, HMRC should have used TMA s 30, rather than TMA s 29. Had they used TMA s 30, they would have been out of time to make the assessment.

204. Ms Jones said that use of TMA s 30 was at HMRC's option. This is indicated by the opening words of the section, which reads:

> "(1) Where an amount of income tax or capital gains tax has been repaid to any person which ought not to have been repaid to him, that amount of tax may be assessed and recovered as if it were unpaid tax."

205. She said that the facts of this case would have allowed HMRC to use TMA s 30, but they could also use TMA s 29.

206. We considered the wording of the two sections and make the following observations.

(1) An assessment can be raised under TMA s 29 only where income has not been assessed, an assessment has been made but is now insufficient, or a relief has been given which is now found to be excessive. TMA s 30 allows an assessment to be raised where, for whatever reason, there has been an overpayment.

(2) There is some overlap between the two sections. For example, overpayments may arise as the result of an insufficiency in an assessment, or an excessive relief. These come within the statutory words of both sections.

(3) In some overpayment situations only one section can be used – for example, if the overpayment results from of a simple error, so that neither TMA s 29(4) or (5) are satisfied, the sum can be recovered under TMA s 30.

207. We could find only one authority on the use of TMA s 30, being *Guthrie v Twickenham Film Studios* [2002] STC 1374 ("*Guthrie*"), and the issue in that case was very different to the one we are considering. However, Lloyd J confirms at [14] that HMRC have a discretion as to whether or not to assess under TMA s 30. We also agree with Ms Jones that the existence of that discretion is indicated by the opening words of the section.

208. Taking both *Guthrie* and the wording of the provision into account, as well as the obvious scope for overlap, we find that when either section can apply, it is a matter for HMRC as to which they use.

209. As a result we find that HMRC were not prevented from raising a discovery assessment on Mrs Rebecca Thomas simply because they could also (subject to time limits) have raised an assessment under TMA s 30.

210. We go on to consider whether the companies issued certificates for the interest, whether they deducted the tax, and if they did not, whether that is relevant to the appellants' position.

Interest issue: whether certificates were issued to the appellants

211. We have already found the following facts, which are repeated here for ease of reference:

(1) Mr Stewart wrote to both appellants on 10 February 2010, asking for copies of certificates from the borrowers. He repeated this request on 22 February 2010, 19 April 2010 and 14 October 2010. No certificates were provided. In his letter of 22 October 2010, Mr Stewart said that in the absence

of the certificates he was issuing the discovery assessments of the same date. On 2 November 2010 he repeated his request for certificates.

(2) On 20 November 2013, Judge Berner held a case management hearing on these appeals. On the following day he issued directions, which included a list of issues between the parties. Issue 8 was "is the absence of a tax deduction certificate decisive against the Appellants, or either of them."

(3) On 14 March 2014, Mr Thomas sent HMRC a certificate for Mrs Rebecca Thomas. The covering email says that it is "a copy of the relevant tax certificate." The certificate is on SSL's headed paper and states that on 5 April 2008 an amount of net interest, being £120,000, was paid to her after tax of £30,000 had been deducted. The certificate is not signed and does not give a date on which it was issued.

Submissions

212. Mr Thomas said that there was no statutory obligation for the appellants to keep the certificates, as the enquiry window had already expired. It was also possible, he said, that the documents had been lost in a flood in 2007.

213. During cross-examination by Ms Jones, Mr Thomas said that the certificate now provided for Mrs Rebecca Thomas had been supplied "in accordance with the directions." In answer to questions from the Tribunal, he said that he had "found [the certificate] in our filing" and that it was "a copy of the original."

214. Mr Thomas was asked by Ms Jones if he had any other documents supporting the appellants' claims that tax had been deducted from the interest. He said that there was no other documentation, and in particular, there was no certificate in existence evidencing Mrs Sarah Thomas's tax deduction. He said she might have lost it.

Discussion and decision

215. No copy of Mrs Rebecca Thomas's certificate was produced in response to Mr Stewart's many requests. It is highly improbable that a copy would then be discovered in the company's filing shortly before this hearing.

216. We find on the balance of the evidence that Mrs Rebecca Thomas did not have a certificate at the time she completed the returns.

217. No certificate was produced for Mrs Sarah Thomas, either in response to Mr Stewart's requests, or at any time. It is for the appellants to prove their case, and we are unconvinced by Mr Thomas's suggestion that she may have lost it. Again, we decide on the basis of the evidence that she did not have a certificate at the time she completed the return.

218. Mr Thomas said that the appellants had no other documentary evidence of the tax said to have been deducted, and we find as a further fact that there was no such other documentation.

Interest issue: whether the companies deducted tax

The parties' submissions

219. Mr Thomas's case was that SSL and TML had deducted tax from the interest arising to the appellants. He accepted, however, that nothing had been paid over to HMRC until 19 April 2013, when SSL made a payment in relation to Mrs Rebecca Thomas's loan interest (we return to this at §238 below).

220. Ms Jones said that as no tax had been paid over to HMRC in 2007 or 2008, on Mr Thomas's case the statutory accounts of both companies would have shown interest due to each appellant of £120,000 and an HMRC creditor for £30,000 of tax payable. In fact, SSL's accounts show £150,000 of interest payable to Mrs Rebecca Thomas, and a nil balance under the subheading "other taxes and social security." TML's accounts show £150,000 of interest payable to Mrs Sarah Thomas, and a nil balance under "other taxes and social security."

221. When asked in cross-examination about the absence of any HMRC creditor in either company's accounts, Mr Thomas said "I can't explain that" and "accounts are not necessarily the truth." When pressed, he said "I can't offer you an explanation. The tax has disappeared."

222. Ms Jones also asked Mr Thomas when he first requested CT61 forms so as to report and pay over the tax he said had been deducted. Mr Thomas said he contacted HMRC's Reading office to obtain the forms, but none were sent. Ms Jones asked again when he made this contact, and Mr Thomas responded: "I can't remember. It is probably in the files…I can't recall when I asked for them." It is however not in dispute that the first written evidence of any such request is in November 2010: the correspondence to this effect is in the Bundles.

Discussion and decision

223. Neither company made any payment of tax in relation to the loan interest until £30,000 was paid by Spring Capital Ltd (previously known as SSL) in 2013.

224. We agree with Ms Jones that if tax had been deducted from the loan interest, it would have been shown in the accounts as a credit balance due to HMRC, and that this would have been carried forward until payment was made. However, the balances shown under "other taxes and social security" are nil for both companies. .

225. In reliance on the accounts, we find that at the time Mrs Rebecca and Mrs Sarah Thomas submitted their SA returns, neither SSL nor TML had deducted tax from the interest arising. This finding is supported by the absence of any evidence of a request for a CT61 (so as to report and pay over the tax supposedly deducted) until after the discovery assessments were made in October 2010.

Interest issue: whether a failure to deduct tax affects the appellants' position

226. Mr Thomas said that the statute placed the obligation to deduct tax on the company. He relied on ITA s 874, which states that:

> "The person by or through whom the payment is made must, on making the payment, deduct from it a sum representing income tax on it at the basic rate in force for the tax year in which it is made."

227. He said that the appellants had the right to assume the tax had been deducted, in the same way that an employee could assume that her employer had deducted PAYE from salary.

228. Ms Jones said that the key provisions were ITTOIA ss 370 and 371. The first of these states that "tax is charged on the full amount of the interest arising in the tax year" and the second that "the person liable for any tax charged under this Chapter is the person receiving or entitled to the interest."

Discussion

229. Ms Jones is correct to highlight ITA s 370 and s 371, which places liability for the tax squarely on the appellants.

230. However, Mr Thomas is also correct that under ITA s 874(1)(a), companies are legally obliged to deduct tax from yearly interest. Neither party sought to argue that the interest was not yearly interest, and we agree: the accounts show that the loans were likely to continue for more than a year. Chapter 15 of ITA sets out the company's collection and reporting obligations. The key question is: what happens when the company does not comply with its obligation to deduct the tax?

231. We start by considering the statutory provisions applying to SA returns. TMA s 8(1) says that a person may be required to complete an SA return "for the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year." However, TMA s 8(1AA)(b) says that, for the purposes of that subsection:

> "the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source."

232. The word here is "deducted," not "deductible". Since we have found that no tax was deducted from the interest arising to the appellants, this section cannot assist.

233. Mr Thomas sought to draw a parallel with PAYE. He is right that an employee is given a credit for the PAYE which his employer should have deducted, even if it is not in fact paid over to HMRC, see TMA s 59B. But there is no similar provision for interest.

234. It is therefore clear, from considering both TMA s 9A and s 59B, that the appellants remained liable for the tax not deducted by the companies.

235. That this is correct can also be seen from ITA s 961, which concludes the Chapter setting out the payer's interest deduction obligations. Under the heading "Relationship between Chapter and Income Tax Acts powers" it says:

> "Nothing in this Chapter affects any powers conferred by the Income Tax Acts[6] for the recovery of income tax by means of an assessment or otherwise."

236. We read this as meaning that the existence of the collection and payment obligations placed on the payers of interest does not displace the obligations placed on those completing SA returns.

237. On the basis of the foregoing, we find the company's failure to deduct tax does not allow the appellants to deem the interest to have been received net. There is no parallel with PAYE. The interest should have been included on a gross basis in the appellants' returns.

Interest issue: later payment of tax by Mrs Rebecca Thomas

238. As already set out earlier in this decision, on 19 April 2013, Mr Thomas sent HMRC a cheque from SSL (which had by then changed its name to Spring Capital Ltd) for £40,000. Of this, £30,000 was stated to be the tax on Mrs Rebecca Thomas's 2007-08 interest of £150,000, being 20% of that sum, and the balance of £10,000 to be the tax on her gross interest of £50,000 for the following year (which is not part of this appeal).

239. Ms Jones said that this payment did not change the position *vis à vis* Mrs Rebecca Thomas's 2007-08 return. As at the date when that return was submitted, no tax had been deducted from the interest by the borrower and no tax had been paid to HMRC. Mrs Rebecca Thomas was therefore taxable on the gross interest. Ms Jones indicated that HMRC would consider whether to give credit for the £40,000 when calculating the overall balance owed by Mrs Rebecca Thomas to HMRC.

240. Mr Thomas did not challenge this, and we agree with Ms Jones that Mrs Rebecca Thomas's 2007-08 tax liability cannot be changed by a payment made some five years later. We make no comment on how the 2013 receipt should be dealt with by HMRC other than to say that it does not change the 2007-08 position.

Interest issue: decision

241. As a result of the foregoing, we find that the appellants were taxable on the gross amount of interest, being £150,000, and were not entitled to credit for £30,000 of tax which had not in fact been deducted from the interest arising.

THE PENALTY ISSUE

Penalty issue: outline and legal provisions

242. The final part of this decision concerns the penalty determinations raised on the appellants. Although new penalty rules were introduced in Finance Act 2007, by

[6] The Interpretation Act 1978 at Schedule 1 defines "the Income Tax Acts" as meaning "all enactments relating to income tax, including any provisions of the Corporation Tax Acts which relate to income tax." ITA is self-evidently an enactment which comes within the Income Tax Acts.

virtue of transitional provisions in SI 2008/568, article 2(2), these new rules do not have effect in relation to the 2007-08 tax year. As a result, the penalties were raised under TMA s 95.

243. As set out at the beginning of this decision notice, the following issues arise:

(1) In relation to discovery, HMRC relied only on TMA s 29(5) and not on TMA s 29(4). Were they thereby precluded from raising penalty determinations based on negligence; and if not

(2) were the determinations invalid because of manuscript amendments; and if not

(3) were Mrs Sarah Thomas and/or Mrs Rebecca Thomas negligent in relation to the share loss relief claim and/or the interest; and if so

(4) should the quantum of the penalties be upheld, reduced or increased by the Tribunal.

Penalty issue: findings of fact and law

244. On 13 January 2013, HMRC issued the appellants with penalty determinations. In the box headed "Details of the penalty" was the following text. The words in italics were added in manuscript to the typed script:

> "The penalty arises under Section 95(1)(b) Taxes Management Act 1970 for negligently making an incorrect return, statement or determination in connection with a claim for *capital gains tax loss* relief *and* in respect of income tax *deduction* for the year shown."

245. The maximum penalty provided under TMA s 95(2) is as follows:

> (2) The difference…between–
>
> (a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and
>
> (b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

246. HMRC's practice in relation to TMA s 95 penalties is to abate the penalty by awarding a maximum of 20% for disclosure, 40% for co-operation and 40% for gravity. The penalty charged on Mrs Sarah Thomas was £26,070, being 40% of the difference between the tax liability shown as due on her original SA return and the £65,175 chargeable after the discovery assessment.

247. The 60% abatement was calculated by adding together a reduction of 5% for disclosure, 20% for co-operation and 35% for gravity. Mr Stewart's covering letter says that disclosure means "a disclosure of irregularities or an admission that the return is incorrect: a positive and useful contribution by the taxpayer" and that Mrs Sarah Thomas had " a number of opportunities to make disclosure." In relation to co-operation, he said that there had been a delay in providing information and that the

information obtained by HMRC had come from third parties. In relation to gravity, he gave some weight to the fact that no repayment was in fact made, and said Mrs Sarah Thomas has not "pressed for repayment."

248. The penalty charged on Mrs Rebecca Thomas was £32,066, being 50% of the difference between the amount originally calculated as due on her SA return and the £64,133 charged by the discovery assessment. The 50% abatement was calculated by adding together a reduction of 5% for disclosure, 20% for co-operation and 25% for gravity. The higher weighting for gravity compared to Mrs Sarah Thomas was because she had "claimed and been repaid income tax" and Mr Stewart had made Mr Thomas aware of this overclaim on a number of occasions.

249. Both penalties were appealed to HMRC, upheld on review, and notified to the Tribunal on 19 April 2012. The ground of appeal to the Tribunal was that the SA returns were correct.

Penalty issue: whether negligence penalty possible given approach on discovery

250. Mr Thomas submitted that it was not open to HMRC to issue a penalty on the basis of negligence, when they had decided to rely only on TMA s 29(5) and not TMA s 29(4) in relation to discovery.

251. Ms Jones submitted that HMRC only had to satisfy the requirements of each statutory provision. Relying on TMA s 29(5) carried no implication that the taxpayer was not negligent and does not prevent HMRC from issuing a penalty determination under TMA s 95.

252. We agree with Ms Jones. TMA s 29 allows HMRC to raise a discovery assessment on an SA taxpayer if there is both a discovery and "one of the two conditions mentioned below is fulfilled." Before us, HMRC sought to rely only on subsection (5). That is sufficient for the purposes of the discovery provisions. Deciding to rely only on TMA s 29(5) does not mean that HMRC have, by implication, agreed that there was no negligence, or given up a right to make a penalty determination.

Penalty issue: whether Notices invalidated by manuscript amendments

253. Mr Thomas also argued that the penalty determinations were invalidated by the manuscript amendments.

254. TMA s 100B(2) sets out the statutory requirements for a valid penalty Notice. They are that it "shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made." These conditions were met. There is no requirement that all parts of the Notice be typed.

255. TMA s 113(3) provides that a penalty determination "shall be in accordance with the forms prescribed from time to time in that behalf by the Board." However, s 114(1) provides that want of form does not invalidate a determination:

> "…if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding."

256. In *Fleming* (*Inspector of Taxes*) *v London Produce Co* (1968) 44 TC 582 at page 987 Megarry J said, albeit *obiter,* that he would be slow to accept that the earlier version of this section provided "an impervious coverlet for gross errors" and went on to say that, when construing subsection (3) "the likelihood of the recipient being deceived or misled would also be an important factor." In *Hoare Trustees v Gardner* [1978] STC 89 Brightman J said at page 99 that "the likelihood of the recipient being deceived or misled would also be an important factor in construing s 114(1)."

257. We think there is a difference between not making a determination *in accordance with* the forms prescribed by the Board, and merely making manuscript amendments to those prescribed forms. But if the amendments do cause a "want of form," TMA s 114(1) provides that the determinations are nevertheless valid. They were "in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts." There was no "gross error" – indeed, Mr Thomas does not submit that there was any error at all, other than the mere insertion of manuscript amendments into a standard form document. Neither Mr Thomas, nor the appellants, were misled or deceived as to why the penalties were being imposed.

258. We do not accept Mr Thomas's criticism of the Notices and find that they are not invalidated by the manuscript amendments.

Penalty issue: submissions on negligence

259. We move on to considering whether the appellants were negligent. Ms Jones said that the standard here was that of the reasonable taxpayer: it was an objective test. She relied on *Blyth v Birmingham Waterworks Co* [1856] 11 Ex 781 where it was said that:

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

260. She said that the reasonable taxpayer would not have claimed that tax of £30,000 had been deducted from interest of £150,000, and declared only the net amount on her return, without having any evidence at all to support that claim. Not only was there no certificate, but no other supporting material had been put forward by or on behalf of the appellants. The reasonable taxpayer would also not have claimed share loss relief, when there was no evidence that any shares had been transferred to her. Although Mr Thomas had acted as agent for both appellants, they had to take responsibility for their own returns; above their signatures are the words "the information I have given on this Return is complete to the best of my knowledge and belief."

261. Mr Thomas had three arguments. First, he said that HMRC's SA guidance notes on completing the interest parts of the returns had been followed. That relating to Box 1 says:

> "you will usually receive your interest etc after tax (at 20%) has been taken off (deducted) by the payer, for example, the bank or building society or unit trust manager. What we want in box 1 is the net amount – that is, the interest etc after tax was taken off – the amount that actually increased the balance in the account."

262. In his oral evidence he said that the appellants had followed this guidance in completing their returns, and that it "doesn't say that you have to go off and corroborate" the deduction by the payer. In his witness statement he said that he had followed this guidance.

263. Second, he said that there were difficult legal issues about the nature of interest. Yearly interest was paid after the deduction of tax. Short interest was not. An ordinary taxpayer could not be expected to understand these matters.

264. Third, he said that the appellants had not calculated their liabilities, and it was HMRC who had given them a deduction for the tax on the interest.

265. Ms Jones drew the Tribunal's attention to the fact that Mrs Sarah Thomas had later amended her 2008-09 return, so as to move that year's interest from Box 1 to Box 2, i.e., from net to gross interest. This implied that she knew the Box 1 entry was wrong. Mr Thomas said that Mrs Sarah Thomas "could have made a mistake" about whether the 2008-09 interest was short interest. By the end of the proceedings, he had strengthened his submission so that it had become "that's why Sarah amended 2008-09."

266. Finally, Mr Thomas said that neither appellant had been charged penalties for negligence in the past, and this should be taken into account when deciding on whether to charge these penalties.

Penalty issue: discussion and conclusion on liability

267. We agree with Ms Jones that the test for negligence in the context of TMA s 95 is objective. In *Anderson v HMRC* [2009] UKFTT 206 at [22], Judge Berner said:

> "The test to be applied, in my view, is to consider what a reasonable taxpayer, exercising reasonable diligence in the completion and submission of the return, would have done."

268. This formulation was cited with approval by Judge Bishopp in the Upper Tribunal in *Colin Moore v HMRC* [2011] UKUT 239 (TCC) at [13] and we too respectfully adopt it.

269. Our findings of fact show that at the time the appellants delivered their SA returns:

(1) they had no share certificates issued by SS&S and no evidence that the shares had been transferred to them;

(2) they had no certificates showing that tax had been deducted from the interest on their loans, and no other supporting evidence;

(3) the accounts for SSL showed no credit for amounts due to HMRC such as would be expected if an amount of tax had been deducted from Mrs Rebecca Thomas's loan interest but not yet paid over to HMRC. Instead, it showed her interest gross. Similarly, the accounts for TML showed Mrs Sarah Thomas's interest on a gross basis and no amounts owing to HMRC.

270. The appellants therefore signed their SA returns, confirming that each owned £100,000 worth of shares in SS&S, without having in their possession any evidence of share ownership. They claimed that interest has been received net of tax, when holding no information – such a certificate of tax deducted – which would evidence that claim.

271. These are simple checks, which the reasonable person can be expected to carry out before signing the SA return as complete and correct. We find that both appellants were negligent.

272. We do not agree with Mr Thomas's submissions for the following reasons:

(1) He said that Box 1 had been completed in line with the HMRC Guidance. But it was Mr Thomas, not the appellants, who completed the SA returns. He was the director of TML and knew no interest had been deducted from Mrs Sarah Thomas's interest. He was company secretary of SSL and had access to its accounts. It is simply not credible that he relied on the HMRC guidance.

(2) Even if the appellants had consulted the guidance, it provides only general information, and correctly states that "you will usually receive your interest etc after tax (at 20%) has been taken off (deducted) by the payer, for example, the bank or building society or unit trust manager." Here, the interest arose from two loans made by the appellants to companies of which their husbands were directors. It is not credible that the appellants genuinely relied on this generic note to include in their returns a credit for tax which had never been deducted from their interest. If the appellants did consult this guidance, we find that it was not reasonable of them to rely on it.

(3) We agree, of course, that there are interesting legal arguments about the nature of interest. But that is not what is at issue here. The appellants did not need to understand the difference between yearly interest and short interest. They simply had to establish, as a question of fact, whether or not tax had been deducted.

(4) The hypothetical reasonable person who had lent money to a company of which her husband was the director, would not have included interest on her SA return, without first checking whether tax had been deducted from the interest. In this case, neither appellant had any evidence at all that tax had been

deducted. They failed to check the position, and simply signed their returns stating that the interest was net. This was negligent.

(5) Mr Thomas's third submission – that the appellants did not calculate their own tax – is disingenuous. By completing Box 1, and leaving HMRC to carry out the calculation, they had ensured that they would be treated as having received the interest net. The fact that they did not themselves carry out the calculation is irrelevant.

(6) The appellants have been charged penalties under TMA s 95, which applies "where a person…negligently delivers any incorrect return of a kind mentioned in section 8 of this Act," namely an SA return. The penalties are for the negligent delivery of a specific return. The fact that no penalties have been charged for negligence in earlier years is not a relevant consideration.

273. As Mrs Sarah Thomas did not give witness evidence, we decline to speculate as to the reason why she changed her 2008-09 return.

274. We also record for completeness that Mr Thomas did not seek to argue that the appellants were not negligent because they depended on his specialist professional advice, see *Hanson v HMRC* [2012] UKFTT 314 (TC). We agree. The appellants were negligent because they did not carry out the most basic checks into what had been included on their SA returns.

Penalty issue: quantum

275. The Tribunal has the power, under TMA s 100B, to confirm the penalties if they appear to be appropriate, to reduce them if they appear excessive, and to increase them if they appear insufficient.

276. We considered the three headings under which HMRC assess penalties. We are not bound to follow the same approach, but it is a sensible one and we see no reason to depart from it. In so doing we bear in mind that we have a wide discretion and can take into account matters not before Mr Stewart when he set the penalties originally, see *Willey v HMRC* [1985] STC 56 *per* Scott J at page 61.

277. We find that the level of disclosure was minimal: as Mr Stewart said, the information about the shares came to him almost accidentally, via the Minute of Amendment prepared for different legal proceedings. Information about the interest was extracted from publicly available company accounts. We agree with Mr Stewart that, out of the 20% which is available for disclosure, no more than a 5% reduction should be given.

278. Turning to co-operation, we find that this was poor in relation to the interest: Mr Stewart asked repeatedly for evidence that tax had been deducted, but without receiving any substantive response. In relation to the share loss relief, there was lengthy correspondence between Mr Thomas and Mr Stewart, albeit was more in the nature of legal argument. Mr Stewart gave the appellants a 20% reduction for co-operation out of a possible 40%. We think this is generous, but consider that he is

better placed than us to judge the day-to-day progress of the communications, so we do not disturb that percentage either.

279. Finally, gravity. Mrs Rebecca Thomas received her claimed repayment after challenging the surcharge notice, and in Mr Stewart's eyes this made her negligence more serious than that of Mrs Sarah Thomas, whose repayment was blocked and who did not press for the block to be removed.

280. In our judgment, this is an insignificant and accidental difference; had Mr Stewart not intervened to prevent the repayment, both appellants would be in the same position. The cash flow advantage arising to Mrs Rebecca Thomas will be dealt with by an interest charge; this will not be due from Mrs Sarah Thomas. We have therefore decided that Mrs Sarah Thomas's gravity percentage should be the same as that of Mrs Rebecca Thomas.

281. In our judgment, the appellants' negligence was serious, both in amount and by reason of the total lack of evidence supporting either the share loss relief claim or the tax deduction on the interest. Had the discovery assessments not been made, both appellants would have received repayments of over £30,000. Instead, the true position is that they *owed* over £30,000 of tax. The difference is substantial and the sums significant. We see no reason to increase the abatement percentage for gravity above 25%.

282. As a result, both penalties are abated by 5% for disclosure, 20% for co-operation and 25% for gravity, making a total of 50%. The penalties are therefore as follows:

(1) Mrs Sarah Thomas, 50% of £65,175, being £32,587.50;

(2) Mrs Rebecca Thomas, 50% of £64,133, being £32,066.50.

Overall conclusion

283. We have upheld the discovery assessments on both appellants, confirmed the penalty determination on Mrs Rebecca Thomas and increased that on Mrs Sarah Thomas as set out above. All appeals are dismissed.

Appeal rights

284. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 21 October 2014

APPENDIX: LEGISLATION

TAXES MANAGEMENT ACT

8 Personal return

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—

(a) to make and deliver to the officer, on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and

(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1AA) For the purposes of subsection (1) above—

(a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and

(b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) or 397A(1) of ITTOIA 2005 applies.

9A Notice of enquiry

(1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so ("notice of enquiry")—

(a) to the person whose return it is ("the taxpayer"),

(b) within the time allowed.

(2) The time allowed is—

(a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the day on which the return was delivered…

29 Assessment where loss of tax discovered

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.[7]

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) informed the taxpayer that he had completed his enquiries into that return,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) …

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made.

30 Recovery of overpayment of tax, etc

(1) Where an amount of income tax or capital gains tax has been repaid to any person which ought not to have been repaid to him, that amount of tax may be assessed and recovered as if it were unpaid tax.

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[7] The wording was changed from "is attributable to fraudulent or negligent conduct on the part of the taxpayer" by FA 2008 s 118, Sch 39 paras 1, 3 with effect from 1 April 2010 (SI 2009/403 art 2(2)).

(1A) Subsection (1) above shall not apply where the amount of tax which has been repaid is assessable under section 29 of this Act.

(1B) Subsections (2) to (8) of section 29 of this Act shall apply in relation to an assessment under subsection (1) above as they apply in relation to an assessment under subsection (1) of that section; and subsection (4) of that section as so applied shall have effect as if the reference to the loss of tax were a reference to the repayment of the amount of tax which ought not to have been repaid.

(2) In any case where—

(a) a repayment of tax has been increased in accordance with section 824 of the principal Act or section 283 of the 1992 Act (supplements added to repayments of tax, etc); and

(b) the whole or any part of that repayment has been paid to any person but ought not to have been paid to him; and

(c) that repayment ought not to have been increased either at all or to any extent;

then the amount of the repayment assessed under subsection (1) above may include an amount equal to the amount by which the repayment ought not to have been increased.

(3) In any case where—

(a) a payment, other than a repayment of tax to which subsection (2) above applies, is increased in accordance with section 824 or 825 of the principal Act or section 283 of the 1992 Act; and

(b) that payment ought not to have been increased either at all or to any extent;

then an amount equal to the amount by which the payment ought not to have been increased may be assessed and recovered as if it were unpaid income tax…

(5) An assessment under this section shall not be out of time under section 34 of this Act if it is made before the end of whichever of the following ends the later, namely—

(a) the year of assessment following that in which the amount assessed was repaid or paid as the case may be, or

(b) …

(6) Subsection (5) above is without prejudice to section 36 of this Act.[8]

(7) ….

30A Assessing procedure

(1) Except as otherwise provided, all assessments to tax which are not self-assessments shall be made by an officer of the Board.

(2) …

(3) Notice of any such assessment shall be served on the person assessed and shall state the date on which it is issued and the time within which any appeal against the assessment may be made.

(4) After the notice of any such assessment has been served on the person assessed, the assessment shall not be altered except in accordance with the express provisions of the Taxes Acts.

(5) Assessments to tax which under any provision in the Taxes Acts are to be made by the Board shall be made in accordance with this section.

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[8] TMA s 36 was previously headed "fraudulent or negligent conduct," and was subsequently amended to "loss of tax brought about carelessly or deliberately."

59B Payment of income tax and capital gains tax

(1) Subject to subsection (2) below, the difference between—

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of section 246D(1) of the principal Act, section 626 of ITEPA 2003 or section 399(2), 400(2), 414(1), 421(1) or 530(1) of ITTOIA 2005.

(2) The following, namely—

(a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and

(b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year, or is a tax credit to which section 397(1) or 397A(1) of ITTOIA 2005,

shall be respectively deducted from and added to the aggregate mentioned in subsection (1)(b) above.

95 Incorrect return or accounts for income tax or capital gains tax

(1) Where a person fraudulently or negligently--

(a) delivers any incorrect return of a kind mentioned in section 8…of this Act, or

(b) makes any incorrect return, statement or declaration in connection with any claim for any allowance, deduction or relief in respect of income tax or capital gains tax, or

(c) …

he shall be liable to a penalty not exceeding the amount of the difference specified in subsection (2) below.

(2) The difference is that between--

(a) the amount of income tax and capital gains tax payable for the relevant years of assessment by the said person (including any amount of income tax deducted at source and not repayable), and

(b) the amount which would have been the amount so payable if the return, statement, declaration or accounts as made or submitted by him had been correct.

(3) ...

100 Determination of penalties by officer of Board

(1) …an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

(2) …

(3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

(4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

100B Appeals against penalty determinations

(1) An appeal may be brought against the determination of a penalty under section 100 above and subject to…the following provisions of this section, the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.

(2) …on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but–

(a) in the case of a penalty which is required to be of a particular amount, the First-tier Tribunal may

(i) if it appears to it that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to it to be correct, confirm the determination, or

(iii) if the amount determined appears to it to be incorrect, increase or reduce it to the correct amount,

(b) in the case of any other penalty, the First-tier Tribunal may–

(i) if it appears to them that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to it to be appropriate, confirm the determination,

(iii) if the amount determined appears to it to be excessive, reduce it to such other amount (including nil) as they consider appropriate, or

(iv) if the amount determined appears to it to be insufficient, increase it to such amount not exceeding the permitted maximum as they consider appropriate.

113 Form of returns and other documents

(1) Any returns under the Taxes Acts shall be in such form as the Board prescribe…

(1D) Where an officer of the Board has decided to impose a penalty under section 100 of this Act and has taken all other decisions needed for arriving at the amount of the penalty, he may entrust to any other officer of the Board responsibility for completing the determination procedure, whether by means involving the use of a computer or otherwise, including responsibility for serving notice of the determination on the person liable to the penalty…

(3) Every assessment, determination of a penalty, duplicate, warrant, notice of assessment, of determination or of demand, or other document required to be used in assessing, charging, collecting and levying tax or determining a penalty shall be in accordance with the forms prescribed from time to time in that behalf by the Board, and a document in the form prescribed and supplied or approved by them shall be valid and effectual.

14 Want of form or errors not to invalidate assessments, etc

(1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

(2) An assessment or determination shall not be impeached or affected—

(a) by reason of a mistake therein as to—
(i) the name or surname of a person liable, or
(ii) the description of any profits or property, or
(iii) the amount of the tax charged, or
(b) by reason of any variance between the notice and the assessment or determination.

TAXATION OF CHARGEABLE GAINS ACT 1992

24 Disposals where assets lost or destroyed, or become of negligible value

(1) Subject to the provisions of this Act and, in particular to sections 140A(1D), 140E(7) and 144, the occasion of the entire loss, destruction, dissipation or extinction of an asset shall, for the purposes of this Act, constitute a disposal of the asset whether or not any capital sum by way of compensation or otherwise is received in respect of the destruction, dissipation or extinction of the asset.

(2) …

126 Application of sections 127 to 131

(1) For the purposes of this section and sections 127 to 131 "reorganisation" means a reorganisation or reduction of a company's share capital, and in relation to the reorganisation—

(a) "original shares" means shares held before and concerned in the reorganisation,

(b) "new holding" means, in relation to any original shares, the shares in and debentures of the company which as a result of the reorganisation represent the original shares (including such, if any, of the original shares as remain).

(2) The reference in subsection (1) above to the reorganisation of a company's share capital includes—

(a) any case where persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) their holdings of shares in the company or of any class of shares in the company, and

(b) any case where there are more than one class of share and the rights attached to shares of any class are altered.

(3) …

127 Equation of original shares and new holding

Subject to sections 128 to 130, a reorganisation shall not be treated as involving any disposal of the original shares or any acquisition of the new holding or any part of it, but the original shares (taken as a single asset) and the new holding (taken as a single asset) shall be treated as the same asset acquired as the original shares were acquired…

128 Consideration given or received by holder

(1) Subject to subsection (2) below, where, on a reorganisation, a person gives or becomes liable to give any consideration for his new holding or any part of it, that consideration shall in relation to any disposal of the new holding or any part of it be treated as having been given for the original shares…

INCOME TAX (TRADING AND OTHER INCOME) ACT 2005

369 Charge to tax on interest

(1) Income tax is charged on interest.

370 Income charged

(1) Tax is charged under this Chapter on the full amount of the interest arising in the tax year.

371 Person liable

The person liable for any tax charged under this Chapter is the person receiving or entitled to the interest.

INCOME TAX ACT 2007

131 Share loss relief

(1) An individual is eligible for relief under this Chapter ("share loss relief") if—

(a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ("the year of the loss"), and

(b) the shares are qualifying shares.

This is subject to subsections (3) and (4) and section 136(2).

(2) Shares are qualifying shares for the purposes of this Chapter if—

(a) EIS relief is attributable to them, or

(b) if EIS relief is not attributable to them, they are shares in a qualifying trading company which have been subscribed for by the individual.

(3) Subsection (1) applies only if the disposal of the shares is—

(a) by way of a bargain made at arm's length,

(b) by way of a distribution in the course of dissolving or winding up the company,

(c) a disposal within section 24(1) of TCGA 1992 (entire loss, destruction, dissipation or extinction of asset), or

(d) a deemed disposal under section 24(2) of that Act (claim that value of the asset has become negligible).

(4) Subsection (1) does not apply to any allowable loss incurred on the disposal if—

(a) the shares are the subject of an exchange or arrangement of the kind mentioned in section 135 or 136 of TCGA 1992 (company reconstructions etc), and

(b) because of section 137 of that Act, the exchange or arrangement involves a disposal of the shares.

134 Qualifying trading companies

(1) In relation to shares to which EIS relief is not attributable (see section 131(2)(b)), a qualifying trading company is a company which meets each of conditions A to D.

(2) Condition A is that the company either—

(a) meets each of the following requirements on the date of the disposal—

(i) the trading requirement (see section 137),

(ii) the control and independence requirement (see section 139),

(iii) the qualifying subsidiaries requirement (see section 140), and

(iv) the property managing subsidiaries requirement (see section 141), or

(b) has ceased to meet any of those requirements at a time which is not more than 3 years before that date and has not since that time been an excluded company, an investment company or a trading company.

(3) Condition B is that the company either—

(a) has met each of the requirements mentioned in condition A for a continuous period of 6 years ending on that date or at that time, or

(b) has met each of those requirements for a shorter continuous period ending on that date or at that time and has not before the beginning of that period been an excluded company, an investment company or a trading company.

(4) Condition C is that the company—

(a) met the gross assets requirement (see section 142) both immediately before and immediately after the issue of the shares in respect of which the share loss relief is claimed, and

(b) met the unquoted status requirement (see section 143) at the relevant time within the meaning of that section.

(5) Condition D is that the company has carried on its business wholly or mainly in the United Kingdom throughout the period—

(a) beginning with the incorporation of the company or, if later, 12 months before the shares in question were issued, and

(b) ending with the date of the disposal.

135 Subscriptions for shares

(1) This section has effect in relation to shares to which EIS relief is not attributable.

(2) An individual subscribes for shares in a company if they are issued to the individual by the company in consideration of money or money's worth.

(3) If—

(a) an individual ("A") subscribed for, or is treated under subsection (4) or this subsection as having subscribed for, any shares,

(b) A transferred the shares to another individual ("B") during their lives, and

(c) A was B's spouse or civil partner at the time of the transfer,

B is treated as having subscribed for the shares.

(4) If—

(a) an individual has subscribed for, or is treated under subsection (3) or this subsection as having subscribed for, any shares, and

(b) any corresponding bonus shares are subsequently issued to the individual,

the individual is treated as having subscribed for the bonus shares

136 Disposals of new shares

(1) This section has effect in relation to shares to which EIS relief is not attributable.

(2) If—

(a) an individual disposes of shares ("the new shares"), and

(b) the new shares are, by virtue of section 127 of TCGA 1992 (reorganisation etc treated as not involving disposal), identified with other shares ("the old shares") previously held by the individual,

the individual is not eligible for share loss relief on the disposal of the new shares unless condition A or B is met.[9]

(3) Condition A is that…

(4) Condition B is that the individual gave for the new shares consideration in money or money's worth other than consideration of the kind mentioned in paragraph (a) or (b) of section 128(2) of TCGA 1992 ("new consideration").

(5) If the individual relies on condition B, the amount of share loss relief on the disposal of the new shares must not exceed the amount or value of the new consideration taken into account as a deduction in calculating the amount of the loss incurred on the disposal.

139 The control and independence requirement

(1) The control element of the requirement is that—

(a) the company must not control (whether on its own or together with any person connected with it) any company which is not a qualifying subsidiary,[10] and

(b) no arrangements must be in existence by virtue of which the company could fail to meet paragraph (a) (whether at a time during the continuous period that is relevant for the purposes of section 134(3) or otherwise).

(2) The independence element of the requirement is that—

(a) the company must not—

(i) be a 51% subsidiary of another company, or

(ii) be under the control of another company (or of another company and any other person connected with that other company), without being a 51% subsidiary of that other company, and

(b) no arrangements must be in existence by virtue of which the company could fail to meet paragraph (a) (whether at a time during the continuous period that is relevant for the purposes of section 134(3) or otherwise).

(3) This section is subject to section 145(3).

(4) In this section—

"arrangements" includes any scheme, agreement or understanding, whether or not legally enforceable,

"control", in subsection (1)(a), is to be read in accordance with sections 450 and 451 of CTA 2010,

"qualifying subsidiary" is to be read in accordance with section 191.

150 Deemed time of issue for certain shares

(1) In this section "the relevant provisions" means…section 134(5)(a)…

(2) If—

(a) any shares were issued to an individual ("A") or are treated under subsection (3) or this subsection as having been issued to A at a particular time,

(b) the shares are transferred by A to another individual ("B") during their lives, and

(c) A was B's spouse or civil partner at the time of the transfer,

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[9] In relation to shares issued before 6 April 2007, the cross reference to s 146(2) which is currently in this subsection is omitted, by virtue of ITA Sch 2 para 39, but para 39(2) says "In this paragraph "new shares" is to be read in accordance with section 145."

[10] In relation to shares issued before 6 April 2007, the phrase "of the company" which is currently included in this subsection is omitted, see ITA Sch 2 para 42(1)

the shares are treated for the purposes of the relevant provisions as having been issued to B at the time they were issued to A or are treated as having been so issued.

(3) If—

(a) any shares ("the original shares") have been issued to an individual, or are treated under subsection (2) or this subsection as having been issued to an individual at a particular time, and…

874 Duty to deduct from certain payments of yearly interest

(1) This section applies if a payment of yearly interest arising in the United Kingdom is made—

(a) by a company,

(b)-(d) …

(2) The person by or through whom the payment is made must, on making the payment, deduct from it a sum representing income tax on it at the basic rate in force for the tax year in which it is made…

Chapter 15:
Collection: Deposit-takers, Building Societies and Certain Companies

945 Overview of Chapter

(1) This Chapter provides—

(a) for persons who have made payments within section 946 ("section 946 payments") to make returns of the payments, and

(b) for the collection of income tax in respect of those payments.

(2)-(6) …

(7) Sections 961 and 962 contain supplementary provisions.

946 Payments within this section

The payments within this section are…

(b) a payment from which a UK resident company is required to deduct a sum representing income tax under—

(i) section 874(2) (payments of yearly interest)…

961 Relationship between Chapter and Income Tax Acts powers

Nothing in this Chapter affects any powers conferred by the Income Tax Acts for the recovery of income tax by means of an assessment or otherwise.

COMPANIES ACT 1985

22 Definition of "member"[11]

(1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration shall be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company."

[11] This section was not repealed by virtue of CA 2006 until 1 October 2009, see SI 2008/2860. It is currently found in slightly amended form at CA 2006, s 112

88 Return as to allotments, etc[12]

(1) This section applies to a company limited by shares and to a company limited by guarantee and having a share capital.

(2) When such a company makes an allotment of its shares, the company shall within one month thereafter deliver to the registrar of companies for registration:

(a) a return of the allotments (in the prescribed form) stating the number and nominal amount of the shares comprised in the allotment, the names and addresses of the allottees, and the amount (if any) paid or due and payable on each share, whether on account of the nominal value of the share or by way of premium; and

(b) in the case of shares allotted as fully or partly paid up otherwise than in cash

(i) a contract in writing constituting the title of the allottee to the allotment together with any contract of sale, or for services or other consideration in respect of which that allotment was made (such contracts being duly stamped), and

(ii) a return stating the number and nominal amount of shares so allotted, the extent to which they are to be treated as paid up, and the consideration for which they have been allotted.

(3) Where such a contract as above mentioned is not reduced to writing, the company shall within one month after the allotment deliver to the registrar of companies for registration the prescribed particulars of the contract …

(4) …

(5) If default is made in complying with this section, every officer of the company who is in default is liable to a fine and, for continued contravention, to a daily default fine, but subject as follows.

(6) In the case of default in delivering to the registrar within one month....

Transfer and registration[13]

183. It is not lawful for a company to register a transfer of shares in or debentures of the company unless a proper instrument of transfer has been delivered to it, or the transfer is an exempt transfer within the Stock Transfer Act 1982. This applies notwithstanding anything in the company's articles.

186 Certificate to be evidence of title[14]

A certificate under the common seal of the company (or, in the case of a company registered in Scotland, subscribed in accordance with section 36B) specifying any shares held by a member is—

(a) in England and Wales, prima facie evidence, and

(b) in Scotland, sufficient evidence unless the contrary is shown.

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[12] This section remained in force until 1 October 2009, see SI 2008/2860. It is currently found in slightly amended form at CA 2006, s 555, and in secondary legislation, see SI 2009/388

[13] This section was in force until 6 April 2008, see SI 2007/3495; it can now be found in amended form at CA 2006, s 770.

[14] As amended by CA 1989, Sch 17, para 5. This section remained in force until 6 April 2008, see SI 2007/3495; the equivalent current provision is CA 2006, s 768

738 "Allotment" and "paid up"[15]

(1) In relation to an allotment of shares in a company, the shares are to be taken for the purposes of this Act to be allotted when a person acquires the unconditional right to be included in the company's register of members in respect of those shares….

COMPANIES ACT 2006

1031 Decision on application for restoration by the court

(1) On an application under section 1029 the court may order the restoration of the company to the register--

(a) if the company was struck off the register under section 1000 or 1001 (power of registrar to strike off defunct companies) and the company was, at the time of the striking off, carrying on business or in operation;

(b) …

(c) if in any other case the court considers it just to do so…

1032 Effect of court order for restoration to the register

(1) The general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register.

(2) The company is not liable to a penalty under section 453 or any corresponding earlier provision (civil penalty for failure to deliver accounts) for a financial year in relation to which the period for filing accounts and reports ended--

(a) after the date of dissolution or striking off, and

(b) before the restoration of the company to the register.

(3) The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register…

[15] This section remained in force until 1 October 2009, see SI 2008/2860 (other than for certain limited purposes, see SI 2007/1093, when it was replaced by CA 2006, s 558