[2019] UKFTT 254 (TC)

CORPORATION TAX – loan relationship rules – whether a note issued as part of a structure for refinancing the US sub-group without generating net taxable interest income in the UK had an unallowable purpose – yes – extent of deductions referable to the unallowable purpose considered

FIRST-TIER TRIBUNAL
TAX CHAMBER

TC07094

Appeal number: TC/2017/07785

BETWEEN

OXFORD INSTRUMENTS UK 2013 LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE TONY BEARE

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 26 and 27 March 2019

Mr Julian Ghosh QC and Mr Charles Bradley, instructed by Ashurst LLP, for the Appellant

Ms Elizabeth Wilson, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. This decision relates to the potential application of Section 441 of the Corporation Tax Act 2009 (the "CTA 2009") (Loan relationships for unallowable purposes) to a loan relationship entered into in the course of a structure established for the purposes of refinancing the US sub-group of the group headed by Oxford Instruments Plc ("OI Plc") (the "Oxford Instruments Group").

BACKGROUND

2. The appeal to which this decision relates is by Oxford Instruments UK 2013 Limited (the "Appellant"), a UK resident subsidiary in the Oxford Instruments Group. The Appellant has appealed against the conclusions stated in, and the company tax return amendments made by, the Respondents in a closure notice dated 30 March 2017 in respect of the Appellant's accounting period ending 31 March 2014. Those conclusions were that the Appellant was not entitled to any relief for the interest which had accrued in respect of a promissory note with a principal amount of $140m (the "$140m Promissory Note") which it had issued to its US resident immediate parent company, Oxford Instruments Holdings 2013 Inc ("OI 2013 Inc"), on 31 March 2013 because:

(1) the Appellant had an "unallowable purpose" (as defined in Section 442 of the CTA 2009) in entering into, and remaining party to, the $140m Promissory Note;

(2) all of the interest which had accrued under the $140m Promissory Note in respect of the relevant accounting period was attributable to that unallowable purpose; and

(3) therefore, all of the debits which would otherwise have fallen to be taken into account for corporation tax purposes under the loan relationships legislation in Part 5 of the CTA 2009 in respect of the $140m Promissory Note were precluded by Section 441(3) of the CTA 2009 from being so taken into account.

3. The grounds of the Appellant's appeal were that, as a function of the relevant evidence and on a proper construction of the provisions of Sections 441 and 442 of the CTA 2009:

(1) the Appellant did not have an unallowable purpose in entering into, and remaining party to, the $140m Promissory Note; and

(2) further, and in the alternative, even if the Appellant did have an unallowable purpose in entering into, and remaining party to, the $140m Promissory Note, none of the interest which had accrued under the $140m Promissory Note should, on the basis of the just and reasonable apportionment required by Section 441(3) of the CTA 2009, be regarded as being attributable to that unallowable purpose,

and that, further and in the alternative, the clearance which the Respondents had provided in respect of the non-application of Part 6 of the Taxation (International and Other Provisions) Act 2010 (the "TIOPA 2010") to the structure of which the $140m Promissory Note formed part meant that the Respondents were precluded from disallowing relief for any of the relevant debits.

4. The final ground of appeal – the one based on the prior clearance under Part 6 of the TIOPA 2010 - was not pursued before me at the hearing, presumably because the clearance provided by the Respondents stated clearly that it was confined to Part 6 of the TIOPA 2010 and "[did] not provide clearance in respect of any other anti-avoidance provision". This decision is therefore confined to the grounds of appeal set out in paragraphs 3(1) and 3(2) above.

THE FACTS

5. For the purposes of the hearing, I was presented with a statement of facts which had been agreed by the parties on the basis that "[nothing] in this statement should be taken as an acceptance by either party of the relevance of any particular fact or facts or that any fact omitted from this statement is not relevant."

6. The agreed facts are set out in paragraphs 7 to 42 below and in the appendices to this decision.

7. OI Plc is and was at all times during the relevant accounting periods the listed UK parent company of the Oxford Instruments Group, an international group of companies. The Oxford Instruments Group is and was at all times during the relevant accounting periods a provider of high technology products, systems and tools for industry and research in academic markets. The Oxford Instruments Group had operations in the UK, Europe, the US, China and Japan.

8. From August 2006 to April 2016, Kevin James Boyd was the Group Finance Director for OI Plc. Mr Kevin James Boyd was also a director of a number of subsidiaries of OI Plc during this time (including Oxford Instruments Overseas Holdings Ltd ("OIOH Ltd"), Oxford Instruments Holdings 2008 Inc ("OI 2008 Inc") and Oxford Instruments Overseas Holdings 2008 Ltd ("OIOH 2008 Ltd")). During this period, Mr Tom Curtis was Director of Accountancy, Treasury and Tax for the Oxford Instruments Group and Ms Gillian Thomson[1] was Group Tax Manager for the Oxford Instruments Group.

9. Mr Boyd, Mr Charles Holroyd and Mr Jonathan Flint were the directors of the Appellant. They were appointed directors on 12 March 2013. The company changed from unlimited to limited on 25 March 2013. All three were on the board of OI Plc during the relevant accounting period[2].

10. Mr Boyd was also a director of OI 2013 Inc. He was appointed on 19 March 2013.

11. Deloitte LLP ("Deloitte") were the retained tax advisor for the Oxford Instruments Group until 2006 and had been for many years. Thereafter the Oxford Instruments Group used a mixture of various tax advisors and in-house resources but Deloitte remained in regular contact.

Pre-2013 Financing of the US Sub-Group

12. In 2012 and immediately before the implementation of the "tower structure" (which is the subject of the appeal), the members of the Oxford Instruments Group relevant to the appeal were:

(1) OI plc;

(2) OIOH Ltd;

(3) OIOH 2008 Ltd;

(4) OI 2008 Inc; and

(5) Oxford Instruments Holdings Inc ("OIH Inc") (and, together with OI 2008 Inc, the "US Sub-Group").

13. At that time, the existing debt in the US Sub-Group comprised:

(1) loan notes in the principal amount of $60 million (comprising a $50 million loan note and a $10 million loan note both issued by OI 2008 Inc to OIOH 2008 Ltd) due to expire on 31 March 2013 (the "$60m Loan Notes"); and

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[1] Note, Gillian Thomson joined the Oxford Instruments Group in 2012.
[2] Note, Charles Holroyd resigned as director of OI Plc on 10 September 2013.

(2) a $34 million loan from OIOH 2008 Ltd to OIH Inc repayable on OIOH 2008 Ltd's demand or at OIH Inc's volition at any time (the "$34m Loan Agreement"),

(together, the "Existing Debt").

14. The $60m Loan Notes originated from an internal recapitalisation of the US Sub-Group in 2008 pursuant to which OIH Inc was transferred to OI 2008 Inc (with the $60m Loan Notes issued as part of the consideration for OI 2008 Inc's acquisition of OIH Inc). The $34m Loan Agreement was advanced in 2009 in order to provide the US Sub-Group with more working capital. OIOH 2008 Ltd adopted a functional $ currency.

15. The recapitalisation in 2008 provided the following tax advantages:

(1) a deduction was available for the interest payable on the loans by the US Sub-Group in the US, where the federal income tax rate applicable to companies was 35%;

(2) where the UK companies in the Oxford Instruments Group had tax losses available to set against that interest, there would be no UK corporation tax payable on the interest receivable from the US Sub-Group; and

(3) even if there were no available losses in the UK, there would still generally be a benefit for the Oxford Instruments Group because the prevailing UK corporation tax rate at that time was lower than the federal income tax rate applicable to companies in the US[3].

16. The structure of the US Sub-Group and the Existing Debt is shown in the structure chart which is attached as Appendix 1 to this decision.

17. All of the companies, unless stated, are UK incorporated and UK tax resident. OI 2008 Inc and OIH Inc are US incorporated and US tax resident.

Refinancing Proposal

18. The $60m Loan Notes were due to expire on 31 March 2013.

19. Deloitte gave a presentation to the Oxford Instruments Group on 20 June 2012. The presentation covered:

(1) the use of certain controlled foreign company ("CFC") finance company structures;

(2) the use of a "tower structure" and variants;

(3) tax losses; and

(4) pension planning.

20. In an email dated 18 July 2012, Ms Thompson instructed Deloitte to conduct a feasibility study in relation to the "UK-US debt restructuring", with an agreed fee of £15,000.

21. Deloitte presented the results of the feasibility study to the Oxford Instruments Group on 4 September 2012 (the "Feasibility Study"). The Feasibility Study was headed "Oxford Instruments Tax efficient financing structure: Results of Feasibility Study". A value of $300 million was attributed to the US business of the Oxford Instruments Group for the purposes of producing the Feasibility Study.

22. Deloitte stated at page 4 of the Feasibility Study, amongst other things, that:

[3] The UK corporation tax rate in 2013 was 23%, which was lower than the prevailing US federal income tax rate applicable to companies of 35%.

> "We have carried out a feasibility study to assess a range of options and provide a recommendation of an appropriate tax efficient financing structure, taking into account the current facts and circumstances of the OI US Group.
> We understand that the US sub-group has no immediate requirement for funds.
> Consideration has been given to ways in which the leverage can be achieved without providing further cash to the US sub-group so that an appropriate debt:equity ratio can be achieved. We have also considered how any future US acquisitions could be incorporated into the financing structure and the US sub-group at a later date.
> Judgment is involved in deciding which is the most suitable tax efficient financing structure for OI. Two key financing structures have been considered:
> i a 'tower structure', together with a 'tower structure' variant; and
> ii a CFC finance company structure, which sought to take advantage of the financing exemption proposed as part of the changes to the UK's CFC legislation.
> Whilst it would be possible to simply refresh the existing debt, we understand through discussions with Tom and Gillian that it expected that the group's UK losses will be used up by 2015, resulting in the interest income in OIOH 2008 Ltd being fully taxable."

23. Deloitte recommended that a "tower structure" be pursued to refinance the Existing Debt in the US Sub-Group and that clearance under the arbitrage provisions should be obtained from the Respondents. The Feasibility Study noted that a CFC finance company structure would involve setting up a presence in another jurisdiction and result in additional costs for the Oxford Instruments Group.

24. The "tower structure" was taken by Mr Boyd, Mr Curtis and Ms Thomson to the Board of Directors of OI Plc on 9 October 2012 and approval sought (Paper Number 12:141). On that date, the Board approved the implementation of a "tower structure". The Board resolved that, if arbitrage clearance was not obtained from the Respondents in respect of the "tower structure", "KJB" (being Mr Boyd, who was Group Finance Director for OI Plc at this time) would seek to progress with a CFC finance company structure instead.

25. Ms Thomson presented an update to the Board of Directors of OI Plc on 8 November 2012 which said, amongst other things, that "we are proceeding with the Tower structure as a means of refinancing the existing debt in the US subgroup in a tax efficient manner…The first stage in the implementation of the Tower is to obtain clearance from HMRC (also known as arbitrage clearance) and Deloitte are currently in the process of preparing this...We have also asked Deloitte to consider a CFC financing company ("CFC Finco") structure as an alternative method of financing the US subgroup, should the appropriate clearance not be received from HMRC…This presentation concludes that it is feasible in our specific circumstances to implement the CFC Finco structure, if required. However, a CFC Finco does introduce a third country into the refinancing of the US group rather than the loans being directly between the UK and the US. For this main reason, the Tower structure is the preferred option. However, approval is now sought to progress the CFC Finco structure if the appropriate clearances are not obtained for the Tower structure."

26. On 1 November 2012, Deloitte provided a report to the Oxford Instruments Group outlining the CFC finance company structure that it was said would be used in the absence of receiving the appropriate clearance from HMRC for the "tower structure".

27. By a letter dated 30 November 2012, Deloitte (on behalf of OI Plc) applied for clearance in respect of the arbitrage provisions contained in Part 6 TIOPA 2010 on the basis that, in the author's submission, Condition C of Section 233 of the TIOPA 2010 was not met as there was no main purpose of achieving a UK tax advantage (the "Clearance Application"). The Clearance Application included a statement that the purpose of the proposed refinancing was to:

" (a) refinance those loans that are due to mature in March 2013;

(b) introduce additional intra-group debt to achieve an appropriate capital structure for the US operations which have grown significantly in recent years;

(c) simplify/consolidate existing intra-group loans; and

(d) provide a flexible structure to allow future US acquisitions to be funded."

28. The Clearance Application stated that the proposed steps of the refinancing were:

"(1) OIOH Ltd incorporates US Newco.

(2) US Newco incorporates UK Newco and makes a US election to treat UK Newco as a branch for US tax purposes.

(3) OIH Inc novates its existing $34m liability (owed to [OIOH 2008 Ltd]) to [OI 2008 Inc] in exchange for shares.

(4) OIOH Ltd sells [OI 2008 Inc] to US Newco in exchange for shares and debt of $56m.

(5) OIOH Ltd contributes its receivable of $56m from US Newco to [OIOH 2008 Ltd] in exchange for shares.

(6) [OI 2008 Inc] issues a new loan note to [OIOH 2008 Ltd] as payment for the existing loan notes of $94m.

(7) [OI 2008 Inc] novates its $94m liability (owed to [OIOH 2008 Ltd]) to US Newco in exchange for shares.

The total debt outstanding between [OIOH 2008 Ltd] and US Newco following this step will be $150m (being the $56m from step 5 and $94m from step 7).

(8) UK Newco subscribes for preference shares in US Newco in exchange for a loan note of $150m. It is agreed between the parties that no cash should move."

29. The Clearance Application stated that whilst (in the author's submission) the main purpose (or main purposes) of the scheme was not to obtain a UK tax advantage, a UK tax advantage would occur when the final structure was compared to the current structure "– at present, interest income arises in the UK on the existing $94m of intra-group debt whereas the final structure has no net interest income in the UK by virtue of the deduction arising in UK Newco." It was proposed in the Clearance Application that the Oxford Instruments Group would make a voluntary disallowance of 25% in order to eliminate any UK tax advantage. This voluntary disallowance was calculated by comparing the proposed "tower structure" with a "suitable comparator transaction" (being the CFC finance company structure that the Oxford Instruments Group submitted it would pursue if clearance was not obtained under the arbitrage provisions). Deloitte (on behalf of OI Plc) suggested that UK Newco make a voluntary disallowance of 25% of the interest deductions arising in UK Newco in respect of the $94m loan. No disallowance was proposed in relation to the interest income arising in UK Newco in respect of the $56m loan as, in the author's submission, there would be no apportionment to UK CFC tax if the alternative of a CFC finance company structure was pursued and therefore no UK tax advantage arose in respect of such loan.

30. By a letter dated 15 January 2013, the Respondents provided clearance under Part 6 TIOPA 2010 on the following basis:

"(a) …it is my view that the creation of interest deductions in UK Newco, which will cancel out the net UK interest income arising on the loans of $60 million and $34 million under the current US financing arrangements, means that a UK tax advantage would arise to UK Newco under the proposed arrangements.

(b) I am able to provide clearance requested on the following bases

… that UK Newco shall disclaim 25% of the interest deductions arising to it on $94 million of the loan note of $150 million, to be issued to US Newco under the proposed arrangements, for the purposes of Corporation Tax in each accounting period during which the arrangement are in place.

…to the extent that in any accounting period the interest deductions arising to UK Newco on the remaining proportion of $56 million of the $150 million loan note exceed the interest income arising to OIOH 2008 Ltd on the loan of $56 million made to US Newco, UK Newco shall disclaim that excess of interest deductions arising on $56 million.

(c) Therefore, subject to the scheme being executed as described in the application and in accordance with the bases detailed above, I can confirm that the Commissioners for HM Revenue and Customs will not issue a notice under the provisions of section 232 TIOPA 2010.

(d) This clearance refers only to the application of the arbitrage legislation to the specific arrangements as described. It does not provide clearance in respect of any other avoidance provision, or if the arrangements specified are not adhered to."

Implementation of the "tower structure"

31. During February and March 2013, the "tower structure" was implemented by the Oxford Instruments Group. Mr Curtis and Ms Thomson were responsible for preparing and commissioning all the documents necessary to implement the "tower structure" which they did between those dates.

32. On 27 March 2013, Deloitte produced final drafts of:

(1) a tax advice paper ("US refinancing: tax technical analysis" with appendices) (the "UK Tax Analysis");

(2) a transfer pricing review of intragroup funding (on the arm's length nature of the quantum and pricing of the intra-group borrowing by OIH 2013 Inc) (the "US Thin Capitalisation Review"); and

(3) a memorandum on pricing the coupon rate on the preference shares and assessing the thin capitalisation position of the Appellant (the "UK Thin Capitalisation Memorandum"). Page 1 of the UK Thin Capitalisation Memorandum stated "Step 8 involves [the Appellant] …subscribing for preference shares in OIH 2013 Inc, in exchange for a promissory note. The promissory note is for a principal sum of $140m and the applicable interest rate is 5.5%, with quarterly interest payments". The UK Thin Capitalisation Memorandum

concluded that "a coupon of 8.1% on the preference shares should be supportable on an arm's length basis". Also, that the "quantum of debt" was commensurate with arm's length arrangements.

33. The implementation followed the steps detailed in the Clearance Application except that the debt of the US Sub-Group was increased to $140 million (not $150 million). More particularly:

(1) OI 2013 Inc (being the US Newco) was incorporated on 19 March 2013 as a wholly-owned subsidiary of OIOH Ltd. Mr Boyd, Mr Chris Fraser, Mr Scott Reiman and Mr Bernard Scanlan were appointed directors on 19 March 2013.

(2) The Appellant (being the UK Newco) was incorporated as a private unlimited company on 1 February 2013. The Appellant re-registered as a private limited company on 25 March 2013. OI 2013 Inc acquired the entire issued share capital in the Appellant on 26 March 2013. OI 2013 Inc made a US "check the box" election to treat the Appellant as a branch of OI 2013 Inc for US federal income tax purposes.

(3) Pursuant to a Contribution Agreement between OI 2008 Inc and OIH Inc dated 31 March 2013, OI 2008 Inc assumed all rights and obligations under the $34m Loan Agreement in exchange for the issue of shares. The $34m Loan Agreement was restated to reflect the assumption by OI 2008 Inc.

(4) Pursuant to a Stock Purchase Agreement between OIOH Ltd and OI 2013 Inc dated 31 March 2013, OIOH Ltd sold the entire issued share capital of OI 2008 Inc to OI 2013 Inc in exchange for:

(a) the issue of a promissory note by OI 2013 Inc in the principal amount of $46 million with interest at a rate of 5.5 per cent and due and payable on 31 March 2018 (the "$46m Promissory Note"); and

(b) the issue of shares in OI 2013 Inc having a deemed value of $254m.

(5) Pursuant to a Subscription Agreement between OIOH Ltd and OIOH 2008 Ltd dated 31 March 2013, OIOH 2008 Ltd issued to OIOH Ltd 46,000,000 ordinary shares in return for the assignment by OIOH Ltd to OIOH 2008 Ltd of its right to receive payment from OI 2013 Inc under the $46m Promissory Note. The $46m Promissory Note was restated to reflect the assignment to OIOH 2008 Ltd.

(6) On 31 March 2013, OI 2008 Inc issued a new loan note to OIOH 2008 Ltd in the principal amount of $94 million (with interest at a rate of 5.5 per cent and due and payable on 31 March 2018) (the "$94m Promissory Note") as payment for the $34m Loan Agreement and $60m Loan Notes.

(7) Pursuant to a Contribution Agreement between OI 2013 Inc and OI 2008 Inc dated 31 March 2013, OI 2013 Inc assumed all rights and obligations under the $34m Loan Agreement in exchange for the issue of shares. The $94m Promissory Note was restated to reflect the assumption by OI 2013 Inc. At this step, the total debt outstanding between OIOH 2008 Ltd and OI 2013 Inc was $140 million.

(8) Pursuant to a Subscription Agreement between OI 2013 Inc and the Appellant dated 31 March 2013, OI 2013 Inc issued to the Appellant 1,400,000 preference shares (the "Preference Shares") in return for the issue of the $140m Promissory Note. The coupon payable on the Preference Shares was 8.1 per cent. The $140m Promissory Note had an interest rate of 5.5 per cent and was due and payable on 31 March 2018.

(9) There were no cash movements.

34. The transactions entered into by the Appellant were approved by way of written resolution dated 31 March 2013.

35. The debt in the US Sub-Group following the implementation of the "tower structure" is shown in the structure chart at Appendix 2 to this decision.

36. During the accounting period ending 31 March 2014, the Appellant accrued $11,340,000 in dividends from the Preferences Shares and $7,700,000 in interest accrued on the $140m Promissory Note (as shown in the profit and loss account of the Appellant in the Directors' report and financial statements for the year ended 31 March 2014). The Appellant therefore made a margin of $3,640,000 on its investment in the Preference Shares[4]. During the period 1 April 2014 to 18 September 2014 (being the date the "tower structure" was wound-up) the Appellant made a margin of $1,705,315 on its investment in the Preference Shares. The cash margin retained by the Appellant was deposited in an HSBC bank account in the name of the Appellant which was part of a balance offset agreement with all other US Dollar accounts held by the Oxford Instruments Group's UK subsidiaries.

37. The "tower structure" was wound-up in September 2014 and replaced by a CFC finance company structure in Luxembourg/Ireland:

(1) The Appellant incorporated Oxford Instruments Funding (Ireland) Limited ("Irish Finco") and Oxford Instruments Funding (Luxembourg) S.a.r.l ("LuxCo").

(2) OI 2013 Inc repurchased all of the Preference Shares held by the Appellant in exchange for settlement of the $140m Promissory Note. The Appellant distributed its remaining cash in the amount of $4,000,000 to OI 2013 Inc as a dividend by way of bank transfer on 11 September 2014.

(3) OIOH 2008 Ltd acquired the Appellant from OI 2013 Inc. OIOH 2008 Ltd assigned its existing $140 million loans receivable (owed by OI 2013 Inc) to the Appellant in consideration for the Appellant issuing a $140 million loan note to OIOH 2008 Ltd.

(4) OI Plc lent $1.4 million to the Appellant under an interest-free short-term facility.

(5) The Appellant contributed $138.6 million to Irish FinCo as consideration for an issue of shares and $1.4 million to LuxCo as consideration for an issue of shares (each by way of rights issue). The $1.4 million was paid to LuxCo by bank transfer on 11 September 2014.

(6) Irish FinCo lent $138.6 million interest free to LuxCo. LuxCo acquired the existing loans receivable (owed by OI 2013 Inc to the Appellant) from the Appellant for $140 million consideration. $1.4 million of the $140 million was repaid by LuxCo by bank transfer on 24 September 2014 (no cash transferred in respect of the balance).

(7) The Appellant repaid its existing $1.4 million debt owed to OI plc.

(8) Other than as expressly stated above, no cash moved on the unwind of the "tower structure" and its replacement with the CFC finance company structure.

HMRC Enquiry

38. On 24 September 2015, the Respondents had a routine meeting with Mr Curtis and Ms Thomson of the Oxford Instruments Group. The Respondents said *inter alia* that, as part of

[4] The significance of this margin is in dispute.

their Business Risk Review process, there were some concerns arising from the implementation of the "tower structure" which indicated to the Respondents that the Oxford Instruments Group had been involved in tax planning and accordingly the Oxford Instruments Group might be required to move from "low risk" to "non-low risk". The Respondents noted that there would be a subsequent information request in due course. To this end, the Oxford Instruments Group provided the Respondents with information regarding the implementation of the "tower structure" during December 2015.

39. On 9 February 2016, the Respondents issued an enquiry notice to the Appellant in respect of the accounting period ended 31 March 2014.

40. Between March 2015 and February 2017, the Appellants provided the Respondents with more information regarding the implementation of the "tower structure".

41. On 30 March 2017, the Respondents issued a closure notice to the Appellant in respect of the accounting period ended 31 March 2014. The closure notice was issued on the basis that, in the Respondents' view, the main purpose or one of the main purposes of the Appellant in being a party to the loan relationship (the $140m Promissory Note) was to secure a tax advantage and therefore, in accordance with the provisions of Section 441 of the CTA 2009, none of the debits arising to the Appellant should be brought into account.

42. On 26 April 2017, Deloitte (on behalf of the Appellant) appealed the closure notice on the basis the loan relationship (the $140m Promissory Note) did not have an unallowable purpose. The Respondents offered a review of their decision on 9 May 2017 which was accepted by the Appellant on 1 June 2017. On 25 September 2017, the Respondents confirmed that, following the independent review, the decision was upheld. On 23 October 2017, the Appellant submitted a notice of appeal to the First-tier Tribunal (Tax Chamber).

THE RELEVANT LAW

43. Given the specific nature of the dispute in the present case, I will not set out in this decision any of the provisions of the loan relationships regime in Part 5 of the CTA 2009 apart from the two sections which are germane to the dispute. Suffice it to say that, under that regime, a company which is within the UK corporation tax net is generally entitled to relief, in accordance with its accounting treatment, for the interest which it pays on its borrowings. However, such relief is denied to the extent that the borrowing in respect of which the interest is paid has an "unallowable purpose" (as defined in Section 442 of the CTA 2009) but only to the extent that the debit which appears in the borrower's accounts in respect of that interest is, on a just and reasonable apportionment, attributable to that unallowable purpose.

44. Sections 441 and 442 of the CTA 2009 provide as follows:

"**441 Loan relationships for unallowable purposes**

(1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.

(2) The company may not bring into account for that period for the purposes of this Part so much of any credit in respect of exchange gains from that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.

(3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.

(4) An amount which would be brought into account for the purposes of this Part as respects any matter apart from this section is treated for the purposes of section 464(1) (amounts brought

into account under this Part excluded from being otherwise brought into account) as if it were so brought into account.

(5) Accordingly, that amount is not to be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.

(6) For the meaning of "has an unallowable purpose" and "the unallowable purpose" in this section, see section 442.

442 Meaning of "unallowable purpose"

(1) For the purposes of section 441 a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company—

(a) is a party to the relationship, or

(b) enters into transactions which are related transactions by reference to it,

include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.

(2) If a company is not within the charge to corporation tax in respect of a part of its activities, for the purposes of this section the business and other commercial purposes of the company do not include the purposes of that part.

(3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company –

(a) is a party to a loan relationship at any time, or

(b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.

(4) For the purposes of subsection (1) the tax avoidance purpose is only regarded as a business or other commercial purpose of the company if it is not—

(a) the main purpose for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or

(b) one of the main purposes for which it is or does so.

(5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage for the company or any other person."

45. Section 476(1) of the CTA 2009 imports into Part 5 of the CTA 2009 the definition of "tax advantage" in Section 1139 of the Corporation Tax Act 2010 (the "CTA 2010"). So far as it is pertinent to this decision, that section provides as follows:

"1139 "Tax advantage"

(1) This section has effect for the purposes of the provisions of the Corporation Tax Acts which apply this section.

(2) "Tax advantage" means—

(a) a relief from tax or increased relief from tax,

(b) a repayment of tax or increased repayment of tax,

(c) the avoidance or reduction of a charge to tax or an assessment to tax,

(d) the avoidance of a possible assessment to tax,

(da) the avoidance or reduction of a charge or assessment to a charge under Part 9A of TIOPA 2010 (controlled foreign companies),….

(3) For the purposes of subsection (2)(c) and (d) it does not matter whether the avoidance or reduction is effected—

(a) by receipts accruing in such a way that the recipient does not pay or bear tax on them, or

(b) by a deduction in calculating profits or gains."

46. In addition to the above provisions, I should refer briefly to the arbitrage provisions in Part 6 of the TIOPA 2010, which were in effect at the time when the "tower structure" that has given rise to the present dispute was implemented and which were the subject of the Clearance Application. Those provisions were introduced in 2005 to counteract certain transactions involving hybrid entities or hybrid instruments which would otherwise have given rise to a UK tax advantage, whether in the form of a tax deduction or in the form of a non-taxable receipt. The regime was replaced with effect from 1 January 2017 by new anti-avoidance provisions in relation to hybrids, which are set out in Part 6A of the TIOPA 2010.

47. For the purposes of this decision, it is unnecessary to describe the regime in any detail. Instead, it suffices to note two points in relation to the regime.

48. First, in relation to those transactions which were potentially within the ambit of the regime because they gave rise to a tax deduction (as opposed to a non-taxable receipt), one of the conditions which needed to be satisfied before the relevant transaction could be subject to the regime was deduction scheme condition C – namely, that "the main purpose of the scheme, or one of its main purposes, is to achieve a UK tax advantage for the company" (Section 233(4) of the TIOPA 2010).

49. For this purpose, Section 234 of the TIOPA 2010, so far as relevant to this decision, provided as follows:

"**234 Schemes achieving UK tax advantage for a company**

(1) For the purposes of section 233, a scheme achieves a UK tax advantage for a company if, in consequence of the scheme, the company is in a position to obtain, or has obtained—

(a) a relief or increased relief from corporation tax,

(b) a repayment or increased repayment of corporation tax, or

(c) the avoidance or reduction of a charge to corporation tax.

(2) ….

(3) For the purposes of subsection (1)(c) avoidance or reduction may, in particular, be effected -

(a) by receipts accruing in such a way that the recipient does not pay or bear tax on them, or

(b) by a deduction in calculating profits or gains."

50. In addition, Section 258 of the TIOPA 2010 defined a "scheme" as follows:

"**258 Schemes and series of transactions**

(1) In this Part "scheme" means any scheme, arrangements or understanding of any kind whatever, whether or not legally enforceable, involving one or more transactions.

(2) In determining whether any transactions have formed or will form part of a series of transactions or scheme for the purposes of this Part, it does not matter if the parties to one of the transactions are different from the parties to another of the transactions.

> (3) For the purposes of this Part, the cases in which any two or more transactions form, or form part of, a series of transactions or scheme include the cases where subsection (4) or (5) applies.
>
> (4) This subsection applies if it would be reasonable to assume that one or more of the transactions would not have been entered into independently of the other or others.
>
> (5) This subsection applies if it would be reasonable to assume that one or more of the transactions would not have taken the same form or been on the same terms if entered into independently of the other or others."

51. Secondly, again in relation to those transactions which were potentially within the ambit of the regime because they gave rise to a tax deduction (as opposed to a non-taxable receipt), the regime operated by allowing the Respondents, in a case where they considered that all of the pre-conditions necessary for the regime to apply might be met by a transaction to which the relevant company was a party, to serve a "deduction notice" on the company under Section 232 of the TIOPA 2010. Section 243 of the TIOPA 2010 specified that, in that event, if each of the pre-conditions necessary for the regime to apply were met by the transaction, the company in question was obliged to calculate or recalculate its income or chargeable gains for the purposes of UK corporation tax for the accounting period to which the deduction notice related and any later accounting period. Broadly, that calculation or recalculation was required to be done in such a way as to eradicate the offending deduction (or the relevant portion of the offending deduction).

52. In the case of the "tower structure", the fact that the interest paid by the Appellant to OI 2013 Inc was not subject to tax in the US in the hands of OI 2013 Inc (because, for US federal income tax purposes, the Appellant was treated as a branch of OI 2013 Inc), meant that, had the Respondents served a deduction notice on the Appellant under the arbitrage rules, and had the pre-conditions necessary for the regime to apply been met by the note in respect of which the interest was paid, the Appellant would have been denied relief for all of the interest paid under the note to OI 2013 Inc.

53. However, as is set out in paragraph 30 above, Deloitte, on behalf of OI Plc, was able to secure the Respondents' agreement that the regime would not apply to the interest at all, on the basis that it was not the main purpose, or one of the main purposes, of the "scheme" comprising the "tower structure" to achieve a UK tax advantage for the company and that therefore the pre-condition set out in Section 232(4) of the TIOPA 2010 was not satisfied. In order to secure that agreement, OI Plc undertook to disclaim relief in respect of 25% of the interest which would be payable in respect of $94m of the aggregate principal amount of the $140m Promissory Note (the "Disclaimer").

54. At the hearing, neither party was able to explain the statutory basis on which the Appellant was entitled to make the Disclaimer. However, they did point me to certain paragraphs in the Respondents' International Manual in relation to the regime - INTM595030, in which the following was said:

> "It should be borne in mind that:
>
> - A partial disclaim of the deduction may cancel the tax advantage main purpose and so "switch off" the legislation altogether s243(6)(a) TIOPA 2010 – see INTM595110…",

and INTM595110, which repeated that:

> "In a case involving the deductions rules, the company may choose to disclaim sufficient of the tax deduction to cancel the additional tax deduction that arises because of the use of the arbitrage scheme, in order to prevent the operation of the statutory rules cancelling the tax deductions…" and

"Where the legislation would otherwise apply, a company may prevent the further application by making a disclaim of a deduction sufficient to cancel the reduction in UK tax arising from the qualifying scheme."

55. They also pointed out that, under Sections 243(4) to 243(6) of the TIOPA 2010, in circumstances where a company fell within the arbitrage regime and was in receipt of a notice to that effect from the Respondents, it would be able to comply with its obligations under the legislation by incorporating "the necessary relevant adjustments" in its company tax return in respect of the accounting period in question. Those "necessary relevant adjustments" were the adjustments necessary to counteract "those effects of the scheme that [were] referable to the purpose referred to in deduction scheme condition C". This is explained in paragraph INTM595110 of the Respondents' International Manual as follows:

"To cancel the tax advantage main purpose, the disclaim should cancel the reduction in UK tax that is attributable to the main purpose of the scheme in achieving a UK tax advantage. This requires the same comparison to be drawn as explained in the second and third paragraphs of INTM595070, and the disclaimer to be equal to the amount by which the scheme increased UK tax deductions or reduced a UK tax charge. The amount of the disclaim necessary to satisfy the test can be the subject of a clearance application. The disclaimer can be made at any time after the notice has been issued until the assessment becomes final."

56. The parties explained that the provisions of the Respondents' International Manual described above suggest that the Respondents' practice in relation to the arbitrage regime was to extend the provisions in Sections 243(4) to 243(6) of the TIOPA 2010 - which allowed for reliefs to be disclaimed after the service of a notice under the regime as a means of complying with the notice - to include circumstances where a relief could be disclaimed as a means of avoiding the application of the regime in the first place.

57. I agree that that does seem to be the basis on which the Disclaimer in this case was made. Whilst it is intellectually somewhat unsatisfying to conclude that the only basis for the Disclaimer was an extra-statutory practice of the Respondents, rather than a provision of the UK tax legislation, it is unnecessary to address this question further in this decision as it is ultimately not relevant to the issue which is the subject of the appeal.

THE WITNESS EVIDENCE

58. The sole witness for the purposes of the appeal was Mr Boyd, the Group Finance Director of OI Plc from August 2006 until April 2016, who was also a director of the Appellant.

59. Mr Boyd is not a tax specialist and he made it very clear that, both at the time when the transactions giving rise to the appeal had been implemented and for the purposes of giving his evidence, he had relied heavily on Mr Curtis and Ms Thomson, who had been responsible for liaising with Deloitte in relation to the structure.

60. The following information in relation to the transactions giving rise to the appeal emerged from Mr Boyd's evidence:

(1) the purpose of the transactions was to achieve the US objectives mentioned in the Clearance Application and set out in paragraph 27 above in a manner which was tax efficient for the Oxford Instruments Group. In that regard, as the available losses within the group were expected to have been completely utilised by 2015 if all of the interest payable by OI 2013 Inc to OIOH 2008 Ltd were to be subject to tax in the hands of OIOH 2008 Ltd without there being any offsetting reliefs, it was important to find a way to ensure that the transactions as a whole did not have that effect;

(2) in that regard, Deloitte had outlined two possible generic structures – one involved the "tower structure" which was eventually implemented and the other was the CFC

finance company structure which had been described as the comparator structure in the Clearance Application;

(3) the "tower structure", as originally proposed, had always involved the Appellant's making a spread between its interest payments on the $140m Promissory Note and the dividends accruing on the Preference Shares. Thus, asking whether the Appellant would still have entered into step 8 if no such spread existed was an entirely hypothetical question but he very much doubted that the Appellant would have done that because, as a stand-alone company, it would have wanted to make a commercial profit;

(4) however, it was fair to say that the spread made by the Appellant was not the reason why step 8 was undertaken. The reason for step 8 was to generate the tax deductions needed to ensure that, before taking into account the Disclaimer, the transactions as a whole gave rise to no incremental net taxable income in the UK for the group. It was clear from, for example, the sentence in parenthesis which appeared between step 7 and step 8 in the Clearance Application that the US objectives of the transactions had been met by the time that step 7 was completed and that step 8 was not essential to achieving those objectives. However, step 8 was an important part of the overall structure as it achieved the UK tax efficiency described above;

(5) the importance of step 8 to the overall structure could be seen in the fact that, if the Respondents had not provided the clearance which they did in respect of the arbitrage regime, then the group would have proceeded to implement the CFC finance company structure;

(6) the latter would have given rise to effectively the same UK tax outcome as did the structure which was implemented, taking into account the Disclaimer. However, it was less attractive than the structure which was implemented because it involved greater cost and the involvement of a third country in the structure. As such, it was the fall-back structure for use in the event that no clearance for the preferred structure was obtained;

(7) however, if neither step 8 nor the CFC finance company structure had been feasible, then the group would still have implemented steps 1 to 7 of the structure because:

> (a) there was a desire to meet the US objectives mentioned the Clearance Application and set out in paragraph 27 above in any event; and
>
> (b) the structure arising out of steps 1 to 7 would still have been beneficial from the perspective of the worldwide tax position of the group because of the available UK corporation tax losses (at least until 2015) and, thereafter, because of the difference between the US federal income tax rate and the UK corporation tax rate;

(8) the written board resolution of the Appellant of 31 March 2013 approving the issue of the $140m Promissory Note and the subscription for the Preference Shares referred to the commercial objectives of the overall structure as "including" the US objectives of the overall structure mentioned in the Clearance Application and set out in paragraph 27 above and also to the spread which the Appellant would derive as a result of the difference between the interest rate under the $140m Promissory Note and the dividend rate on the Preference Shares. However, it contained no express reference to the role which the Appellant's participation in the overall structure was designed to achieve – namely, the creation of deductions which could be surrendered to OIOH 2008 Ltd to be offset against the additional interest income in OIOH 2008 Ltd arising as a result of its investment in the $94m Promissory Note and the $46m Promissory Note;

(9) although there was no compulsion for the Appellant to have chosen a principal amount of $140m for the $140m Promissory Note and the Preference Shares, and a rate

of interest of 5.5% on the $140m Promissory Note, in practice those had effectively been fixed by reference to the aggregate principal amount of, and the interest payable under, the $94m Promissory Note and the $46m Promissory Note. Thus, the only variable in step 8 was the level of dividend on the Preference Shares which could be justified from the arm's length perspective;

(10) the Appellant had no employees and paid no salaries to its directors;

(11) there were two engagement letters in relation to the structure with Deloitte, both of which were between Deloitte and OI Plc. The Feasibility Study had been prepared under Deloitte's original engagement letter with OI Plc of 21 October 2009 whilst the work done by Deloitte in relation to the structure after 10 September 2012 fell within the scope of their engagement letter with OI Plc of 30 November 2012 (signed by Mr Curtis on behalf of OI Plc on 4 December 2012). Both of these engagement letters preceded the incorporation of the Appellant on 1 February 2013;

(12) the structure created by step 8 was unwound – and replaced by a CFC finance company structure - pursuant to written board resolutions of the Appellant on 18 September 2014. At that point, the accumulated spread made by the Appellant pursuant to step 8 was paid by way of dividend to OI 2013 Inc, the Appellant's sole member. The written board resolutions commented on each constituent step of the unwind and the directors' fiduciary duties to the Appellant and duties under applicable law in relation to each of those steps. However, they did not contain any observations about the fact that, by virtue of the relevant steps, the Appellant would be losing the spread which it had been earning by virtue of its involvement in the structure created by step 8;

(13) the Preference Shares were, to all intents and purposes not transferable, because their transfer would have given rise to registration issues in the US. In addition, pursuant to advice from Deloitte which was included in the UK Tax Analysis, the Appellant was to "be kept as 'clean' as possible from any transactions not related to the financing structure." This was because:

(a) should the Appellant incur any additional expenses, that might put the continued availability of the deduction for the interest paid by the Appellant under the $140m Promissory Note at risk; and

(b) as the Appellant was transparent for US tax purposes, any net income arising in the Appellant might be subject to tax in both the UK and the US; and

(14) Mr Boyd did not know whether the Appellant had earned any interest income on the accumulated spread over the period between the time when step 8 was implemented and the time when the structure created by step 8 was unwound and the accumulated spread was paid as a dividend to OI 2013 Inc.

THE PARTIES' SUBMISSIONS

Does Section 441 of the CTA 2009 apply?

61. Both parties agree that:

(1) a company has an unallowable purpose if its purposes include one which is "not amongst the business or other commercial purposes of the company" – see Section 442(1) of the CTA 2009;

(2) a purpose of securing a tax advantage for the company itself or for any other person "is only regarded as a business or other commercial purpose of the company if it is not …the

main purpose for which the company is party to the loan relationship…or one of the main purposes for which it is" – see Sections 442(3) and 442)4) of the CTA 2009; and

(3) whether or not a company has a main purpose of securing a tax advantage for itself or for any other person in entering into a loan relationship is a question of fact to be determined by reference to the subjective purpose of the company in so doing – see, in relation to similar language in another provision of the tax legislation, *IRC v Brebner* [1967] 2 AC 18 at pages 27 and 30.

The above propositions are not in dispute and are enumerated in paragraph [41] of the decision of Newey LJ in the Court of Appeal in *Travel Document Service and another v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWCA Civ 549 ("*TDS*").

62. However, the parties do disagree on the questions of whether:

(1) any member of the Oxford Instruments Group did obtain a tax advantage in this case; and

(2) if so, whether that tax advantage can properly be said to be a main purpose, or one of the main purposes, of the Appellant in issuing the $140m Promissory Note at step 8 of the structure and remaining party to the note thereafter.

63. Mr Ghosh's position is that step 8 was an integral part of a larger structure which, before taking into account the Disclaimer, had the effect of leaving the Oxford Instruments Group flat for UK tax purposes. In other words, before taking into account the Disclaimer, there was symmetry between the deductions arising in the Appellant under the $140m Promissory Note and the interest income arising in OIOH 2008 Ltd in respect of $94m Promissory Note and the $46m Promissory Note. This was no different from the situation pertaining in the case of any loan relationship between two companies within the UK corporation tax net. In his view, it would be a startling proposition if I were to conclude that a structure which gave rise to matching loan relationship credits and debits should be regarded as giving rise to a "tax advantage" (as defined in Section 1139 of the CTA 2010) at all, let alone that any such tax advantage should be regarded as a main purpose of the company which was party to the loan relationship giving rise to the debits. In short, Mr Ghosh submitted that the Respondents had erred in focussing solely on the deductions which arose in the Appellant without also taking into account the interest income in OIOH 2008 Ltd to which the structure gave rise.

64. Mr Ghosh added that, even if I were to conclude that the structure did give rise to a tax advantage, the evidence of Mr Boyd clearly demonstrated that the only purposes of the Appellant in issuing the $140m Promissory Note were:

(1) to obtain the spread deriving from its subscription for the Preference Shares; and

(2) in common with OI Plc, to enable the group to achieve the US objectives mentioned in the Clearance Application.

65. As regards the first of these purposes, Mr Ghosh observed that the evidence of Mr Boyd demonstrated that he was well aware of his responsibilities to the Appellant as a single company – as opposed to his responsibilities to OI Plc and to the group as a whole - and that the spread which the Appellant had derived as a result of issuing the $140m Promissory Note and subscribing for the Preference Shares was of great significance to him in agreeing to the Appellant's participation in the structure. Mr Ghosh pointed out that Mr Boyd had said expressly that step 8 would not have occurred unless the spread existed.

66. As regards the second of these purposes, Mr Ghosh pointed out that Mr Boyd had testified to the fact that the group would still have implemented the structure even if neither step 8 of the structure nor the alternative CFC finance company structure had been feasible. In

his view, this demonstrated that the purpose of the group in implementing the structure, and hence the purpose of the Appellant in participating in the structure, was to enable the group to meet the US objectives mentioned in the Clearance Application.

67. In this regard, Mr Ghosh referred to the decision of the First-tier Tribunal in *Versteegh Ltd and others v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKFTT 642 (TC) ("*Versteegh*"). In that decision, the First-tier Tribunal, adopting a similar stance to one taken by the Value Added Tax and Duties Tribunal (the "VAT Tribunal") in *Coffee Republic v The Commissioners for Her Majesty's Revenue and Customs* (2007) VAT Decision 2150 ("*Coffee Republic*"), distinguished between "an inevitable result of the successful completion of a purpose and something which is necessary for or part of a stated purpose". He reiterated that the mere fact that the successful completion of a purpose has an inevitable effect does not mean that that effect is part of the purpose and therefore that, in this case, even if I were to conclude that the $140m Promissory Note gave rise to a tax advantage, that tax advantage was an "effect" and not a "purpose".

68. Mr Ghosh said that the same distinction between effect and purpose could be found in cases relating to the "wholly and exclusively" test which is relevant to the deductibility of trading expenses – see *Mallalieu v Drummond (Inspector of Taxes)* [1983] 2 AC 861 at pages 365 and 366 and *McKnight (Inspector of Taxes) v Sheppard* [1999] 1 WLR 1333 at page 1336. In short, in Mr Ghosh's view, the deductions arising in the Appellant and surrendered to OIOH 2008 Ltd in this case might have been an inevitable effect of its issuing the $140m Promissory Note but that effect was not one of the Appellant's purposes in issuing, and remaining party to, the notes.

69. Mr Ghosh added that, even if the deductions arising in the Appellant in this case could properly be seen as a purpose of the Appellant, and not simply an inevitable result of its issuing the $140m Promissory Note, that purpose would need to be a "main" purpose before Section 441 of the CTA 2009 could apply. In this context, the Upper Tribunal in *Versteegh* had held that "main" did not simply mean considering, in isolation from all other factors, whether the tax advantage in question was "important". Instead, it was necessary to consider "the significance of the tax advantage to the relevant taxpayer as a matter of subjective intention, which necessarily involves a careful analysis of all the reasons the taxpayer had for entering into the transaction". Mr Ghosh submitted that, given the significance to the Appellant of the purposes described in paragraph 64 above, even if obtaining the deductions could properly be regarded as being one of the Appellant's purposes in issuing, and remaining party to, the $140m Promissory Note, it could not properly be regarded as being one of the Appellant's "main" purposes in so doing.

70. In response, Ms Wilson submitted that Mr Ghosh was wrong in arguing that the structure as a whole did not give rise to a tax advantage because it did not generate a net tax deduction for the Oxford Instruments Group and instead left the group flat from the UK tax perspective before taking into account the Disclaimer. In her view, the fact that the interest payments made by the Appellant under the $140m Promissory Note were deductible and had been surrendered by the Appellant to OIOH 2008 Ltd and offset against the interest income of OIOH 2008 Ltd in respect of the $94m Promissory Note and the $46m Promissory Note meant that OIOH 2008 Ltd had thereby obtained a tax advantage.

71. In support of this proposition, Ms Wilson referred me to paragraphs [109] and [110] of the decision of Jonathan Parker LJ in *Commissioners of Inland Revenue v Sema Group Pension Trustees* 74 TC 593 ("*Sema*") to the following effect:

"109 In my judgment, what the draftsman was manifestly trying to do when defining "*tax advantage*" in s 709(1) was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is

improved in consequence of the particular transaction or transactions. As I read s 709(1) the distinction between "*relief*" and "*repayment*" is not based on any conceptual difference between the two; the true interpretation of s 709(1) is in my judgment much simpler than that. In my judgment, "*relief*" in s 709(1) is intended to cover situations where the taxpayer's liability is reduced, leaving a smaller sum to be paid, and "*repayment*" is intended to cover situations in which a payment is due from the Revenue. In the same way, the references to "*increased relief*" and "*increased repayment*" are directed at situations in which the taxpayer is otherwise entitled to a relief or repayment, with which the "*relief*" or "*repayment*" referred to in s 709(1) must be aggregated.

110. It follows that I respectfully agree with the observation of Aldous J. in *Sheppard* (at[1993] STC 240, page 253e) that the words "*tax advantage*" in the relevant statutory provision (Aldous J. was concerned with s 466(1) of the 1970 Act: the forerunner of s 709(1)) presuppose that a better position has been achieved. However, I respectfully differ from him when he goes on to answer the question "An advantage over whom or what?" by saying: "An advantage over persons of a similar class". In my judgment, the simple answer to that question is that a better position has been achieved vis-à-vis the Revenue."

72. Although Jonathan Parker LJ in *Sema* was dealing with the definition of "tax advantage" in Section 709(1) of the Income and Corporation Taxes Act 1988 (the "ICTA 1988") (which has now become the definition of "corporation tax advantage" in Section 732 of the CTA 2010), there is no difference which is relevant in this context between those definitions and the definition of "tax advantage" in Section 1139 of the CTA 2010. They all include a reference to a "relief or increased relief" from tax. In Ms Wilson's view, the deductions in this case were "reliefs" and therefore OIOH 2008 Ltd obtained a relief when the deductions arising in respect of the $140m Promissory Note were surrendered to it. That was both the beginning and the end of the story and the fact that the same structure pursuant to which the reliefs arose had also given rise to additional interest income in OIOH 2008 Ltd was neither here nor there. In particular, whether that structure had given rise to a net incremental UK tax deduction or left the UK flat from the tax perspective was simply not relevant to the issue.

73. Ms Wilson went on to submit that, in considering whether obtaining the deductions in question were a main purpose of the Appellant in issuing the $140m Promissory Note, it was important to distinguish the purpose of the structure as a whole from the purpose of step 8 of the structure. It was plain from the various documents outlining the steps and from the evidence of Mr Boyd that the US objectives of the structure as a whole had been met by the time that step 7 was completed. In her view, it necessarily followed that the $140m Promissory Note which was issued only at step 8 of the structure could not have had the achievement of those objectives as a purpose at all, let alone one of its main purposes. Instead, the sole purpose of the Oxford Instruments Group in general, and the Appellant in particular, in implementing step 8 was to generate deductions which, before taking into account the Disclaimer, would be equal and opposite to the incremental interest income in OIOH 2008 Ltd to which steps 1 to 7 of the structure gave rise. Put another way, the Appellant would not have existed if step 8 had not been implemented as part of the structure. However, the structure would still have achieved the US objectives. It followed that achieving the US objectives could not have been one of the purposes of the Appellant in implementing step 8.

74. Ms Wilson added that the importance to the Appellant of the deductions (and the relative insignificance to the Appellant of the spread) could be shown by the fact that:

(1) the group had been willing to pay significant fees to Deloitte in order to develop, and advise on, the structure;

(2) the Appellant gave up the spread by unwinding the structure created by step 8 as soon as the deductions appeared to be under threat from the OECD's Base Erosion and Profit Shifting ("BEPS") proposals;

(3) the Appellant's role in the structure had been decided even before the Appellant was incorporated;

(4) the principal amount of the $140m Promissory Note and the Preference Shares, and the rate of interest payable under the $140m Promissory Note, were fixed in advance because they were a function of the principal amount of, and the interest payable under, the $94m Promissory Note and the $46m Promissory Note. Thus, the only variable in step 8 was the level of dividend on the Preference Shares; and

(5) there had been no negotiations between the Appellant and OI 2013 Inc, the issuer of the Preference Shares, in relation to the dividend rate on the Preference Shares before the shares were issued. Instead, the group had simply commissioned Deloitte to ascertain what level of dividend could be justified from the arm's length perspective and had chosen the rate which that threw up.

75. Picking up on the language which had been used by Lightman J at first instance in *Sema* 74 TC 593 (at paragraph [53]) in relation to circumstances where a tax advantage could be said to be mere "icing on the cake" and not a main purpose, Ms Wilson said that, on the contrary in this case, the spread which the Appellant had obtained by virtue of subscribing for the Preference Shares was merely "icing on the cake" for the Appellant and it was securing the deductions which was the Appellant's only purpose. There was no meaningful sense in which obtaining the spread could be said to be a purpose of the Appellant in implementing step 8.

Apportionment of the debits

76. Mr Ghosh submitted that, even if I were to conclude that the $140m Promissory Note gave rise to a tax advantage for OIOH 2008 Ltd and that securing that tax advantage was the main purpose, or one of the main purposes, of the Appellant in issuing, and remaining party to, the $140m Promissory Note (with the result that the Appellant had an unallowable purpose in issuing the note):

(1) Section 441(3) of the CTA 2009 provided that the consequence of that was that only so much of the debits arising in respect of the note "as on a just and reasonable apportionment is attributable to the unallowable purpose" fell to be disallowed; and

(2) on the facts in this case, either none of the debits or, in the alternative, only 25% of the debits in respect of $94m in principal amount of the $140m Promissory Note - which the Appellant had already voluntarily agreed to give up by virtue of the Disclaimer – were attributable to the unallowable purpose (ie the main purpose of securing a tax advantage for OIOH 2008 Ltd).

77. In support of his contention that none of the debits in respect of the $140m Promissory Note should be apportioned to the tax advantage main purpose in this case, Mr Ghosh relied on the First-tier Tribunal decision in *Iliffe News and Media Ltd and others v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 696 ("*Iliffe*") as establishing the proposition that, where a company entering into a loan relationship has main purposes which comprise both a commercial purpose other than a tax advantage purpose and a tax advantage purpose, the debits which are to be apportioned to the tax advantage purpose on a just and reasonable basis are only those which would not have arisen if the company had had only the commercial purpose (see paragraph [327] in *Iliffe*).

78. Applying that principle to these facts, Mr Ghosh submitted that, even if I were to conclude that the Appellant's main purposes in issuing the $140m Promissory Note included the purpose of securing a tax advantage for OIOH 2008 Ltd, as those main purposes also included:

(1) the purpose of participating in a structure which had a clear commercial purpose other than securing that tax advantage – namely, achieving the US objectives; and

(2) the purpose of obtaining the spread as a result of investing in the Preference Shares,

the debits arising in respect of $140m Promissory Note would have been the same even if the tax advantage purpose had not existed. Accordingly, none of the debits should be apportioned to the tax advantage purpose.

79. Mr Ghosh said that the same approach as that adopted in *Iliffe* was supported by the decision of the Court of Appeal in *TDS* in relation to the appeal of Ladbroke Group International ("LGI") in that case (see paragraphs [50] to [53] in *TDS*). In those paragraphs, Newey J concluded that the appellant had failed to establish that the debits arising in respect of the transaction which it had actually effected would have been the same in the absence of a tax advantage purpose. However, he did not cast doubt on the underlying proposition that the approach adopted in *Iliffe* of identifying the debits to be disallowed by reference to the extent to which they had been increased by the tax advantage purpose was the correct approach.

80. Mr Ghosh submitted that the Court of Appeal in *Fidex Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2016] EWCA Civ 385 ("*Fidex*") had adopted a similar approach to apportionment but in a very different context. In that case, the relevant debit had arisen because, at the start of the financial year in which the relevant company changed the accounting principles by reference to which it prepared its accounts (from UK Generally Accepted Accounting Practice to International Financial Reporting Standards), the company had in issue preference shares the effect of which was to cause certain bonds held by the company to be derecognised, thereby triggering the debit. The Court of Appeal accepted that the company had had two commercial purposes other than securing a tax advantage in continuing to hold the bonds over the year end in which the accounting practice changed, in addition to its tax advantage purpose. However, it noted that the sole purpose of the issue of the preference shares was to give rise to the debit and that, more importantly, the whole of the debit was attributable to that purpose. Accordingly, the whole of the debit was attributable to the tax advantage purpose, even though there were good non-tax-advantage commercial reasons for continuing to hold the bonds. In other words, even though, in the absence of the tax advantage purpose, the company would have continued to hold the bonds, no debit would have arisen in such absence because the preference shares would not have been issued (see paragraphs [71] to [75] in *Fidex*).

81. Mr Ghosh accepted that, in *Versteegh*, the First-tier Tribunal had expressed some caution about adopting the approach taken in *Iliffe* as a universal basis for applying the statutory language. It said that, "attractive as [that formulation] of the just and reasonable apportionment test might appear, in terms of simplicity of application, it does involve in our view a gloss on the words of para 13 itself, which talks only of a just and reasonable apportionment in order to arrive at the extent to which loan relationship debits are attributable to an unallowable purpose. That may be answered in a particular case by considering the extent to which the debit is greater than it would be but for the identified unallowable purpose, but that should not, in our view, be regarded as a substitute for the statutory test itself" (see paragraph [166] in *Versteegh*). Mr Ghosh submitted that the First-tier Tribunal in *Versteegh* were wrong to have expressed the reservations about the approach adopted in *Iliffe* and that the test in all cases where there was a combination of tax advantage main purposes and commercial non-tax-advantage main purposes was quite simply to identify how much greater the debits were than they would have been if the tax advantage main purpose had not existed.

82. In support of his contention that, if it would not be just and reasonable for none of the relevant debits to be apportioned to the tax advantage main purpose, then only 25% of the

relevant debits arising in respect of $94m in principal amount of the $150m Promissory Note should be so apportioned, Mr Ghosh pointed to the alternative comparator transaction – the CFC finance company structure – to which reference had been made in the Clearance Application. In his view, since it would have been possible for the Oxford Instruments Group to have implemented that structure instead of the structure which it actually implemented, it would not be just or reasonable for the apportionment of debits to the tax advantage main purpose to result in disallowed debits which gave rise to a greater corporation tax liability than would have arisen under that alternative structure.

83. In response, Ms Wilson said that the approach to the statutory language in relation to attribution in *Iliffe* was wrong and that the Respondents would have challenged it on appeal had they not won the case on other grounds.

84. She submitted that, furthermore, the decision in *TDS* in relation to the appeal of LGI in that case could not be said to support the approach adopted in *Iliffe* because the Court of Appeal in *TDS* had merely held that LGI had failed to adduce sufficient evidence to establish that the debits in question were attributable to anything other than the (admitted) tax advantage main purpose (see paragraph [55] in *TDS*). Thus, the Court of Appeal should not be regarded as having approved the proposition that, had the relevant appellant been able to show that the debits in question would have arisen in any event even in the absence of the tax advantage main purpose, then none of the debits should be apportioned to the tax advantage main purpose.

85. Ms Wilson added that the approach of the Court of Appeal in *Fidex* to the apportionment language was subtly different from the explanation given by Mr Ghosh in paragraph 80 above. In her view, Mr Ghosh's approach in this case was the same as that proposed by Mr Flesch on behalf of the appellant in *Fidex*, and that approach had been rejected by the Court of Appeal. In other words, just as, in *Fidex*, Mr Flesch had proposed that the correct approach was to conduct the apportionment exercise by considering whether the relevant bonds would have been held even in the absence of the tax advantage main purpose, so Mr Ghosh in this case was proposing that the correct approach was to conduct the apportionment exercise by considering whether the $140m Promissory Note would have been issued even in the absence of the tax advantage main purpose. And, just as the Court of Appeal in *Fidex* had rejected that approach, so too should that approach be rejected in this case.

86. In Ms Wilson's view, *Fidex* showed that the correct approach to apportionment was to consider whether, and to what extent, the debits in question were attributable to the tax advantage main purpose – as set out in the express language of Section 441(3) of the CTA 2009 itself - and not to ask whether, and to what extent, the debits in question had been increased by the tax advantage main purpose. She submitted that this was exactly why the Upper Tribunal in *Versteegh* had expressed reservations about slavishly construing the actual language used in Section 441(3) of the CTA 2009 in all cases by reference to the formulation used in *Iliffe*.

87. Ms Wilson submitted that this was a case which demonstrated the limitations of the approach adopted in *Iliffe* because, if I were to find as a fact in this case that the Appellant had, as its main purposes in issuing, and remaining party to, the $140m Promissory Note, both the purpose of securing the tax advantage for OIOH 2008 Ltd and the two commercial non-tax-advantage purposes alleged by the Appellant to have existed – namely, achieving the US objectives of the structure as a whole and obtaining the spread from the investment in the Preference Shares - then:

(1) as the $140m Promissory Note would have been issued in any event to fulfil the two commercial non-tax-advantage main purposes, the formulation in *Iliffe* would suggest that none of the debits arising in respect of the note should be apportioned to the tax advantage main purpose; whereas

(2) as the tax advantage main purpose was precisely to secure the debits in question, the statutory language, as supported by Ms Wilson's interpretation of *Fidex*, would suggest that all of the debits were attributable to the tax advantage main purpose and should therefore be apportioned to the tax advantage main purpose.

88. Ms Wilson said that, although it related to different legislation, the decision of the Court of Appeal in *Lloyds TSB Equipment Leasing (No 1) Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2014] EWCA Civ 1062 ("*Lloyds*") tended, by parity of reasoning, to support her approach to apportionment. In *Lloyds*, the Court of Appeal held that the First-tier Tribunal had misdirected itself in concluding that, just because each step in the transaction served a genuine commercial purpose, it followed that obtaining capital allowances could not also be a main object of the transactions (see paragraphs [64] and [65] in *Lloyds*). Rimer LJ noted that:

"Even if each of the transactions was entered into for a genuine commercial purpose, it may still be the case that a main object of structuring them in the way they were was to obtain the capital allowances, and the FTT's findings in [218] to [230] might be said to provide a factual basis for a finding that it was."

89. Ms Wilson submitted that, in the same way, even if the Appellant had had two commercial non-tax-advantage main purposes as part of its main purposes in issuing, and remaining party to, the $140m Promissory Note, that would not mean that it would not be just and reasonable to apportion all of the debits arising in respect of the note to the tax advantage main purpose which also existed in issuing, and remaining party to, the note if that would be just and reasonable given that tax advantage main purpose.

90. Ms Wilson concluded by saying that, notwithstanding her submissions described above in relation to circumstances involving a combination of main purposes, in her view, there was only one purpose for the existence of the $140m Promissory Note because step 8 would not have existed in the structure at all if the Oxford Instruments Group had not had, as one of its main purposes in implementing the structure, the desire to cancel out the incremental income generated by the structure in OIOH 2008 Ltd, before taking into account the Disclaimer. It therefore followed that:

(1) the whole of the debits to which step 8 gave rise were attributable to that sole purpose; and

(2) all of the debits must necessarily be apportioned to that sole purpose.

THE BURDEN OF PROOF

91. Before setting out my findings of fact and my conclusions in relation to the questions of law which are the subject of the appeal, I should make some observations about the burden of proof in this case.

92. The parties did not agree on the question as to which of them had that burden. Mr Ghosh submitted that the burden lay on the Respondents to prove the allegations which formed the basis for the closure notice whilst Ms Wilson submitted that the present case was no different from any other appeal against a closure notice, where the language in Section 50(6) of the Taxes Management Act 1970 places the onus on the appellant to show that the closure notice is incorrect.

93. Neither party made detailed substantive submissions in support of its view at the hearing but the parties did refer me to:

(1) the decision in *A.H Field (Holdings) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 104 (TC) ("*Field*") in which the First-

tier Tribunal referred to two earlier cases in relation to Section 703 of the ICTA 1988 (and one of its predecessor provisions, Section 28(1) of the Finance Act 1960) - *Hasloch v Inland Revenue Commissioners* 47 TC 50 ("*Hasloch*") and *Lewis (Trustee of Redrow Staff Pension Scheme) v Commissioners for Inland Revenue* [1999] STC (SCD) 349 ("*Lewis*") - as establishing that the burden of proof in relation to the predecessor to Section 441 of the CTA 2009 (paragraph 13 of Schedule 9 to the Finance Act 1996 ("paragraph 13")) lay on the appellant and concluded that "[it] is clear, and was agreed between the parties that the onus of proof in this instance is on the taxpayer…" (see paragraphs [73] and [114]);

(2) various cases in which the Respondents had accepted that they had the burden of proof in relation to the application of Section 441 of the CTA 2009 (or paragraph 13) - see *Iliffe*, at paragraph [34], and the Upper Tier Tribunal decision in *Fidex Ltd v The Commissioners for Her Majesty's Revenue and Customs* [2014] UKUT 454 (TCC) at paragraph [115]; and

(3) in contrast, a case where the Respondents had taken the position which they were adopting in these proceedings to the effect that the appellant had the burden of proof– the First-tier Tribunal decision in *Travel Document Service (1) and Ladbroke Group International (2) v The Commissioners for Her Majesty's Revenue and Customs* [2015] 582 UKFTT (TC) ("*TDS FTT*") at paragraph [44].

94. Contrary to the decision of the First-tier Tribunal in *Field*, I do not think that the decisions in *Hasloch* or *Lewis* shed any light on the question of which party has the burden of proof in relation to the application of Section 441 of the CTA 2009 or paragraph 13. Those cases both related to statutory provisions which, on their terms, stipulated that, where a person obtained a tax advantage from one of certain specified transactions, then a counteraction notice could be served on him "unless he shows that the transaction or transactions were carried out either for bona fide commercial reasons or in the ordinary course of making or managing investments, and that none of them had as their main object, or one of their main objects, to enable tax advantages to be obtained…". It is therefore not surprising that the decision in each of those cases was that the burden of showing that the transaction in question did not have a tax advantage main object was on the relevant appellant and not on the Respondents. The language in Section 441 of the CTA 2009 and paragraph 13 is (and was) very different in that respect.

95. Since the Respondents conceded that they had the burden of proof in the cases mentioned in paragraph 93(2) above, and the issue was a matter of dispute only in *TDS FTT*, I have naturally looked to the decision in *TDS FTT* for guidance in this regard. However, it appears that the First-tier Tribunal in that case must have accepted the further submission of Mr Ghosh on behalf of the Respondents, as recorded in paragraph [44] of the decision, that, "[in] the circumstances of this case,…he considered the burden of proof to be irrelevant as the necessary facts were, in his submission, quite clear" because I can see no further consideration of the matter in the "Discussion and decision" section of the decision.

96. The above means that I have not been directed to any meaningful analysis on the burden of proof in relation to Section 441 of the CTA 2009 or paragraph 13 in any previous decision. Given that absence of guidance, and the fact that there is nothing in the language of Section 441 of the CTA 2009 itself to indicate that the Respondents have to establish that the Appellant had an unallowable purpose in issuing, and remaining party to, the $140m Promissory Note, I am inclined to consider that, as is the case with every other appeal against a closure notice in relation to UK corporation tax, it is for the taxpayer to show that the notice, and the consequent amendments to its company tax return, are incorrect and therefore that the burden of proof in this case is on the Appellant.

97. However, for reasons which will become apparent, I do not think that very much turns on this because, in my view, even if I am wrong and it is for the Respondents to show that the Appellant had a tax avoidance purpose as its main purpose, or one of its main purposes, in issuing, and remaining party to, the $140m Promissory Note, I consider that the strength of that evidence is such that the Respondents have discharged that burden.

FINDINGS OF FACT

Balance of probabilities

98. Each finding of fact set out in this section of this decision has been made on the balance of probabilities, taking into account the written and oral evidence presented to me for the purposes of the appeal, including the documents referred to in the statement of agreed facts and the written and oral evidence of Mr Boyd.

Whose purposes?

99. In addition, when I refer in this section of this decision to a purpose of a company, I am referring to the purpose of the directors of that company. It is their intentions which inform the intentions of the company. In the case of OI Plc, the intentions of the directors may be seen in the communications which passed between the representatives of the company and Deloitte and the papers submitted to the board by Mr Boyd. In the case of the Appellant, the intentions of the directors may be seen in the resolutions passed by the board and in the testimony of Mr Boyd as to his (and the other Appellant directors') thinking at the time when the company took the actions which it did.

100. In relation to the Appellant, Ms Wilson submitted that the intentions of Deloitte should also be treated as informing the intentions of the company, given Deloitte's extensive involvement in the creation and implementation of the structure. In this regard, she relied on the decision of Goff J in *Addy and others v Inland Revenue Commissioners* [1975] STC 601 at page 610f.

101. I have no doubt that, if the evidence in this case pointed to the fact that the directors of the Appellant had ceded to Deloitte de facto control of the company and therefore effectively delegated to Deloitte their fiduciary responsibilities in relation to the company, then the intentions of Deloitte might well be relevant. Similarly, if the evidence pointed to the fact that the directors of the Appellant were just acting as the puppets of the directors or employees of OI Plc and simply acceding, without independent thought, to the requests made of them by the directors or employees of OI Plc, then the intentions of the directors or employees of OI Plc might well inform my findings in relation to the intentions of the Appellant.

102. However, I could see no evidence of this in the facts which were presented to me. On the contrary, I consider that, based on the evidence of Mr Boyd, which I found to be credible, the directors of the Appellant took their fiduciary duties in relation to the Appellant seriously and that the Appellant's actions were a result of the intentions of its directors and its directors alone. The mere fact that the directors of the Appellant may have taken into account, as one of the factors in the deliberations which preceded their decisions, the benefit to the group as a whole (and the advice of Deloitte in relation to the Appellant's participation in the structure) did not mean that the directors had thereby abdicated their fiduciary duties to the Appellant in favour of OI Plc or Deloitte.

103. Accordingly, it is solely the purposes of the directors of OI Plc to which I allude below when I refer to the purposes of OI Plc and solely the purposes of the directors of the Appellant to which I allude below when I refer to the purposes of the Appellant.

Findings of fact

104. Having considered all of the evidence, I have, for the reasons set out in paragraphs 105 to 107 below, found the following facts in relation to the appeal:

(1) the $140m Promissory Note and the Preference Shares were issued at step 8 of a single scheme comprising that step and the seven steps which preceded that step, as described in paragraph 33 above. In the rest of this decision, I will refer to the single scheme comprising those steps 1 to 8 together as the "Scheme";

(2) the sole purposes of OI Plc, in procuring the implementation of the Scheme, were:

(a) to achieve certain US objectives as described in certain of the documents mentioned above - for example, the US Thin Capitalisation Review and the Clearance Application– and set out in detail in paragraph 104(3) below; and

(b) before taking into account the Disclaimer, to do so without increasing the net taxable income of the Oxford Instruments Group in the UK;

(3) the US objectives mentioned in paragraph 104(2) above were as follows:

(a) the refinancing of the $60m Loan Notes and the $34m Loan Agreement, the former of which was due for repayment on 31 March 2013 and the latter of which was repayable on demand or at OIH Inc's volition at any time;

(b) the introduction into the US sub-group of the Oxford Instruments Group of an additional $46m of debt, in order to achieve an appropriate capital structure for the US sub-group, which had grown more valuable since the previous refinancing of the US sub-group in 2008;

(c) the simplification of the debt in the US sub-group (in that two borrowing companies, OI 2008 Inc and OIH Inc, were replaced by a single borrowing company, OI 2013 Inc); and

(d) the provision of a flexible structure to allow for further acquisitions by the US sub-group;

(4) so far as concerns the UK corporation tax consequences of the Scheme, the way in which the Scheme was intended to operate was that:

(a) steps 1 to 7 would give rise to taxable interest income in OIOH 2008 Ltd equal to 5.5% of $140m - that being the interest accruing on the $94m Promissory Note and the $46m Promissory Note; and

(b) before taking into account the Disclaimer, step 8 would give rise to a tax deduction of an equal and opposite amount for the Appellant, which the Appellant could surrender to OIOH 2008 Ltd;

(5) the US objectives described in paragraph 104(3) above would all have been achieved if the Scheme had not included step 8 and had instead comprised only steps 1 to 7. However, if step 8 had not been implemented, the Scheme would have given rise to net taxable income in the UK in an amount which was equal and opposite to the net deductible interest in the US;

(6) if that had been the case, the Scheme would still have been beneficial for the Oxford Instruments Group from the perspective of its worldwide tax position because:

(a) at the time when the Scheme was implemented, the Oxford Instruments Group had available UK corporation tax losses which, until they were all used -

which was expected to occur in 2015 - would have sheltered the interest income arising in OIOH 2008 Ltd; and

(b) in any event, the rate of US federal income tax applicable to OI 2013 Inc was considerably greater than the rate of UK corporation tax applicable to OIOH 2008 Ltd, with the result that the tax saving in the US as a result of the payments of interest on the $94m Promissory Note and the $46m Promissory Note would considerably exceed the tax arising in the UK as a result of those payments, even after the available UK corporation tax losses were all used;

(7) thus, even if the Scheme had not included step 8 and had instead comprised only steps 1 to 7, OI Plc would still have chosen to procure the implementation of the Scheme;

(8) by the time that the directors of the Appellant were considering whether the Appellant should implement the transactions comprising step 8 of the Scheme:

(a) the US objectives which were a significant part of OI Plc's main purposes in procuring the implementation of the Scheme – as to which, see paragraph 104(2)(a) above - had been achieved. The only main purpose of the Scheme which had yet to be achieved at that point was the one described in paragraph 104(2)(b) above;

(b) it was clear that the Scheme would include step 8 of the Scheme - that was apparent from the terms of the Clearance Application describing the Scheme which had been submitted in the previous November and which both included step 8 as part of the Scheme and revealed that the Scheme (as opposed to the CFC finance company structure) was the structure favoured by OI Plc;

(c) it was clear that the $140m Promissory Note and the Preference Shares were going to have the same principal amount as the aggregate principal amount of the $94m Promissory Note and the $46m Promissory Note and that the $140m Promissory Note was going to carry the same interest rate as each of the $94m Promissory Note and the $46m Promissory Note – that was also apparent from the terms of the Clearance Application. In addition, if step 8 was to achieve the result described in paragraph 104(4)(b) above, the principal amounts of the $140m Promissory Note and the Preference Shares needed to match the aggregate principal amount of, and the interest rate under, the $94m Promissory Note and the $46m Promissory Note. (In this context, the fact that the principal amounts in question changed from $150m to $140m between the submission of the Clearance Application and the implementation of the Scheme is neither here nor there. The relevant feature was that the principal amounts and interest rates would match, whatever they were); and

(d) it was clear that step 8 of the Scheme was going to give rise to a spread of 2.6% per annum for the Appellant – that was apparent from the fact that the advice of Deloitte to OI Plc and the Appellant from the inception of the project was that, in order for step 8 of the Scheme to be viable, the UK Newco which became the Appellant would need to obtain a spread between its interest payments on the $140m Promissory Note and the dividends on the Preference Shares. The exact size of that spread, based on a dividend rate of 8.1% calculated by Deloitte, was determined in early March 2013, almost a month before the Appellant resolved to issue the $140m Promissory Note and to subscribe for the Preference Shares;

(9) if it would not have been possible to justify, from the arm's length perspective, a dividend rate on the Preference Shares of greater than 5.5%, then step 8 of the Scheme

would never have occurred. Instead, OI Plc would either have proceeded to procure the implementation of the CFC finance company structure or procured the implementation of steps 1 to 7 of the Scheme without also procuring the implementation of step 8 of the Scheme; and

(10) it follows that, in my view:

(a) the sole purpose of OI Plc in incorporating the Appellant and procuring the implementation of step 8 of the Scheme was to ensure that, before taking into account the Disclaimer, step 8 of the Scheme would give rise to debits in respect of the $140m Promissory Note which were equal and opposite to the credits arising in OIOH 2008 Ltd in respect of the $94m Promissory Note and the $46m Promissory Note and which could be surrendered to OIOH 2008 Ltd by way of group relief for offset against the taxable income of OIOH 2008 Ltd, with the result that, before taking into account the Disclaimer, the Scheme (comprising steps 1 to 8) would give rise to no incremental net taxable income in the UK;

(b) step 8 of the Scheme would never have occurred (and therefore the Appellant would not have been incorporated or resolved to enter into step 8 of the Scheme) if OI Plc had considered that step 8 of the Scheme would not give rise to the anticipated debits described above, even if step 8 of the Scheme would still have given rise to the spread; and

(c) neither the achievement of the US objectives described in paragraph 104(4) above nor the obtaining of the spread was a purpose of the Appellant in implementing step 8 of the Scheme and issuing the $140m Promissory Note in the course of that implementation. The former had already occurred by the time that step 8 occurred, whilst the latter was always an implicit feature of step 8 of the Scheme from the time when the Scheme was conceived. In short, following the distinction helpfully explained by the First-tier Tribunal in *Versteegh* at paragraphs [144] et seq., the spread was simply an inevitable known consequence (or effect) of the Appellant's participation in step 8 of the Scheme but not any part of the Appellant's purpose in so doing.

Reasons

105. The reasons why I have reached the conclusions described in paragraph 104 above are as follows:

(1) I believe that it is clear from the gestation of the Scheme – the paper produced by Deloitte for the purposes of its original presentation on 20 June 2012 and the Feasibility Study - the fact that the alternative proposal to the Scheme took the form of the CFC finance company structure and the witness evidence of Mr Boyd that:

(a) the Scheme was planned as a single integrated structure;

(b) the most significant main purpose of OI Plc in procuring the implementation of that structure was to achieve the US objectives described in paragraph 104(3) above; but

(c) another main purpose of OI Plc in procuring the implemention of that structure was to achieve those US objectives in a manner which avoided or minimised any incremental net taxable income in the UK for the Oxford Instruments Group;

(2) that was the reason why Deloitte were asked to explore tax-efficient financing proposals for the US sub-group and why the Scheme developed as it did. It is also

revealed in the final paragraph of the section of the Feasibility Study headed "Current position and approach", which referred to the fact that, "[whilst] it would be possible to simply refresh the existing debt, we understand through discussions with Tom and Gillian that it [is] expected that the group's UK losses will be used up by 2015 resulting in the interest income arising in OIOH 2008 Ltd being fully taxable. Whilst a tax rate arbitrage would still arise, the overall tax efficiency would be reduced";

(3) that is not to say that OI Plc would not have been prepared to procure the implementation of the Scheme without the inclusion of step 8 (or without using a CFC finance company structure) should neither of those proposals have been feasible. The US objectives were the paramount purpose of the Scheme (and, for that matter, the CFC finance company structure) and the overall worldwide tax benefit which would still have arisen in the Oxford Instruments Group by virtue of steps 1 to 7 of the Scheme meant that, even though those steps, without step 8, would have given rise to additional net taxable income in the UK, OI Plc would still have proceeded to procure the implementation of the structure even in the absence of step 8. Mr Boyd said exactly that in his evidence;

(4) however, it is clear from the documents mentioned in paragraph 105(1) above and the testimony of Mr Boyd that avoiding or minimising additional net taxable income in the UK was also a main purpose of the Scheme. Had that not been the case, then there would have been no need for the group to go to the trouble and expense which it did, in engaging Deloitte to devise the Scheme and to compare and contrast the Scheme with the CFC finance company structure. The very fact that the two alternative structures on the table both involved avoiding or minimising the incremental net taxable income in the UK as a result of achieving the US objectives demonstrates the importance which step 8 had to the Scheme as a whole;

(5) more crucially in terms of the discussion which follows this section of this decision, it is apparent from the documents mentioned in paragraph 105(1) above and the testimony of Mr Boyd that the only purpose of OI Plc in procuring the implementation of step 8 of the Scheme, as distinct from procuring the implementation of the Scheme as a whole, was to secure that, before taking into account the Disclaimer, the Scheme as a whole generated no incremental net taxable income in the UK. That had to be the case because, as those documents make clear, and as Mr Boyd candidly admitted, all of the US objectives were achieved as soon as steps 1 to 7 had been completed. All that remained to be done at that stage was to deal with the incremental net taxable income in the UK to which steps 1 to 7 were going to give rise;

(6) additional support for this conclusion may be found in the fact that the principal amount of the $140m Promissory Note and the Preference Shares, and the 5.5% interest rate that was payable under the $140m Promissory Note, were set so that they corresponded precisely with the aggregate principal amount of the $94m Promissory Note and the $46m Promissory Note held by OIOH 2008 Ltd and the interest rate that was payable under each of the latter two notes. The clear purpose underlying that approach was to ensure that, before taking into account the Disclaimer, the net deductible interest arising in the Appellant as a result of its undertaking step 8 would be exactly equal and opposite to the net taxable income arising in OIOH 2008 Ltd as a result of steps 1 to 7 of the Scheme;

(7) having determined that step 8 was necessary in order to generate the deductions which were required to ensure that the Scheme as a whole did not, before taking into account the Disclaimer, give rise to incremental net taxable income in the UK, both OI Plc and Deloitte were cognisant of the need for the UK Newco which was to become the

Appellant to make a positive commercial return from its participation in the Scheme. This is shown in the Deloitte presentation of 20 June 2012 where, on the page headed "Existing debt structure", the final item under the list of considerations which were applicable to the "tower structure" was "Commercial purpose for increase in leverage/use of hybrid". To my mind, that reference is a clear indication that the sole purpose of step 8 of the Scheme was to generate the necessary tax deductions in the UK Newco and not for the UK Newco to make any commercial profit. Instead, the commercial profit was simply the means to justify the existence of the transactions which the UK Newco needed to implement in order to achieve its sole purpose;

(8) there were two reasons why it was necessary for the UK Newco which became the Appellant to make a positive commercial return from its participation in step 8 of the Scheme;

(9) first, as Mr Boyd made clear in his evidence, he and the other directors of the Appellant were well aware of their fiduciary duties to the Appellant, as directors of the Appellant, in addition to any fiduciary duties which they might owe to OI Plc. It was therefore important for the directors to be able to conclude that step 8 of the Scheme was in the interests of the company. If step 8 had produced no commercial benefit for the company as a single entity, then the directors might still have been able to approve the implementation of the step by the company by reference to the overall group benefit to which the step gave rise - in the form of the deductions mentioned above - but that would have been a much more difficult decision for the directors to reach. As Mr Boyd said in his evidence, they would not in fact have reached that decision if step 8 had not generated a commercial profit for the company as a single entity but, significantly, Mr Boyd added that that was an entirely hypothetical issue given that, from the time that step 8 was conceived, it was always going to give rise to a spread for the UK Newco which became the Appellant;

(10) secondly, it had been made clear by Deloitte on page 21 of the UK Tax Analysis that a strong non-tax commercial purpose was significant if the Appellant was to avoid the application to the $140m Promissory Note of Sections 441 and 442 of the CTA 2009;

(11) it was because of the need to ensure that the Appellant would make a commercial profit from implementing step 8 that Deloitte was commissioned to calculate the dividend rate which could be justified on the Preference Shares from the arm's length perspective. On 5 March 2013, Ms Joy Hindson of Deloitte sent an email to Ms Thomson to explain the methodology which Deloitte had used to calculate the dividend rate on the Preference Shares. At the end of that email, Ms Hindson concluded that a dividend rate on the Preference Shares of 8.1% "should be supportable on an arm's length basis". That was a communication between Deloitte and OI Plc and preceded, by almost a month, the decision by the directors of the Appellant to issue the $140m Promissory Note and subscribe for the Preference Shares. The inescapable conclusion is that the dividend rate on the Preference Shares was established at that time and that, from at least that time, the precise spread which the Appellant would make as a result of implementing step 8 was fixed;

(12) consequently, by the time that the directors of the Appellant were considering whether the Appellant should enter into the transactions comprising step 8 of the Scheme, there was never any question that the Appellant might decide not to issue the $140m Promissory Note and not to subscribe for the Preference Shares because the dividend rate which it was being offered on the Preference Shares was insufficient or any question that the Appellant might be able to negotiate an increase in that dividend rate. Instead, the

spread was simply an inherent immutable part of the package which was being offered to the directors of the Appellant as a means of securing the tax advantage to which that package was expected to give rise and which the directors could either take or leave;

(13) in the light of the above, when it comes to considering the purposes of the Appellant in issuing, and remaining party to, the $140m Promissory Note, the only logical conclusion is that the sole purpose of the Appellant in doing so was to play the role that had been allotted to it in the Scheme as a whole – namely, to generate, before taking into account the Disclaimer, the deductions needed to match the incremental net taxable income in OIOH 2008 Ltd to which steps 1 to 7 of the Scheme were going to give rise;

(14) the US objectives of the Scheme could not logically have been part of the Appellant's purposes in issuing, and remaining party to, the $140m Promissory Note because those objectives had already been met (by the implementation of steps 1 to 7 of the Scheme) by the time that the note was to be issued.

In that regard, the fact that Mr Boyd in his evidence said that the group would have been prepared to implement steps 1 to 7 of the Scheme without also implementing step 8 of the Scheme – which Mr Ghosh contended was of great assistance to his case – seems to me to be exactly the contrary. It clearly assists the argument that the US objectives were a more significant purpose of OI Plc in implementing the Scheme as a whole than the desire to minimise or avoid any net taxable income in the UK to which the Scheme as a whole was going to give rise.

However, that is not the question which I am required to address in relation to the appeal. Instead, I am required to identify the purposes of the Appellant in issuing, and remaining party to, the $140m Promissory Note. The purposes of OI Plc in procuring the implementation of the Scheme as a whole do not assist in providing the answer to that question. And, as the US objectives had already been achieved by the time that step 8 was implemented, the Scheme had by then already fulfilled OI Plc's primary purpose in procuring the implementation of the Scheme.

The fact that OI Plc would have been prepared to procure the implementation of steps 1 to 7 of the Scheme without also procuring the implementation of step 8 of the Scheme therefore serves only to emphasize the fact that step 8 of the Scheme played no role in OI Plc's thinking when it came to OI Plc's intention to achieve the US objectives.

In my view, it is therefore impossible to conclude that meeting the US objectives formed any part of the purposes of the Appellant in issuing, and remaining party to, the $140m Promissory Note (or, for that matter, any part of the purposes of OI Plc in procuring the implementation of step 8);

(15) for different reasons, the spread which the Appellant was able to obtain by issuing the $140m Promissory Note and subscribing for the Preference Shares cannot logically be seen as being a purpose of the Appellant in issuing the note because that spread was already built into the step by the time that the directors of the Appellant met to approve the Appellant's participation in step 8 of the Scheme. Its inclusion was necessary for the reasons given in paragraphs 105(9) and 105(10) above but it was no more than an inevitable effect, or known consequence, of the step. In *Versteegh*, the First-tier Tribunal noted that:

"…the mere existence of a tax advantage, known to the taxpayer, does not on its own render the obtaining of that advantage a main purpose" (see paragraph [158] in *Versteegh*).

Similarly, applying that logic in reverse, the mere fact that the directors of the Appellant knew, at the time when they resolved that the Appellant should enter into the transactions comprising step 8, that the Appellant would realise a spread as a result of entering into those transactions did not thereby make the obtaining of that spread one of the purposes of the Appellant in entering into those transactions. Instead, the spread was just an inherent part of the package which, if approved, would enable the Oxford Instruments Group to achieve the UK-tax-related part of its overall objectives in implementing the Scheme;

(16) it follows from this that, whilst I accept Mr Boyd's evidence to the effect that the Appellant would not have implemented step 8 if the group could not have justified, by reference to arm's length pricing, a positive commercial return to the Appellant from implementing that step, I agree with him that that is a wholly hypothetical question.

I do not think that the Appellant would ever have been required to make the decision to undertake the transactions comprising step 8 unless it had been shown, by the work carried out by Deloitte well before the directors of the Appellant met to consider that decision, that the transactions would necessarily give rise to that positive commercial return because that positive commercial return could be justified on an arm's length basis.

In effect, the spread was the means of justifying the step within the context of the Scheme as a whole but it was not the driver for the step. Thus, obtaining the spread was not in any meaningful sense a purpose of the Appellant in issuing, and remaining party to, the $140m Promissory Note. The sole purpose of the Appellant in so doing was to generate the necessary deductions to surrender to OIOH 2008 Ltd;

(17) I have considered whether the above conclusion could be open to question on the following basis.

In *Versteegh*, at paragraphs [144] et seq., the First-tier Tribunal, referring to the earlier decision of the VAT Tribunal in *Coffee Republic*, drew a distinction between, on the one hand, an inevitable result of the successful completion of a purpose – which was an effect, but not itself a purpose - and, on the other hand, something which was necessary for, or part of, a stated purpose – which was itself part of the purpose.

Applying that reasoning in the present case, I have reflected on whether it might fairly be said that the obtaining of the spread must itself necessarily have been a purpose of the Appellant in entering into the transactions comprising step 8 of the Scheme because OI Plc and the Appellant had been advised that, without that spread, the Appellant would be unable to secure the tax advantage to which those transactions were intended to give rise.

I have concluded that this is not the case. Although the directors of the Appellant may have considered that the spread was necessary in order for the Appellant to be able to secure the tax advantage for OIOH 2008 Ltd to which step 8 was intended to give rise, that did not inevitably mean that the existence of the spread must have formed part of the reasons why the directors of the Appellant resolved to enter into the transactions comprising step 8 of the Scheme.

This can be demonstrated by the fact that, based on the documents mentioned in paragraph 105(1) above and the evidence of Mr Boyd, it is plain that the directors of the Appellant would not have resolved that the Appellant should enter into the transactions comprising step 8 if those transactions would not have given rise to the tax advantage but would still have given rise to the spread.

It follows that, as a matter of the subjective intentions of the directors of the Appellant, obtaining the spread did not itself constitute a self-standing purpose in its own right.

Instead, it was merely an inevitable known consequence of their resolving to enter into the transactions whereby their tax advantage purpose could be secured.

That observation serves to reinforce the conclusion that the sole purpose of the directors of the Appellant in entering into the relevant transactions was to secure the tax advantage and that the spread was simply a by-product of the transactions whereby the Appellant would be able to secure that tax advantage; and

(18) I am bolstered in my conclusion that the spread formed no part of the purposes of the Appellant in issuing the $140m Promissory Note by the fact that, when it became clear that, as a result of the recommendations emanating from the OECD's BEPS project, the Appellant was likely to lose the deductions in respect of the interest which it was paying under the $140m Promissory Note, that part of the overall structure was immediately unwound, and replaced by a CFC finance company structure, without any apparent notice by the directors of the Appellant of the fact that unwinding that part of the structure would inevitably mean that the Appellant would lose its spread. In my view, had the spread to which step 8 gave rise for the Appellant formed any part of the purposes of the Appellant in entering into the part of the structure to which step 8 gave rise, then either that part of the structure would have been maintained notwithstanding the potential loss of deductions or, at the very least, one would have expected the loss of the spread to be noted, and taken into account as a negative factor, in the decision to unwind that part of the structure. Instead, that part of the structure was unwound and the Appellant gave up its spread so that the group could continue to minimise the incremental net taxable income in the UK to which that part of the structure gave rise.

In relation to this last point, Mr Ghosh submitted at the hearing that the Respondents had produced no evidence as to the purposes of the Appellant when it unwound the transaction in 2014 and that, in any event, the purposes of the Appellant at that point did not shed any light on the purposes of the Appellant when it implemented step 8 of the Scheme.

I do not agree with either of these propositions.

As regards the first of them, the documents bundle for the hearing contained written resolutions of the directors of the Appellant dated 18 September 2014 in which the various steps necessary to unwind the part of the structure to which step 8 gave rise were approved. Those written resolutions made various statements as to the matters to which the directors were directing their minds in relation to those steps – see, for example, the various points noted in relation to the interim dividend at paragraph [5] and in relation to the duties of the directors at paragraph [9] and certain of the written resolutions themselves (such as the ones in paragraphs [10.1], [10.2], [10.4], [10.6], [10.8.2] and [10.9]).

The written resolutions are evidence of the intentions of the directors at the time of the unwind and it is conspicuous that, at no point in the numerous statements about promoting the success of the Appellant for the benefit of its membership as a whole is there any reference to the fact that, by implementing the steps described in the written resolutions, the Appellant would be giving up the spread which it was making by reason of its being party to the $140m Promissory Note and investing in the Preference Shares.

As regards the second proposition, whilst I agree that the fact that the loss of the spread was not of any noteworthy value to the directors of the Appellant at the point when the structure was unwound in September 2014 is not direct evidence of the intentions of those directors in March 2013, it is, to put my response to the proposition at its weakest, consistent with the conclusion that the spread was not one of the purposes of the directors

when they made the decision to implement step 8 in March 2013. Whilst I would be reluctant to rely on that as the sole evidence for the finding of fact which I have made in this regard, I do think that it tends to support that finding of fact.

106. It can be seen that, in making the findings of fact set out above, I have deliberately distinguished between:

(1) the purpose or purposes of OI Plc in procuring the implementation of the Scheme; and

(2) the purpose or purposes of the Appellant in issuing the $140m Promissory Note and subscribing for the Preference Shares in the course of implementing step 8 of the Scheme and in remaining party to the $140m Promissory Note while the part of the structure created by step 8 remained in existence.

107. The appeal is concerned with only the second of these and the evidence shows that the purposes of the Appellant in entering into the transactions comprising step 8 of the Scheme (and in remaining party to the $140m Promissory Note) did not include achieving the US objectives of the Scheme as a whole or obtaining the spread but were instead confined solely to securing a tax advantage for OIOH 2008 Ltd.

DISCUSSION

Common ground

108. I have already noted that the parties are in agreement that:

(1) a company has an unallowable purpose if its purposes include one which is "not amongst the business or other commercial purposes of the company";

(2) a purpose of securing a tax advantage for the company itself or for any other person "is only regarded as a business or other commercial purpose of the company if it is not …the main purpose for which the company is party to the loan relationship…or one of the main purposes for which it is"; and

(3) whether or not a company has a main purpose of securing a tax advantage for itself or for any other person in entering into a loan relationship is a question of fact to be determined by reference to the subjective purpose of the company in so doing.

Points in dispute

109. However, there is a dispute between the parties as to:

(1) whether the $140m Promissory Note secured a tax advantage for the Appellant or for any other person;

(2) if so, whether securing that tax advantage was the main purpose, or one of the main purposes, of the Appellant in issuing, and remaining party to, the $140m Promissory Note; and

(3) if so, with the result that Section 441 of the CTA 2009 applies to the Appellant in relation to the $140m Promissory Note, how much of the debits arising in respect of the $140m Promissory Note are, on a just and reasonable apportionment, attributable to that unallowable purpose pursuant to Section 441(3) of the CTA 2009.

Did the $140m Promissory Note secure a tax advantage?

110. In my view, the $140m Promissory Note secured a tax advantage for OIOH 2008 Ltd in that all of the interest arising in respect of the note (apart from 25% of the interest on $94m of the principal amount of the note) was set off against the taxable income of OIOH 2008 Ltd.

Those interest deductions were accordingly a "relief from tax" falling within Section 1139(2)(a) of the CTA 2010.

111. I consider that that would be the case even if I had accepted Mr Ghosh's submission to the effect that, because the Scheme was a single structure, the deductions arising as a result of step 8 of the Scheme should be regarded as inextricably linked to the additional interest income generated by steps 1 to 7 of the Scheme in OIOH 2008 Ltd, with the result that the single structure gave rise to no net deductions for tax purposes. This is because I agree with Ms Wilson that the mere fact that a transaction happens to result in a net neutral tax position or even, as was the case here, a net positive tax position (as a result of the Disclaimer) does not mean, in and of itself, that there has been no "tax advantage", as defined in Section 1139 of the CTA 2010. In a case where that net neutral or net positive tax position arises as a result of both the generation of income and the generation of deductions, the deductions are still reliefs from tax pursuant to which the amount of income giving rise to tax is reduced. Consequently, in the words of Jonathan Parker LJ in *Sema*, it is a situation where "the taxpayer's liability is reduced, leaving a smaller sum to be paid…[and] a better position has been achieved vis-à-vis the Revenue."

112. In keeping with his position as referred to in paragraph 111 above, Mr Ghosh contended that a straightforward borrowing between two companies within the UK tax net in which the debits in the borrower exactly matched the credits in the lender should also not be regarded as giving rise to a tax advantage. For the reason set out in paragraph 111 above, I also do not accept that contention. It seems to me that that transaction would be giving rise to a tax advantage (for the borrower) in the form of the deductions which it generated, regardless of the fact that there would be income in the lender which matched those deductions. Of course, the fact that that matching income existed might well be highly relevant in considering whether securing the borrower's tax advantage was the main purpose, or one of the main purposes, of the borrower in entering into the borrowing, but that is a quite separate question.

113. Having said that, it will be apparent from the findings of fact set out in paragraph 104 above that I have not accepted the basic premise on which the submissions set out in paragraphs 111 and 112 above are founded. In other words, I do not accept that the current circumstances should be regarded as being akin to those pertaining where the same loan relationship gives rise to matching debits and credits. Instead, step 8 of the Scheme generated only debits and no credits and was implemented only after the US objectives which were one of OI Plc's main purposes in procuring the implementation of the Scheme had been achieved by the implementation of steps 1 to 7 of the Scheme. The issue of the $140m Promissory Note was therefore a quite separate step from the steps which gave rise to the income in OIOH 2008 Ltd, a significant part of which was set off against the deductions to which the note gave rise. In those circumstances, it is difficult to see how the deductions to which the $140m Promissory Note gave rise should not be regarded as reliefs falling within the "tax advantage" definition.

114. For completeness, although neither party referred to this part of the "tax advantage" definition in its submissions, I would have thought that the debits in this case might also fall within paragraph (c) of the definition of "tax advantage" in Section 1139(2) of the CTA 2010, as clarified by Section 1139(3) of the CTA 2010 - in other words, that the debits have given rise to "the avoidance or reduction of a charge to tax…by a deduction in calculating profits or gains".

<u>Was that tax advantage a main purpose of the Appellant?</u>

115. Section 441 of the CTA 2009 applies to the Appellant in relation to the $140m Promissory Note only if securing the tax advantage to which I have referred above was the main purpose, or one of the main purposes, of the Appellant in issuing, and remaining party to, the $140m Promissory Note.

116. I have already concluded in my findings of fact that the sole purpose of the Appellant in issuing, and remaining party to, the $140m Promissory Note was to secure the deductions arising in respect of the note and to surrender those deductions to OIOH 2008 Ltd. It follows that, in my view, the Appellant's only purpose in issuing, and remaining party to, the $140m Promissory Note was to secure a tax advantage for OIOH 2008 Ltd and that therefore Section 441 of the CTA 2009 applies to the Appellant in relation to the note.

What debits are apportionable to the unallowable purpose?

117. It also follows from that finding of fact that, on the just and reasonable apportionment required by Section 441(3) of the CTA 2009, all of the debits arising in respect of the $140m Promissory Note were attributable to that sole purpose and therefore all of those debits fall to be disallowed.

118. I should add that, even if my conclusion in paragraph 105(17) above is wrong and the obtaining of the spread should properly be regarded as a purpose of the Appellant in entering into the transactions comprising step 8 of the Scheme solely because obtaining the spread was a necessary part of the transactions whereby the tax advantage arising out of those transactions was secured, that would not change my conclusion on this point. This is because, even if the obtaining of the spread could be said to be a purpose of the Appellant in that sense, it is clear that that purpose was just a means to secure the tax advantage purpose and not a self-standing purpose in its own right. It was, in effect, a necessary stopping point in the journey to the desired ultimate destination but was never a destination in its own right. The Appellant would never have implemented the transactions comprising step 8 of the Scheme solely in order to obtain the spread and in the absence of the tax advantage to which those transactions were intended to give rise.

119. It follows that, in my view, even in that case, all of the debits arising in respect of the $140m Promissory Note should still be apportioned to the Appellant's tax advantage purpose (because none of them would have been incurred in the absence of the tax advantage purpose) and therefore that all of those debits should be disallowed.

120. I should stress that that is the case regardless of the answer to the question which I address in paragraph 124 below, which is predicated on a quite different, and hypothetical, scenario where the US objectives and/or the spread comprise self-standing purposes or a self-standing purpose in their or its own right. The circumstances I am addressing in this paragraph and paragraphs 118 and 119 above are where the spread might technically be described as a purpose of the Appellant solely because it was the means to achieve the Appellant's tax advantage purpose and not because it was a purpose in its own right.

Conclusion

121. It follows from the above that, in my view, the appeal should be dismissed.

Some final considerations

122. Whilst the conclusions set out in paragraphs 108 to 121 above are sufficient to dispose of this appeal in the Respondents' favour, I will, in deference to the fact that the parties made extensive submissions on the subject, consider whether my conclusions would have been different if I had found as a fact that, in addition to the tax advantage main purpose which I have found to be the sole purpose of the Appellant in issuing, and remaining party to, the $140m Promissory Note, the Appellant also had a self-standing non-tax-advantage commercial purpose or self-standing non-tax-advantage commercial purposes - in the form of achieving the US objectives and/or obtaining the spread – as part of its main purposes in issuing, and remaining party to, the $140m Promissory Note.

123. In those circumstances, my conclusions in relation to whether or not Section 441 of the CTA 2009 should apply to the Appellant in relation to the $140m Promissory Note would have been unaffected. I would still have concluded that the note gave rise to a tax advantage in the form of the deductions in respect of the interest on the note which the Appellant surrendered to OIOH 2008 Ltd. I would also have concluded that the fact that the Appellant had, as one of its main purposes in issuing, and remaining party to, the note, a tax advantage purpose was sufficient to bring Section 441 of the CTA 2009 into play.

124. As for whether those different findings of fact would have affected my conclusions in relation to the amount of the debits arising in respect of the $140m Promissory Note which should be apportioned to the unallowable purpose for the purposes of Section 441(3) of the CTA 2009, my thoughts are as follows:

(1) the question in that case would boil down to a choice between the position which was taken by the First-tier Tribunal in *Iliffe* and adopted by Mr Ghosh at the hearing - namely, does the fact that the relevant loan relationship debits would have been incurred even in the absence of the tax advantage main purpose mean that none of those debits should be apportioned to the tax avoidance main purpose – and the more nuanced position which was preferred by the First-tier Tribunal in *Versteegh* and adopted by Ms Wilson – namely, does the statutory language, construed without any gloss, require some or all of the debits to be apportioned to the tax advantage main purpose given that it is one of two (or one of three) self-standing main purposes;

(2) I do not think that the Court of Appeal decision in *Fidex* provides any insight into the correct answer to this question because, in *Fidex*, there was only one purpose for the transaction which gave rise to the debit – that is to say, the issue of the preference shares in that case – and that was the tax advantage purpose. In the absence of multiple main purposes for the transaction which gave rise to the debit, it was inevitable that the Court of Appeal would conclude, as it did, that the whole of the debit should be apportioned to that tax advantage main purpose;

(3) the Court of Appeal decision in *TDS* is potentially of greater relevance in this regard.

In that case, paragraph 13 was in point in relation to both appellants - Travel Document Service ("TD") and LGI.

So far as TD was concerned, it had argued that it did not have securing a tax advantage as one of its main purposes in holding the shares in LGI (as distinct from its purposes in entering into the total return swap (the "TRS") relating to the shares and LGI's purposes in agreeing to the novation to it of certain loans for nominal consideration) and that TD's only purposes in holding the shares in LGI were commercial in nature and unrelated to any tax advantage. However, from the decisions in *TDS* in both the Upper Tribunal and the Court of Appeal, it appears to have been accepted by TD at both hearings that, if it were to fail in that contention, then all of the debits arising in respect of the shares would fall to be disallowed, despite the fact that, in addition to its tax advantage main purpose, it had commercial main purposes unrelated to any tax advantage in holding the shares throughout the term of the TRS.

It is apparent from the decision in the Court of Appeal that, whilst the Court of Appeal considered that securing the tax advantage was a main purpose of TD in holding the shares, it was not casting doubt on the fact that TD also retained, throughout the period of the TRS, main purposes which did not relate to the tax advantage and were instead, in the words of Newey LJ, "exclusively commercial" – see paragraphs [40] et seq. and, in

particular, the references in paragraphs [45] and [46] of the decision to "a main purpose" and not "the main purpose".

It is therefore implicit in the Court of Appeal's decision in *TDS*, so far as it relates to the debit arising in TD, that the Court considered that TD had multiple main purposes in continuing to hold the shares in LGI during the term of the TRS. Notwithstanding that conclusion, the Court went on to dismiss TD's appeal – see paragraph [49] in *TDS*. It did not adopt the approach that, as the non-tax-advantage commercial main purposes in holding the shares meant that TD would have held the relevant shares throughout the term of the TRS even in the absence of the tax advantage main purpose, none of the debits should be attributed to the tax advantage main purpose in holding the shares.

Although it was not expressly articulated by either the Upper Tribunal or the Court of Appeal in relation to TD's appeal in *TDS*, presumably because it was not argued on behalf of TD that the non-tax-advantage main purposes in holding the shares should prevent all or part of the debit from being disallowed, I believe that the reason for this is the same as the reason for the decision of the Court of Appeal in *Fidex*. The grounds for this belief are to be found in paragraph [71] of the decision of the First-tier Tribunal in *TDS FTT*, where the following was said:

"Finally, on whichever basis it is decided that paragraph 13(1) applies, we consider that the whole of the debits claimed by TDS are, on a just and reasonable apportionment, attributable the unallowable purpose. The debits accrued as a result of the completion of the Novations, following the establishment of the deemed loan relationship by virtue of the Swap. So far as TDS was concerned there was no significant business or commercial purpose to the Novation that we can discern – all that happened was that the net assets of its subsidiary LGI were depressed by £253 million, with a corresponding increase in the net assets of Sponsio, another of its subsidiaries. Mr Turner did not seek to assert otherwise. The furthest he could go in his evidence was to say that the Novations represented a more tax-efficient way (for the group) of extracting the reserves of LGI as a precursor to making it dormant. In the context of a scheme specifically devised to create these debits, once an unallowable purpose is found to exist for the (deemed) loan relationships giving rise to them as a result of, effectively, that scheme, we have no doubt that the debits should be attributed entirely to that unallowable purpose."

In other words, in *TDS*, the position of TD was the same as the position of the appellant in *Fidex*. TD may have had mixed main purposes in holding the shares throughout the relevant period but the debit which arose in respect of the shares was wholly attributable to the existence of the TRS and the novation of the loans to LGI, both of which were wholly attributable to a tax advantage main purpose and had no non-tax-advantage commercial purpose. Thus, the whole of the debit was attributable to the tax advantage main purpose of TD.

If my analysis of the Court of Appeal decision in *TDS* in relation to the appeal of TD is right, then that part of the decision provides no guidance as to how to apply the apportionment test in a case where the debits in question are attributable to a loan relationship into which the appellant has entered, and to which it remains party, for a combination of self-standing main purposes, only one of which is a tax advantage main purpose.

On the other hand, the analysis adopted by the Court of Appeal in *TDS* in relation to LGI – see paragraphs [50] to [54] – does shed some light on this question and, in doing so, tends to support the position advanced by Mr Ghosh. In those paragraphs of the decision, the Court plainly accepted the proposition made by Mr Peacock, as counsel for LGI, to the effect that, where a company has entered into, and remains party to, a loan relationship for a tax advantage main purpose, as long as it can show that the tax

advantage main purpose has not increased the debits arising in the company from those which would have arisen in any event even in the absence of the tax advantage main purpose, none of the debits should be attributed to that tax advantage main purpose. Whilst LGI ultimately failed to persuade the Court of Appeal in *TDS* that the debits in its case should not be apportioned to its tax advantage main purpose, that was not because the Court rejected the underlying proposition described above but rather because the Court considered that LGI had failed to adduce sufficient evidence to establish that the debits had not been increased as a result of the tax advantage main purpose;

(4) whilst the Court of Appeal decision in relation to LGI's appeal in *TDS* technically does not bind me to apply the position advanced by Mr Ghosh - because the ratio of the Court in relation to LGI's appeal was simply that LGI had failed to establish that its debits had not been increased by its tax advantage main purpose in accepting the novation of the relevant loans – I believe that it supports the view that, in a case where the debits in question arise solely as a result of the company's being party to a loan relationship (and not as a result of some extraneous transaction or transactions), as long as the company can show that it had one or more commercial main purposes unrelated to any tax advantage in entering into, and remaining party to, that loan relationship, and that the relevant debits would have been incurred in any event, even in the absence of the company's tax advantage main purpose in so doing, then none of the relevant debits should be apportioned to the tax advantage main purpose; and

(5) it therefore follows that, if I had concluded that, in addition to its tax advantage main purpose for issuing, and remaining party to, the $140m Promissory Note, the Appellant had had either or both of the non-tax-advantage commercial main purposes described above as self-standing purposes for issuing, and remaining party to, the note, then, in my view, none of the debits arising in respect of the note would be apportionable to the tax advantage main purpose, on a just and reasonable basis, and therefore the Appellant would be entitled to succeed in its appeal. However, I should reiterate that this conclusion has no bearing on the reasoning or conclusion set out in paragraph 120 above, which relate to a quite different factual scenario.

POSTSCRIPT

125. Whilst I have concluded that the appeal should be dismissed, I do have some sympathy for the Appellant, which was persuaded to enter into a structure that it believed, with good reason, had the apparent blessing of the Respondents, only to discover that that blessing was a mirage.

126. I accept that the Respondents' clearance in relation to the arbitrage regime did say expressly that it should not be regarded as a confirmation that no other anti-avoidance legislation could apply in relation to the structure. In that sense, the Appellant cannot allege that the Respondents are precluded on public law grounds from making the challenge which they have now made.

127. However, it will have been apparent to the Respondents from the substance of the Clearance Application, and, in particular, the description of the comparator transaction involving a CFC finance company and the Disclaimer, that one of OI Plc's purposes in implementing the structure was to ensure that, as a result of the debits arising in the UK Newco which became the Appellant, only a portion of the income arising as a result of the payment of interest by OI 2013 Inc under the $94m Promissory Note and the $46m Promissory Note should use up existing losses in the UK or give rise to a payment of UK corporation tax.

128. It follows that, in my view, if the Respondents had been intending at the time when they gave their clearance to mount a challenge to the structure on the basis that the interest deduction

in the Appellant which prevented a significant part of the relevant income from using up losses or giving rise to a payment of UK corporation tax fell within the ambit of Section 441 of the CTA 2009, then, notwithstanding the disclaimer at the end of the Respondents' clearance letter, it would have been misleading for the Respondents to have provided the clearance which they did.

129. I am satisfied that that was not the Respondents' view at the relevant time and that the present challenge has arisen as a result of a change in their view on the potential application to "tower structures" of Section 441 of the CTA 2009. However, I think that the Appellant can consider itself to be unfortunate in the way that things have turned out.

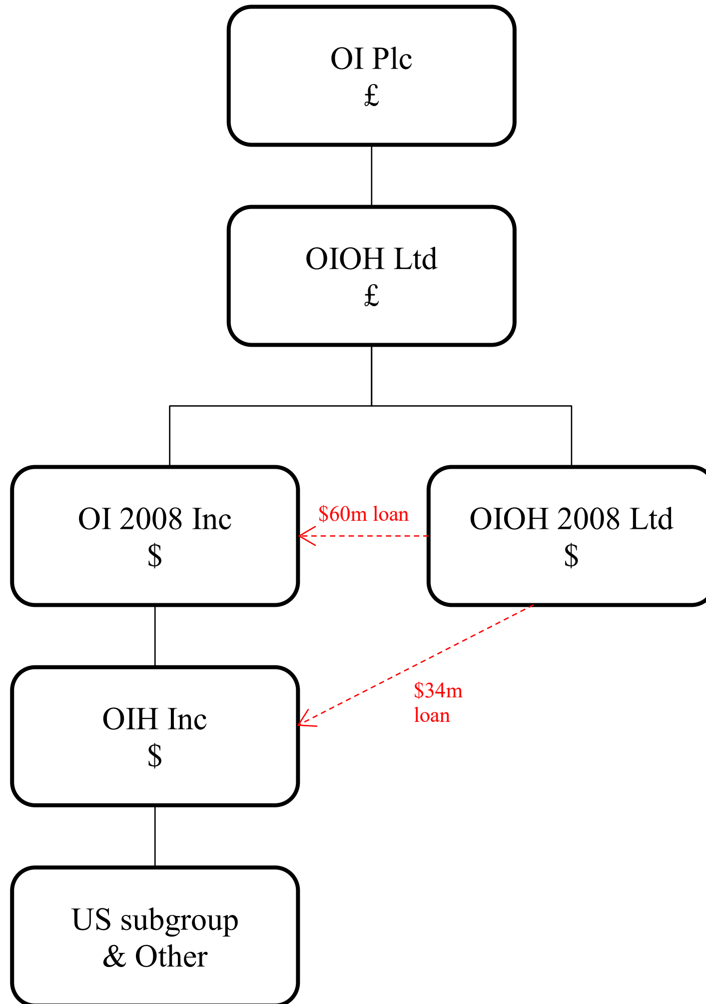
RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

TONY BEARE
TRIBUNAL JUDGE

RELEASE DATE: 13 APRIL 2019

Appendix 1



Appendix 2