

UNITED KINGDOM / JUDGMENT

Wilders v Revenue and Customs (INCOME TAX - share loss relief - whether circumstances of the investment gave rise to a loss within sections 131, 137 Income Tax Act 2007 (ITA) and section 17 Taxation of Chargeable Gains Act 1992 (TCGA) - was relief denied by and of the provisions of general or targeted anti avoidance provisions (sections 16A, 30 or 38 TCGA)) [2026] UKFTT 517 (TC) (01 April 2026)
[2026] UKFTT 517 (TC)

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Case Number: TC 09836

Appeal reference: TC/2022/14116

FIRST-TIER TRIBUNAL

TAX CHAMBER

London – Taylor House

Heard On: 10 – 13 March 2026

Judgment Date: 01 April 2026

B e f o r e :

TRIBUNAL JUDGE AMANDA BROWN KC

JOHN WOODMAN

Between:

SIMON WILDERS

Appellant

- and -

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Avient of Counsel instructed by Levy and Levy

For the Respondents: Ms Rebecca Sheldon of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

HTML VERSION OF DECISION

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INCOME TAX – share loss relief – whether circumstances of the investment gave rise to a loss within sections 131, 137 Income Tax Act 2007 (ITA) and section 17 Taxation of Chargeable Gains Act 1992 (TCGA) – yes – was relief denied by and of the provisions of general or targeted anti avoidance provisions (sections 16A, 30 or 38 TCGA) – yes – loss relief denied under either section 38 or section 16A TGCA

DECISION

Introduction

The appeal concerns a closure notice dated 16 February 2022 issued by HM Revenue & Customs (HMRC

) to Mr Simon Wilders (

Appellant

) removing the Appellant's claim for share loss relief (

Relief

) in the sum of £99,360 and thereby refusing a repayment claim of £48,117.40 for the tax year ended April 2011. The Relief was claimed in respect of an investment made in early 2011 in Shantaram Search and Verification Limited (

SSVL

), a company formed to participate in a marine salvage venture. The investment resulted in a loss following the failure to locate a specific shipwreck (

Wreck

).

The appeal has been identified as a lead case. There are other taxpayers with appeals stayed generally pending the outcome of this appeal. Some of those taxpayers were investors in SSVL. As we understand the position others invested in other entities relating to other searched but using the same investment model.

The Wreck to which the search related was that of the Merchant Royal (codenamed Shantaram) which was recorded to have sunk in 1641 and was believed to contain a valuable cargo. A previous search had recently been undertaken. Although that search did not locate the Wreck, it did identify a debris field on the seabed, including artefacts consistent with a vessel of the relevant period. That debris field was identified using a research file compiled by Odyssey Marine Exploration Inc (

OME

), a specialist marine exploration company.

The estimated value of the cargo, derived from historical records, was believed to be in the region of £400 million, albeit subject to acknowledged uncertainties and risks. Following the initial search, it was decided that a further, more extensive search should be undertaken. That second search was to be funded by admitting a new investor company into the existing joint venture which had been responsible for the initial search.

SSVL was incorporated for that purpose. Its role was to raise capital from investors and to contribute funds to the joint venture, alongside the existing participants, Shantaram Research Ltd (

SRL

) and Linbaba Marine Ltd (

LML

). The joint venture was structured so that, if the Wreck were located and the cargo successfully recovered or sold in situ, the net proceeds would be shared between the joint venture and other participants in agreed proportions, after deduction of costs.

In January 2011, SSVL issued an Information Memorandum (

IM

) setting out the proposed investment. The IM explained that SSVL intended to raise £7,992,000 through the issue of 9,250 ordinary shares of 1p each at a price of £864 per share. The funds were to be used primarily to enable the joint venture to procure specialist marine services to verify the debris field and to search for the remainder of the Wreck and its cargo (the material terms of the IM are discussed below at paragraphs 20 to 51).

As part of the investment structure, subscribers for shares in SSVL were offered the opportunity to fund part of the subscription price by way of loan finance. The IM explained that a loan facility of up to 75% of the subscription price would be made available to investors through Sterling Credit Guarantee Company Ltd (

SCGC

), subject to individual eligibility.

The Appellant was introduced to the investment opportunity by his advisors S4 Financial plc (S4

). He received a suitability letter (

Suitability Letter

) and the IM, and in January 2011 he agreed to subscribe for 115 shares in SSVL at a total subscription price of £99,360. Of that amount, £24,840 was to be paid from his own resources, with the balance of £74,520 to be funded by loan finance.

On 27 January 2011, the Appellant completed and signed the relevant subscription documentation, including a declaration as a high net worth individual, a letter of subscription for the shares, and an authorisation to solicitors to pay the cash element of the subscription and the loan arrangement fee. He also applied for, and was offered, a loan (

Loan

) from SCGC in the amount of £74,520.

The Loan was governed by an agreement under which SCGC agreed to lend 75% of the subscription price. It was secured by a charge over the shares and was supported by a guarantee given by Charlesworth Marine Ltd (

CML

). The Loan was repayable in specified circumstances, including after a period of 60 months or on the winding up of SSVL, subject to the contractual terms (the material terms of the Loan agreement are discussed below at paragraphs 52 - 59).

On 7 February 2011, the Appellant paid the cash element of the subscription price, to the solicitors acting in the transaction. The investment arrangements were completed on 10 March 2011, on which date a large number of interlocking agreements were executed.

The financing structure involved a series of connected loan and guarantee arrangements. SCGC made loans to the investors, including the Appellant. The funds for those loans were provided to SCGC by CML, which in turn was funded by a loan from Burgos Investments Ltd (

BIL

). Security was put in place at various levels, including charges over bank accounts, guarantees, and set-off arrangements.

In order to effect the physical search CML had entered into charter arrangements with Global Marine Search Ltd (

GMSL

), which in turn chartered the search vessel and equipment from OVH Inc (

OVH

). Under the Shantaram "A" Completion Agreement (

A Agreement

), GMSL and OVH both agreed to defer a substantial portion of their charter fees and instead to take an interest in the proceeds of any successful recovery (the relevant terms of the A Agreement are discussed below at paragraphs 71 - 86).

The search commenced in April 2011 and continued through the remainder of that year and into early 2012. OVH produced periodic reports detailing the progress of the search. Despite the extended search, the Wreck was not located. Following a final visit to inspect the remaining targets in February 2012, it was concluded that the funds having been exhausted it was not proposed or recommended that further capital be raised to continue the search.

As a result, SSVL's shares became worthless. The Appellant made a claim for relief in respect of the loss on his shares by way of an amendment to his self-assessment return for the tax year ended 5 April 2011. The amended return was submitted on 23 March 2012 on his behalf by S4 Taxation Services Ltd (we were not told the relationship between this company and S4 but consider it reasonable to infer there was some relationship). HMRC later disallowed the claim by way of the closure notice under appeal.

The basis on which HMRC disallowed the claim gives rise to five disputed issues between the parties:

- (1) Whether the sales were issued by way of an arm's length transaction and if not whether the subscription price was set at market value (

Value Issue – Section 17 Taxation Chargeable Gains Act 1992 (TGCA)

).

- (2) Whether the consideration paid for the subscription was given wholly and exclusively for the acquisition of the shares (

Acquisition Cost Issue – Section 38 TCGA

).

- (3) Whether a "scheme of arrangement" materially reduced the value of the shares and conferred a tax free benefit, justifying an adjustment to the disposal consideration (

Value Shifting Issue – Section 30 TCGA

).

- (4) Whether one of the main purposes of the arrangements was to secure a tax advantage (

Main Purpose Issue – Section 16A TCGA

).

- (5) Whether SSVL was engaged in a qualifying trade (

Trading Issue – Section 131 and 137 Income Tax Act 2007 (ITA)

).

Evidence

We were provided with a bundle of documents comprising 1442 pages included within which were witness statements from the Appellant, Colin Emson, Chairman of SSVL and Fiona Hotson-Moore who had been appointed by the Appellant as an expert witness to value his shares at the time of purchase.

Although not an overly document heavy appeal we nevertheless reminded the parties that in accordance with the guidance given by the court of appeal in

Swift & others v Fred Olsen Cruise Lines

[2016] EWCA Civ 785

at [15] and endorsed by the Upper Tribunal in

Adelekun v HMRC

[2020] UKUT 244 (TCC)

in which it was stated:

"... It cannot be assumed that just because a document appears in a hearing bundle that the tribunal panel will take account of it; if a party wants the tribunal to consider a document then the party should specifically refer the tribunal to it in the course of the hearing (see

Swift & others v Fred Olsen Cruise Lines

[2016] EWCA Civ 785

at [15]). This is not least to give the tribunal adequate opportunity to consider and evaluate the document in the light of the reliance a party seeks to place on it, but also to give the other party the opportunity to make their representations on the document. "

Documentary evidence

Our attention was drawn to comparatively few documents.

IM

We provide a review of the IM first by providing a general overview of it and then by considering the following topics covered by it: (1) the project to be funded; (2) the business plan, financing for the project, and costings; (3) estimated returns to subscribers and how they were determined; (4) risks and potential for loss; (5) tax implications for subscribers; and (6) regulatory status of the investment.

The IM was dated January 2011 and was issued by SSVL. Its stated purpose was to invite subscriptions for ordinary shares in SSVL in order to fund participation in a marine search project directed at locating and verifying the Wreck.

The structure of the IM is that of a conventional private placement or investment promotion document. It begins with a summary of the offer, including the amount sought to be raised, the price per share, the identity of the Company and its joint venture partners, and a high-level description of the project. This is followed by corporate information, including details of directors, advisers, registrars and the Company's registered office. A definitions section is included to establish consistent terminology. Included within the list of directors were Colin Emson, Nicholas Pilbrow and Gabriel Ruhan. Mr Pilbrow's expertise is noted as in international taxation. Mr Ruhan is noted as a shipwreck search specialist.

A substantial portion of the document is devoted to describing the historic background to the Wreck, drawing on archival material from English, Spanish and other European sources. This material appeared intended to support the proposition that the Wreck would be found and that it carried a valuable cargo of silver, gold and jewels, and that the cargo was privately owned rather than subject to sovereign immunity.

The IM also summarised the proposed structure of the joint venture, the contracts to be entered into for search and verification, the technical methodology to be employed, and the phased approach to the project from research through to recovery and sale. Schedules provide budgetary information, vessel specifications, risk factors, and legal and regulatory considerations. The document concludes with subscription procedures, forms, and declarations required from prospective subscribers, including a certified high net worth individual statement.

The project to be funded

The IM identifies the three principal components of a shipwreck search as (1) the research file representing the review of historical files and practical knowledge; (2) the search box i.e. an area identified through research where the shipwreck was expected to lie; and (3) the search vessel.

The Wreck was described as a 17th-century armed merchant vessel which was said to have been lost in the Western Approaches or Western English Channel while carrying a substantial cargo of bullion and valuables. The IM explains that because the ship under investigation was a merchant vessel, rather than a warship, it was considered that it was not considered to be subject to sovereign immunity and thus there was no legal precedent for refusal of salvage. It acknowledged that legal claims to ownership may be lodged but expressed the view that even subject to such claims up to 90% of the value of the cargo may be awarded to the salvor.

The IM sets out a summary of the research file which had been compiled by OME. Detail of the historical records as to location and value of the cargo is provided. The historical records are unsurprisingly not entirely consistent.

According to the IM, SRL and LML had already conducted preliminary research and remote-sensing surveys and had identified a site containing cannon and debris consistent with a merchant vessel of the relevant period. Through this process a search box known as Site 30E was identified as possessing the features anticipated for potentially finding the Wreck and which demanded further study "for positive or negative identification". Pursuant to the initial phase the IM reports that within Site 30 there were scattered remains of a "probable armed merchant vessel wrecked in the same period as the Wreck and within the parameters of location consistent with the historical records as to where the Wreck had sunk. This was described as "extremely important" and justified a view that there was a high degree of historical probability that the wreckage identified was likely to be English. Whilst noting that there were material uncertainties it was considered "on the basis of current evidence, Site 30E remains a compelling candidate for part of" the Wreck.

The funded project was to carry out further analysis and verification of that site, with the objective of locating the main hull and cargo. The immediate phase to be funded was a Search and Verification Contract, under which specialist contractors would conduct geophysical surveys, visual inspections and analysis over an estimated period of up to 99 days. This phase was presented as a necessary precursor to any recovery operation and as the point at which the location and identity of the Wreck, if found, could be reasonably confirmed or excluded. The

plan involved recovery of some of the artefacts identified from the debris trail for verification as to relationship to the Wreck; make further searches to map the debris and follow any debris trail; use technology to identify if the hull was hidden under sand waves on the seabed; and carry out further searches within an additional 100 square mile area following analysis of the previous information.

If the Wreck were confirmed as the Shantaram, the project contemplated subsequent phases, including legal processes to establish salvage rights and ownership, followed by archaeological recovery, conservation and sale of artefacts and cargo. These later phases were acknowledged to require additional funding beyond that raised under the IM.

The business plan, financing for the project, and costings

The business plan set out in the IM centres on raising equity capital to fund the SSVL's contribution to the joint venture for the search and verification phase of the project. The proposal was to raise up to £7,992,000 through the issue of 9,250 ordinary shares of 1p each at a subscription price of £864 per share. Upon full subscription, subscribers would hold 92.5% of the SSVL's issued share capital, with the remaining 7.5% retained by founding shareholders.

The capital raised was to be applied primarily to the Search and Verification Contract. A budget was provided, showing an aggregate projected cost of £7,472,750 for the search operation itself. This budget included mobilisation, vessel transit, operational days, specialist technology days, weather contingency, port calls, equipment, conservation transport, project management and specialist equipment use. The estimated operational period was 99 days, excluding certain transit periods, with daily rates specified for different categories of activity.

In addition to the search costs, allowances were made for capital raising and project assembly costs, legal costs, and a small residual balance to remain within SSVL as working capital. The IM discloses the availability of a loan facility from SCGC of up to £5,994,000, intended to provide "Available Finance" alongside the equity subscriptions, such financing for use either directly by SSVL or to subscribers.

The business plan acknowledges that, if the Wreck were identified and recovery pursued, further substantial expenditure would be required. These additional project costs would include legal proceedings to establish salvage rights and ownership, archaeological recovery operations, conservation, storage, transportation, insurance, security and marketing of recovered items. The IM states that such costs might be funded by borrowing against anticipated recovery value, by asset sales, or by further equity arrangements, but no firm financing structure is fixed for those later phases.

The plan therefore envisages a staged approach, with subscriber funds applied only to the initial search and verification phase, and any decision to proceed further taken in light of the results of that phase and the availability of additional finance.

Estimated returns to subscribers and how they were determined

The IM is explicit that no formal forecast of returns could be given. Nevertheless, it provides illustrative estimates of potential returns in order to indicate the scale of upside contemplated by the promoters. These estimates were said to be derived from historical research into the likely cargo of the Shantaram and from assumptions about the division of proceeds within the joint venture.

The document states that, based on archival material, the cargo and artefacts could have had an original value in excess of £400 million in modern terms, depending on condition, composition and market circumstances. This figure appears to be derived from historical valuations of silver, gold and jewels reportedly carried by the vessel, converted to contemporary values by reference to bullion prices and comparative metrics.

The IM then sets out an illustrative allocation of proceeds. It suggests that the joint venture's share of recoverable value could exceed £137 million. Of that sum, the SSVL's share, divided in proportion to joint venture capital contributions, is stated to be in excess of £47 million. After deducting costs of search, recovery, realisation and corporation tax, funds available to shareholders are illustrated as being approximately £34.7 million.

These figures are not presented as predictions but as scenarios contingent on a series of assumptions: successful identification of the Wreck; recovery of cargo in commercially saleable condition; favourable legal outcomes in relation to ownership and salvage rights; controlled marketing of artefacts to avoid depressing prices; and cost containment within budgeted levels.

The IM also outlines potential exit strategies, including sale of cargo through auction houses or dealers, sale of artefacts through specialist channels, or other forms of realisation. It notes that realisation could take a significant period of time to maintain a controlled market. The estimated returns are therefore presented as highly sensitive to factual, legal, market and operational variables, and the document cautions that subscribers could receive substantially less than the illustrative figures or nothing at all.

Risks and potential for loss

The Memorandum contains an extensive risk section emphasising that the investment is speculative and of high risk. It states plainly that subscribers may lose the entirety of their investment. The risks identified span operational, legal, financial, regulatory and market domains.

Operationally, the search and recovery of deep-sea shipwrecks is described as inherently difficult and hazardous. Weather, sea conditions, equipment failure and unforeseen seabed conditions are identified as giving rise to delay or preventing operations altogether. The material risk that the Wreck may not be found, may already have been salvaged, or may not be the Shantaram is identified. Further, it is highlighted that even if a wreck, either the Shantaram or any other vessel, was found, it may not contain valuable cargo, or the cargo may be degraded beyond

commercial value.

Legally, the Memorandum highlights the possibility of competing ownership or salvage claims by governments or private parties, particularly if the Wreck lies in UK territorial waters. Regulatory intervention was stated to have the potential to prevent recovery, export or sale of artefacts. It was also noted that laws and regulations may change, and political or governmental interference could halt the project.

Financial risks identified include lack of control by SSVL over key contractors, absence of any established market for the shares, currency fluctuation risk, and the possibility that recovery costs exceed the value of recovered items. Further, that additional funding required for later phases may not be available on acceptable terms.

The research underpinning the project is itself identified as a risk. Historical and archival data relating to shipwrecks are identified as potentially being incomplete, inaccurate and based on assumptions, legends or misinterpretations. Investors are reminded that reliance on such data may therefore be misplaced.

The IM stresses that the list of risks is not exhaustive and is not presented in any order of priority.

Tax implications for subscribers

The IM includes a discrete section addressing taxation, while emphasising that it does not constitute tax advice and that subscribers should seek independent professional advice.

At the SSVL level, it is stated that SSVL will pay full United Kingdom corporation tax on trading profits arising from the project. It was recognised that if SSVL were to incur losses, no group relief or other loss relief would be available.

For individual subscribers resident in the United Kingdom, the IM states that any gain arising on the disposal or other realisation of their shares would be subject to capital gains tax at the prevailing rate, which at the time of the IM was stated as 28%. Losses arising on disposal or realisation of the shares were identified as constituting capital losses for taxation purposes which could be set against capital gains or income, subject to applicable tax rules. It does not explicitly indicate any form of tax sheltering or preferential treatment. The tax position is presented as conventional, with returns taxed in accordance with general UK tax principles applicable at the relevant time. Subscribers are expressly warned that tax treatment depends on individual circumstances and may change.

Regulatory status of the investment

The IM makes clear that the investment was promoted as an unregulated financial promotion. It states prominently that the content of the promotion had not been approved by an authorised person within the meaning of the Financial Services and Markets Act 2000.

The offer was restricted to individuals certified as high-net-worth individuals under the Financial Services and Markets Act 2000 (Financial Promotion) Order 2005. Subscribers were required to sign a statutory declaration confirming their status and acknowledging that they may lose significant rights, including rights to complain to the Financial Services Authority or the Financial Ombudsman Service, and rights to compensation under the Financial Services Compensation Scheme.

Loan documentation

The loan documentation comprises a specimen letter setting out principal terms, a loan application form, and a formal loan agreement between SCGC and the borrower.

The stated purpose of the Loan is to fund up to 75% of the borrower's subscription price for shares in the Company. The loan amount is defined by reference to the subscription and is advanced in a single instalment following satisfaction of specified conditions precedent. Drawdown is conditional upon delivery of agreed security and confirmation from the SSVL's solicitors that full subscription monies have been received in accordance with the information memorandum, considering the borrowing from SCGC.

The documentation identifies two forms of security. First, the borrower grants a first legal charge over the entirety of the shares acquired in the SSVL. Secondly, a guarantee of repayment is provided by CML, described as a founder shareholder of SSVL. The specimen terms state that the loan is "with full recourse to yourself as the borrower", although the detailed agreement qualifies enforcement rights in a number of respects. A fee, described as a documentation and guarantee fee, is payable to SCGC on drawdown, calculated as a percentage of the loan amount.

Interest accrues over the life of the loan and is expressed not as a fixed rate on principal but as an amount calculated by reference to 10% of any gain realised by the borrower on a sale or other realisation of the charged shares. Principal and accrued interest are contractually repayable 60 months from drawdown, subject to earlier repayment mechanisms linked to realisation events.

The agreement contains provisions governing the application of proceeds. If the borrower sells any shares while the loan remains outstanding, the proceeds must be paid directly to SCGC and applied in repayment of the loan. In the event of a winding up of SSVL, the borrower irrevocably instructs SSVL or any liquidator to pay to SCGC any monies otherwise due to the borrower, for application towards repayment. These mechanisms operate through the terms of the charge.

The lender's enforcement rights are structured. SCGC agrees that it will not enforce its rights against the borrower under the loan agreement or the charge unless and until it has first called upon the guarantor to make payment under the guarantee. Before calling for repayment from the borrower, SCGC must give 30 days' notice, during which the borrower may nominate a third party to acquire SCGC's rights under the agreement. If such nomination is made, the agreement provides for novation of the lender's rights for consideration calculated by reference to the market value of remaining shares or a minimum sum of £1000.

The borrower gives representations and warranties as to legal capacity and enforceability of obligations, subject to the enforcement sequencing provisions. Ongoing undertakings restrict disposal of the shares other than on terms requiring proceeds to be applied in repayment. Further undertakings require the borrower to exercise shareholder voting rights so as to procure the appointment and retention of directors nominated by SCGC while any part of the loan remains outstanding.

The agreement includes standard provisions as to payment without set-off, waiver, severability, execution in counterparts, and is governed by the law of England and Wales with exclusive jurisdiction of the English courts.

Suitability Letter

The Suitability Letter dated 19 May 2010, records advice given to the Appellant in relation to an investment in SSVL. The assessment of suitability is expressly based on the Appellant's status as a certified high net worth individual, with the stated premise that such status confers both an understanding of, and capacity to absorb, the risks of a highly speculative venture.

The letter outlines the commercial background of the project by reference to the experience and track record of OME, described as a leading operator in deep sea shipwreck exploration and recovery. It recounts a series of past discoveries and recoveries of significant monetary and historical value, together with anticipated media involvement. The historical background of the Merchant Royal is summarised, including estimates of the scale and potential value of its cargo. Prior search activity is described, alongside scientific uncertainty as to identification of a particular site, which is said to justify further verification work.

There is some hyperbole in the letter's description of the project including a statement the investors having an "opportunity to participate in something that has the potential to make history which will be covered at all times by the television team from the Discovery Channel".

The project was said to be managed by Robert Fraser Marine Ltd

(RFML

) a subsidiary of Robert Fraser Asset Management (

RFAM

). These organisations share common directors with CML, GMSL and SSVL. RFML said to have and provide expertise and finance in the location and recovery of historical shipwrecks. We understand this expertise to be a reference to Gabriel Ruhan.

The investment opportunity is presented as participation in a defined programme of verification and search operations, expected to commence in March 2011 and last approximately 99 days. The Appellant was invited to acquire shares in SSVL, whose stated purpose was to carry out the activities described in the IM. The potential gross value of any recovered cargo was estimated to be substantial, subject to condition, recovery and marketing. The letter repeatedly characterises

the investment as speculative, while also emphasising the scale of potential upside if the project proved successful. It stated that a potential return on initial cash invested of 809% could be achieved within 9 months.

The recommended investment was £99,360, structured through a combination of personal funds and borrowing. The Appellant's direct cash contribution would be £24,840 (plus fees), with the balance funded by the Loan of £74,520. The use of gearing was presented as a means of obtaining enhanced exposure to the potential profitability of the project. Illustrative projections were included, showing that, if successful, the investment could yield a significant return relative to the Appellant's cash contribution within a relatively short timeframe, while also stating that the value realised could be lower or nil.

Any return was anticipated to arise from the successful completion of the project and the realisation of value, rather than from ongoing trading receipts. Liquidity risk was highlighted, with no established market for the shares, and the Appellant was warned that he may be unable to dispose of his holding. It is also explained that, if the Wreck is found, additional funding may be required to meet legal, archaeological, recovery, conservation, transportation, storage and sale costs, with such funding potentially raised through borrowing against anticipated value or, subject to shareholder approval, by seeking further equity contributions.

Tax treatment is addressed in a distinct and substantive section of the letter. It states that the investment is designed to make a profit and that, if profitable, SSVL would be subject to corporation tax, with the Appellant subject to capital gains tax on any profits realised on disposal of his shares. It is further stated that it is not the intention of SSVL to pay dividends, but that, if dividends were paid, they would be subject to income tax in the normal way.

The letter also addresses the tax consequences in the event that the investment was unsuccessful. It explained that, if the project did not generate a profit, the Appellant may become eligible to claim capital losses. Those losses were described as potentially capable of being offset either against current or future capital gains or, alternatively, set against income of the current or prior year of assessment. Reference is made to the possibility of relief being available under cessation of trade rules for close companies, subject to the investor having paid sufficient tax in the relevant periods. The letter expressly notes that tax treatment depends on prevailing legislation and practice, that rates and rules are subject to change, and that HMRC may not approve a claim at any stage.

The loan arrangements are summarised as forming part of the overall investment structure. The Loan is described as full recourse to the individual borrower, but secured against the shares and supported by a guarantee from CML. The letter explains that, although the bank would have no recourse to the investor's personal assets beyond the investment vehicle, the debt would remain outstanding and could pass to the guarantor if the project were unsuccessful. It is also noted that variations to the Loan might be considered under a deed of novation.

The letter concludes by emphasising the speculative nature of the venture, the specific operational risks associated with locating and recovering the wreck, and the importance of reading the IM in full. Suitability was framed in terms of the investor's high net worth status, risk tolerance and capacity to bear loss, with express reference to both the potential for significant commercial returns and the availability, in certain circumstances, of tax reliefs if the investment does not succeed.

A Agreement

This agreement is a consolidation and participation agreement entered into between CML, OME, OVH, GMSL, Robert Fraser and Partners LLP and RFAM. It is executed against the background of earlier contractual arrangements relating to the search for, recovery and potential exploitation of the Wreck.

A central feature of the agreement is the variation of the effective price payable under earlier contracts so as to introduce a significant contingent element. In particular, the agreement records that CML had entered into an agreement with OME for the acquisition of the research file and confidential information relating to the Wreck for a total stated consideration of £6.5 million. Of that sum, only £99,151 was payable on contract and £1 million within 30 days, with the substantial balance of £5,400,849 expressly payable only out of any proceeds of sale or other realisation of the cargo recovered from the Wreck.

The agreement also operates to align and consolidate the interests of the various participants by setting out a single scheme for the recovery of costs and the distribution of proceeds. Recovery costs, defined broadly to include inspection, recovery, storage, security, cleaning, cataloguing, marketing and sale costs, are to be recouped in priority by the party that has funded them from 100% of the first proceeds arising from any sale or realisation of the cargo. Only after those costs had been fully recouped did the agreement contemplate the creation of "Net Proceeds of Sale".

Following total recoupment, the Net Proceeds of Sale were to be distributed between the parties in agreed proportions, with CML receiving 40%, OVH 35%, OEM 15% and Robert Fraser and Partners 10%. The agreement therefore replaced any fixed or unconditional payment obligations with an allocation of upside linked directly to the success of the venture.

RFAM is appointed to administer the agreement. It is responsible for opening and operating a collection account, receiving all sale proceeds, settling recovery costs and making distributions in accordance with the agreed waterfall. The agreement contains provisions for audit, tax mitigation, confidentiality, termination and governing law, and makes clear that, in the event of any inconsistency between apportionments under this agreement and any other agreement between the parties, this agreement prevails.

Overall, the agreement provides a comprehensive framework which restructures earlier arrangements so that the price and returns payable to the parties are substantially contingent on the recovery and successful monetisation of the Shantaram cargo, rather than being fixed obligations payable irrespective of outcome.

Witness evidence

Each of the witnesses served witness statements pursuant to directions that their statements stand as their evidence. After being sworn each witness was cross examined and re-examined. Mr Emson was asked some initial clarificatory questions. We accept that each of the witnesses gave evidence as they honestly believed the position to be. However, we do not accept all of their evidence. We explain where evidence has not been accepted and why in our findings of fact.

Simon Wilders

The Appellant accepted that he is a highly educated and experienced professional with a long career in senior roles within the information technology sector. By 2011 he was employed as a senior business development executive at Cisco Systems Limited. His role involved responsibility for business plans, revenue targets, and the coordination of complex commercial relationships.

In 2011, the Appellant and his wife had personal wealth of circa £1.5m, at that time they were renting property. Mr Wilders' income in that year was approximately £184,000. He accepted that he had significant income against which losses could be set. His expenditure commitments at the time were also substantial, including the purchase of a new home and school fees for his children.

Since around 2000, the Appellant had used financial advisers to source and assess investment opportunities. By 2010–2011 he was advised by S4, who would periodically bring investment proposals to his attention. His portfolio included conventional investments, such as funds held within a SIPP, and a smaller number of more specialised investments. Some of those specialist investments involved tax reliefs. He had previously participated in film partnership investments which involved loan funding and tax deferral or relief. In those arrangements, he understood the loans to be guaranteed and accepted that the presence of guaranteed loans could be indicative of tax planning. He regarded such guarantees as important in protecting him from unforeseen liabilities.

Against that background, the investment in SSVL was introduced to him by S4, in late 2010 or early 2011. The Appellant's recollection of the detailed sequence of events was limited, but he accepted that matters moved quickly once he expressed interest. He relied heavily on the documentation provided, in particular the suitability letter and the IM, both of which he said he read carefully, although he accepted that he did not read every word of every document and relied on his adviser's explanations.

The Appellant understood the proposal to be an investment in a second search for the Wreck. He said that the IM described how an earlier search had identified artefacts, including cannons, within a defined search cell (Site 30E), and that this materially narrowed the likely location of the Wreck. He was impressed by the involvement of OME, which he understood to be an experienced and reputable operator with a strong track record in locating historic wrecks. He did not undertake independent research into OME, its experts, or the underlying archaeology or marine science, but accepted that he relied on the IM and the professional reputation presented there.

The Appellant consistently maintained, both in his witness statement and in oral evidence, that he believed there was a good prospect of success. He described his assessment as a "more than 50%" chance that the Wreck would be found. That belief was not based on technical expertise, but on what he regarded as a compelling combination of physical evidence (notably the artefacts already found, particularly the cannons), the methodology described in the IM, and the experience of the search company. He accepted that the documentation repeatedly described the venture as speculative and high risk but said that he regarded such statements as worst-case disclosures rather than a reason to doubt the overall prospects. He did not consider inconsistencies in the historical sources or estimates of cargo value to be decisive and said that the overall picture conveyed by multiple sources was that the vessel carried cargo of very substantial value.

It was accepted that tax considerations formed part of his thinking in 2011 when assessing investments. He was aware that, if the search failed, a capital loss might arise which could potentially be relieved against income. He also understood that the loss would be calculated by reference to the gross subscription price, including the loan-funded element. However, he denied that the primary or main purpose of entering into the investment was to obtain tax relief. He repeatedly stated that he invested because the project was interesting and exciting, with the potential for an exceptionally large commercial return if successful. He described the prospect of an estimated 809% return as attractive, while acknowledging that it depended on a series of contingencies.

The structure of the investment involved a subscription for shares costing £99,360, of which approximately £25,000 was paid from Mr Wilders' own funds and the balance funded by a loan. The Appellant said that the loan element was important to him only because he understood it to be fully secured. His consistent evidence was that he believed, at the time of investment, that he would never be required to repay the loan from his own resources. That understanding was influenced by his experience of earlier film investments, in which guaranteed loans had never resulted in personal liability. He accepted that the suitability letter contained references to novation but said that this was not explained to him in a way that caused him to appreciate that the loan might later become his responsibility.

Following the failure of the search, the Appellant was informed that SSVL's resources were exhausted and that no further capital would be raised. He described this outcome as disappointing, given the scale of the potential upside he had anticipated. He left the handling of the resulting tax position to S4. Claims were made for negligible value relief and for the loss to be set against income. Those claims were subsequently challenged and ultimately disallowed by HMRC, leading to the present appeal.

Sometime after the failure of the search, the Appellant was advised that the loan should be novated to his wife. He said that this came as a surprise. He and his wife signed the deed of novation and paid a fee to "close things down". He accepted that, following novation, his wife could enforce the loan against him, although the loan has not been called in and remains outstanding. He rejected the suggestion that there was never any real expectation of repayment, stating that he regarded the obligation as genuine and intended to repay it in due course.

Throughout cross-examination, the Appellant was challenged on whether, given his experience and the repeated warnings in the documentation, he could genuinely have believed that the investment was commercially viable. It was put to him that the lack of a formal profit forecast, the uncertainty as to location, cargo, ownership, and recovery costs, and the limited extent of the search undertaken all pointed away from a genuine commercial venture. The Appellant did not accept that characterisation. He maintained that, viewed as a funded first-phase but follow on search with a defined scope, the investment was commercially rational, albeit high risk. He rejected the proposition that the subject matter of the investment was irrelevant to him or that the arrangement had no real purpose beyond generating tax losses. It was, however, accepted that the Appellant did not understand there to be any real downside risk: the investment would be profitable or would generate tax losses in excess of his cash investment.

Colin Emson

Mr Colin Emson's evidence was directed primarily to the conception, design and operation of the SSVL investment, including the commercial rationale for the wreck-search business model, the financing and loan structure, the role of research files, and the expectations as to profitability and risk. He was not presented as a specialist in shipwreck salvage or taxation but as a commercial finance professional and architect of the investment structure.

Mr Emson's background evidence emphasised his long experience in commercial loans, corporate finance and shipping-related ventures. He explained that the Robert Fraser Group had become involved in wreck searches after observing that traditional wreck-search companies often failed because of the high upfront and ongoing costs of vessels and the low frequency of successful finds. The core problem, as he described it, was how to design a structure that would allow high-risk capital to be raised while avoiding what he termed the "corporate graveyard" of insolvent search companies. The solution, in his evidence, was a hybrid model in which vessel owners agreed to forego part of their charter remuneration in return for a participation in the proceeds of a successful find, while investors assumed a significant share of the risk.

As to the Shantaram project specifically, Mr Emson said that it followed an earlier unsuccessful search undertaken by related entities, in which a partial wreck and a debris trail had been located. On that basis, it was considered commercially justifiable to incorporate SSVL to fund further verification and an expanded search area. He described the objective of SSVL as verifying whether the wreck already identified was the Wreck. If the Wreck was found there would be further phases to follow in order to recover the cargo but those investing in the search phase would derive significant value from a find. He accepted that the search was speculative and high risk but maintained that this was inherent in wreck searching generally and was made clear to investors.

A central theme of Mr Emson's evidence was his view as to the commerciality of the enterprise. He maintained that searches were only pursued where an independently verified research file suggested that the value of the cargo was at least five times the anticipated cost of the search. He said that some research files had been rejected on that basis and that, in the Shantaram case, the estimated value of the cargo (said to be in excess of £400 million) comfortably exceeded that threshold. In cross-examination, he accepted that the estimates were uncertain and illustrative, that no formal forecast was provided, and that there were numerous uncertainties as to whether the wreck existed, whether the cargo was intact, and whether it could be economically recovered. He nevertheless maintained that, at the relevant time, he and others genuinely believed there was a strong or at least realistic prospect of success.

Mr Emson also considered that what he considered to be the commerciality of the model used had been justified in a separate venture which had found the Enigma established to have on board a valuable cargo. This was so despite his acceptance that none of the investors in that model had yet received any financial benefit from the find because the ownership of the cargo is the subject of a series of legal disputes.

Mr Emson was questioned closely about the absence of legal advice in advance of the search concerning ownership of any recovered cargo. He accepted that multiple jurisdictions might potentially assert claims and that no such advice had been taken. His explanation was that taking comprehensive legal advice in advance would have been prohibitively expensive and, in any event, largely theoretical until a wreck and cargo were actually located. He said that in wreck-search practice, ownership issues were typically addressed after recovery, often through the Receiver of Wrecks, and that disputes were common even where searches were conducted in international waters. He rejected the suggestion that the absence of early legal advice indicated that no recovery was genuinely expected.

In relation to the IM, Mr Emson accepted that it repeatedly described the project as speculative and high risk and that it set out numerous uncertainties. He accepted that the IM did not guarantee success and that the figures used were illustrative. He nonetheless stood by statements in the IM and in his witness statement suggesting that there was a "strong possibility" of success, explaining that these reflected the contemporaneous belief based on the research file and prior search results, rather than certainty.

A substantial part of the cross-examination focused on the financing and loan structure. Mr Emson accepted that the main purpose of the financing was to attract investors and that gearing was used to make the investment more attractive. He described gearing as a normal commercial technique and rejected the characterisation of the structure as artificial. He considered the gearing to be particularly important in the context of having a structure with sufficient value to justify the commerciality of the arrangement fees needed to promote the investment. He maintained that the loans advanced to investors formed part of the true capital at risk, because they were, as a matter of contract, fully repayable in all circumstances and on commercial terms. He emphasised repeatedly that the tax relief available to investors on an unsuccessful search would, in his view, be materially less than the investors' total exposure when the loan obligations were also considered.

When taken to the practical operation of the loan arrangements, Mr Emson accepted that the loan monies were not paid into investors' personal bank accounts but were applied directly towards their share subscriptions. He accepted that, following the failure of the search, investors were entitled to nominate a third party to take an assignment or novation of the lender's rights for consideration of £1,000 or the value of the shares if higher. He accepted that, so far as he was aware, all, possibly bar one, investors exercised that right and that there was no evidence in the bundle of any investor having repaid the loans in full. He nevertheless maintained that the loans remained legally enforceable and that the ability to novate did not negate the existence of a genuine repayment obligation. He gave an example, not evidenced in the bundle, of a case in which a novated loan was being pursued following a divorce.

Mr Emson was challenged on whether the novation mechanism meant that there was never a real expectation that the loans would be repaid. He rejected that proposition, maintaining that the contractual terms governed the position and that commercial reality required the structure to be assessed by reference to those terms. He accepted, however, that the ability to novate was included from the outset and that it formed part of what made the investment attractive to investors. He considered that it was reasonable for CML to have agreed the terms of the guarantee such that it would lose the right to recover the guaranteed sums were the loans novated because that term was agreed up front and in the anticipation that the search would be successful such that the imperative was to obtain the funding to undertake the search.

On the conduct of the search itself, Mr Emson accepted that only a limited proportion of the designated search area was surveyed and that the cannons and other artefacts identified did not conclusively prove the identity of the Wreck. He accepted that statements in reports suggesting that additional days of searching demonstrated "genuine commercial effort and intent" were oddly phrased and that an additional seven days of searching did not, of itself, prove commerciality. He nevertheless maintained that a real search was carried out, with specialist vessels and equipment, at substantial cost, and that the decision not to continue beyond April 2012 reflected the exhaustion of funds and a commercial judgment that further expenditure was not justified.

Throughout his evidence, Mr Emson consistently rejected the suggestion that the Shantaram project, or the wider Robert Fraser wreck-search business, was carried on other than as a genuine commercial venture with a view to profit. He explained that careful consideration had been given to each search funded through this model. He said that at least one opportunity had not been pursued because the risk and potential reward equation did not, in his view, justify it only subsequently for there to have been a valuable find. He also explained that in respect of further fund raising associated with Enigma he had formed the view that the prospects of establishing ownership did not justify further fund raising but contrary to his view the investors had agreed to make further contributions.

Mr Emson accepted that tax consequences were considered and disclosed, and that the availability of loss relief was an intended and sensible feature of the structure if the search failed. He denied, however, that the generation of tax losses was the main purpose of the enterprise, maintaining that tax outcomes followed from, rather than drove, the commercial decisions taken.

Expert witness – Fiona Hotson Moore

Ms Fiona Hotson Moore gave evidence as an expert witness instructed on behalf of the Appellant. Her instructions were to opine on (i) the market value of the shares in SSVL at the date of subscription and (ii) whether, if different, the "value" of those shares for the purposes raised by HMRC in their statement of case. Her analysis proceeded on the basis of the International Valuation Standards 2011 ("

IVS 2011

"). She emphasised, both in her report and in oral evidence, that her conclusions depended upon the completeness and accuracy of the information supplied to her, principally the witness statement of the Appellant and the IM. She did not undertake any independent verification of figures or assumptions and was explicit that inaccuracies or omissions in the source material might affect her conclusions.

In her report, Ms Hotson Moore concluded that the market value of the shares at subscription was the subscription price, £864 per share. She reasoned that the transaction involved a willing buyer and a willing seller acting at arm's length, after proper marketing, and that the parties acted knowledgeably and prudently within the meaning of IVS 2011. She rejected HMRC's contention that the absence of an existing business, the speculative nature of the venture, or the lack of a secondary market rendered the shares valueless at acquisition. In her view, speculative start-up ventures may have value derived from expected future returns, assessed by investors against perceived risk.

Central to her reasoning was the income approach, albeit applied in a limited way. She accepted that she had not carried out her own discounted cash flow analysis and had not generated independent projections. Rather, she relied on the illustrative projections contained in the IM

and on the description in the Appellant's witness statement of the basis upon which he decided to invest. She considered that, of the three standard valuation approaches recognised by IVS 2011, the market and cost approaches were inapplicable, leaving the income approach as the only potentially relevant methodology. However, she acknowledged that her use of that approach was confined to reviewing, at a numerical level, the projections provided, without assessing their realism or probability.

In cross-examination, Ms Hotson Moore accepted a series of propositions directed to the assumptions underlying her opinion. She agreed that if key figures in the IM were inaccurate or incomplete, this could affect her conclusions. She confirmed that she had no expertise in shipwreck recovery or in valuing recovered maritime assets, and that she was not qualified to assess the likelihood of success of the search, the existence of the wreck or cargo, or the accuracy of estimated costs of search, recovery and sale. Her report assumed, rather than tested, statements in the IM and in the Appellant's witness statement that there was a "good" or "very good" chance of locating the wreck and cargo, and that OME had a strong track record.

She accepted that the estimated potential cargo value of £400 million was a critical input. She agreed that a reduction in that estimate would reduce anticipated returns, although she maintained that it would not necessarily, of itself, negate her conclusion on market value. She accepted that if the true value were nil, that would influence her assessment. She also accepted that the IM expressly acknowledged the possibility that the Wreck might not exist, that the cargo might never have been loaded, or that it might have been removed, in which circumstances the chance of recovery would be zero. Her report treated those scenarios as part of the overall risk profile of the venture, rather than as distinct possibilities requiring separate valuation treatment.

Ms Hotson Moore further accepted that she did not analyse all categories of cost referred to in the IM. In particular, she confirmed that, in addressing the effect of costs on market value, she focused on capital raising and project assembly costs and legal costs identified in the IM, and did not independently analyse the larger search, recovery and sale costs set out elsewhere. She accepted that her conclusion assumed there were no other significant relevant costs beyond those she identified and that she had no expertise to assess whether the stated costs were realistic.

A substantial part of the cross-examination concerned the loan facility available to investors and its relevance to market value. Ms Hotson Moore maintained that, under the IVS 2011 definition of market value, the manner of financing is excluded from the assessment. She relied on paragraph 31(a) of IVS 2011, which excludes prices inflated or deflated by atypical financing. She interpreted this as requiring the valuer to ignore financing arrangements altogether when determining market value. She accepted that she did not analyse whether the loan facility constituted "atypical financing" in market terms, nor did she strip out any value attributable to the loan or its risk-mitigating features. She accepted that she did not know the detailed facts of how the loans operated in practice, whether loan monies were ever repaid, or whether loan risk was in fact nil. Notwithstanding those uncertainties, she maintained that the existence or terms of the loan facility did not affect her market value conclusion.

HMRC challenged her analogy between the loan facility and consumer car finance. Ms Hotson Moore accepted that she did not have sufficient facts to determine whether the analogy was exact. She nevertheless maintained that financing arrangements, even if unusual, do not alter market value as defined by IVS 2011.

In relation to HMRC's alternative case under section 30 TCGA 1992 and the concept of "value" rather than market value, Ms Hotson Moore accepted that the legislation did not define the relevant basis of value. She proposed investment value as the closest IVS concept. She concluded that, on an investment value basis, the value of the shares to the Appellant equated to the subscription price being the price he was willing to pay on the basis of the information provided. She accepted, however, that she did not have sufficient information to quantify what the value would have been if the loan facility, its terms, or the fee arrangements had been removed. She further accepted that if the Appellant's primary motivation had been tax relief rather than participation in a commercial venture, that could be relevant to an assessment of value, but she stated that she could not comment on his motivation and had relied on his witness statement and the business plan.

Relevant legislation

Taxation of Chargeable Gains Act 1992:

"

Section 16A – Restrictions on allowable losses

- (1) For the purposes of this Act, 'allowable loss' does not include a loss accruing to a person if—
- (a) it accrues to the person directly or indirectly in consequence of, or otherwise in connection with, any arrangements, and
 - (b) the main purpose, or one of the main purposes, of the arrangements is to secure a tax advantage.
- (2) For the purposes of subsection (1)—

'arrangements' includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable), and

'tax advantage' means—

- (a) relief or increased relief from tax,
- (b) repayment or increased repayment of tax,
- (c) the avoidance or reduction of a charge to tax or an assessment to tax, or
- (d) the avoidance of a possible assessment to tax,

and for the purposes of this definition 'tax' means capital gains tax, corporation tax or income tax.

- (3) For the purposes of subsection (1) it does not matter—
 - (a) whether the loss accrues at a time when there are no chargeable gains from which it could otherwise have been deducted, or
 - (b) whether the tax advantage is secured for the person to whom the loss accrues or for any other person."

Section 17 – Disposals and acquisitions treated as made at market value

- (1) Subject to the provisions of this Act, a person's acquisition or disposal of an asset shall for the purposes of this Act be deemed to be for a consideration equal to the market value of the asset—
 - (a) where he acquires or, as the case may be, disposes of the asset otherwise than by way of a bargain made at arm's length."

Section 30 – Tax-free benefits

- (1) This section has effect as respects the disposal of an asset if a scheme has been effected or arrangements have been made (whether before or after the disposal) whereby—
 - (a) the value of the asset or a relevant asset has been materially reduced, and
 - (b) a tax-free benefit has been or will be conferred—
 - (i) on the person making the disposal or a person with whom he is connected, or
 - (ii) subject to subsection (4) below, on any other person.
- ...
- (4) This section shall not apply by virtue of subsection (1)(b)(ii) above in a case where avoidance of tax was not the main purpose or one of the main purposes of the scheme or arrangements in question.
- (5) Where this section has effect in relation to any disposal, any allowable loss or chargeable gain accruing on the disposal shall be calculated as if the consideration for the disposal were increased by such amount as is just and reasonable having regard to the scheme or arrangements and the tax-free benefit in question.
- (6) Where—
 - (a) by virtue of subsection (5) above the consideration for the disposal of an asset has been treated as increased, and
 - (b) the benefit taken into account under subsection (1)(b) above was an increase in the value of another asset,

any allowable loss or chargeable gain accruing on the first disposal of the other asset after the increase in its value shall be calculated as if the consideration for that disposal were reduced by such amount as is just and reasonable having regard to the scheme or arrangements in question and the increase made in relation to the disposal mentioned in paragraph (a) above."

Section 38 – Acquisition and disposal costs

- (1) ... the sums allowable as a deduction from the consideration in the computation of the gain accruing to a person on the disposal of an asset shall be restricted to:
 - (a) the amount or value of the consideration in money or money's worth given by P (or on his behalf) wholly and exclusively for the acquisition; or if the asset was not acquired by P, any expenditure wholly and exclusively incurred by P in providing the asset,
 - (b) the amount of any expenditure wholly and exclusively incurred on the asset by P (or on his behalf) for the purpose of—
 - (i) enhancing the value of the asset, being expenditure reflected in the state or nature of the asset at the time of its disposal and/or
 - (ii) establishing, preserving or defending his title to, or right over, the asset.

...

Income Tax Act 2007

"

Section 131

- (1) An individual is eligible for relief under this Chapter ('share loss relief') if—
 - (a) the individual incurs an allowable loss for capital gains tax purposes on the disposal of any shares in any tax year ('the year of the loss'), and
 - (b) the shares are qualifying shares.

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

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

...

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

Section 134

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

- (2) Condition A is that the company either—
 - (a) meets each of the following requirements on the date of the disposal—
 - (i) the trading requirement (see section 137).

...

Section 137

- (1) The trading requirement is that—
 - (a) the company, ignoring any incidental purposes, exists wholly for the purpose of carrying on one or more qualifying trades."

Parties submissions

We are grateful to the parties for their clear skeleton arguments, oral submissions and willingness to engage with our questions. We set out below a summary of their submissions.

Appellant's submissions

The Facts Generally

The Appellant submits that the arrangements were those of a genuine, high-risk commercial venture in the specialist field of marine salvage. The investment concerned shares in SSVL, which joined an existing joint venture to search for, verify and, if located, recover the valuable cargo of the Wreck. A debris field had already been located on the seabed, and on the Appellant's case, this materially distinguished the venture from speculative or random exploration.

The Appellant emphasises that the venture had a binary commercial profile. If the Wreck were found, the expected returns were many multiples of the sums invested; if not, the capital would be lost. That profile was said to be characteristic of venture capital activity. The IM set out a detailed business plan, budget, risk factors, and illustrative financial projections for a successful outcome, together with an explanation of how a recovery might be funded. It also identified the specialist contractors engaged, including OME and OVH, whose expertise in marine salvage was not challenged by HMRC.

The Appellant submits that the shares were offered at £864 per share, raising approximately £7.9 million. As part of the offer, investors could fund 75% of the subscription price by way of a loan. That loan was, on the Appellant's case, full recourse, legally enforceable and repayable in defined circumstances, including after 60 months or on winding up. The Appellant accepts that he misunderstood aspects of the loan at the time but submits that his mistaken beliefs do not alter the legal and economic reality of the arrangements he entered into.

The funds raised were applied to pay the costs of the search pursuant to a series of interlocking commercial agreements. Those agreements included charter arrangements under which parts of the charter price were deferred and made contingent on success, thereby placing commercial

risk on the contractors as well as the joint venture. The Appellant relies on evidence that the search was undertaken over a substantial period, using specialist vessels and equipment, that artefacts were recovered, and that the search continued until it was concluded that the Wreck had not been found and further expenditure was not justified.

The Appellant further relies on evidence of a comparable venture, Enigma, said to have been undertaken using the same business model and to have resulted in the successful recovery of valuable cargo. That evidence is relied upon to demonstrate that the model was capable of commercial success and that the prospect of success in the present case was not so remote as to be unreal.

Following the failure of the search, SSVL exhausted its resources and was wound up. The Appellant's shares became worthless. He then made a claim for Relief, as permitted by statute, against his income. HMRC disallowed that claim on the basis that the arrangements were tax-motivated and that a number of statutory "gateways" were not satisfied. The Appellant disputes that characterisation and submits that the appeal falls to be determined by reference to what actually happened, rather than by analogy with other cases or schemes.

2. Issue 1: Value Issue – s 17 TCGA

Meaning of the law.

The Appellant submits that s 17 TCGA requires the Tribunal to determine whether the acquisition of the shares was by way of a bargain made at arm's length. The correct approach is to identify the actual transactions entered into, construe them realistically, and then apply the statutory language purposively, without assuming tax avoidance as a starting point. Reliance is placed on authority establishing that the "Ramsay" line of cases does not permit an assumption of avoidance or a reversal of the evidential burden. Where more than one statutory provision is engaged, the contracts are first to be construed and only then is any purposive analysis undertaken.

Application to the facts.

The Appellant submits that the shares were acquired at arm's length for £864 per share. The price was supported by the IM, by the detailed financial projections it contained, and by unchallenged expert valuation evidence that the market value at the time of subscription was £864. The Appellant relies on the expert's opinion that the availability of loan finance did not affect the market value of the shares, which was determined by reference to a willing buyer and a willing seller, each acting in their own interests on the basis of the information in the IM.

It is submitted that HMRC adduced no expert evidence to contradict that valuation and that their reliance on asserted similarities with other cases (discussed below in respect of HMRC's submissions) is misplaced. Those cases are said to involve materially different facts, including pre-ordained outcomes and arrangements which made profit practically impossible. In contrast, the outcome here depended on whether the Wreck was found, a matter not within the control of the parties. Accordingly, the Appellant submits that the acquisition was at arm's length and, in

any event, that the market value was £864 per share.

Issue 2: Acquisition Cost Issue – s 38 TCGA

Meaning of the law.

Under s 38, TCGA the allowable expenditure is the consideration in money or money's worth given wholly and exclusively for the acquisition of the asset. The Appellant submits that the focus is on economic reality: whether, ignoring the value of the asset acquired, the taxpayer is economically worse off by the amount claimed.

Application to the facts.

The Appellant submits that the full subscription price, including the amount funded by the loan, constituted consideration wholly and exclusively for the acquisition of the shares. The loan was real, full recourse and legally enforceable. The funds were paid pursuant to agreed payment instructions and applied to meet the subscription price. The Appellant was therefore economically worse off by the full amount of £99,360.

It is submitted that HMRC's contention that the loan was illusory or circular is inconsistent with the documentary evidence and with the legal effect of the agreements. The Loan remained repayable on winding up and remains repayable notwithstanding the novation. The Appellant distinguishes the cases relied on by HMRC on the basis that in the present case the Appellant is economically worse off. The Appellant submits, the commercial risk was real, the funds were expended on the search, and no part of the Loan has been waived.

Issue 3: Value Shifting Issue – s 30 TCGA

Meaning of the law.

Section 30 TCGA is a targeted anti-avoidance provision. The Appellant submits that HMRC bear the burden of establishing that arrangements were made whereby the value of the asset was materially reduced and that a tax-free benefit was conferred on the Appellant or a connected person. The term "whereby" requires a causal link between the arrangements and the reduction in value.

Application to the facts.

The Appellant submits that there was no arrangement which caused the shares to lose value. The shares became worthless because the search failed. That was a commercial outcome, not the result of any value-shifting arrangement. Any novation of the Loan occurred after the shares had become valueless and did not reduce their value.

It is further submitted that no tax-free benefit was conferred. The novation substituted the identity of the lender but did not extinguish the debt. The loan remained enforceable. Even if a benefit were said to arise, the Appellant submits that s 30(7) and 58(1) TCGA would apply to exclude transfers between spouses from the operation of the provision. Accordingly, the gateway is not satisfied.

Issue 4: Main Purpose Issue – s 16A TCGA

Meaning of the law.

The Appellant submits that the test under s 16A TCGA is whether one of the main purposes of the arrangements was to secure a tax advantage. The existence of arrangements does not of itself imply tax avoidance. A tax advantage must be a main purpose, not merely a relevant or incidental consequence.

Application to the facts.

The Appellant submits that the arrangements were entered into for a commercial purpose: to fund a salvage search with the prospect of a substantial profit. The IM and Suitability Letter focused on the commercial upside of a successful search. While the possibility of Relief in the event of failure was mentioned, it was not quantified, nor was the investment marketed on the basis that a loss would produce a net gain after tax.

The Appellant relies on evidence that, even with relief, he would suffer a substantial net loss if the venture failed. The loan was full recourse and repayable. The Appellant submits that structuring a risky commercial investment so that statutory relief may be available if it fails does not of itself establish that obtaining that relief was a main purpose. On the facts, the Appellant submits that any tax advantage was incidental to the commercial objective.

Issue 5: Trading and Relief – ss 131 and 137 ITA

Meaning of the law.

For Relief to be available, SSVL must have been a qualifying trading company, carrying on a trade on a commercial basis with a view to profit, and existing wholly for that purpose, ignoring incidental purposes. The Appellant submits that the Tribunal must take an unblinkered, realistic view of the activities undertaken.

Application to the facts.

The Appellant submits that marine salvage is a recognised trade, albeit one that is inherently high-risk. SSVL, through the joint venture, undertook preparatory and operational activities directed to finding and verifying the wreck. Capital was raised, specialist contractors were engaged, and the search was conducted over an extended period. The venture bore the full downside risk of failure and stood to realise a substantial profit if successful.

HMRC's characterisation of the venture as a gamble is disputed. The Appellant submits that the search was based on research, scientific data and professional judgment, not chance. The fact that the search targeted a single Wreck is said to reflect commercial reality in a high-cost industry. The Appellant relies on the Enigma evidence to demonstrate that the same model has led to successful recovery in another case.

Accordingly, the Appellant submits that SSVL was trading, that it did so on a commercial basis with a view to profit, and that any tax-related considerations were incidental to its primary purpose.

HMRC's submissions

Submissions on the Evidence Generally

HMRC characterised the arrangements, viewed objectively and in the round, as a scheme designed to generate share losses for tax relief purposes rather than as a genuine commercial venture directed to the making of profit. HMRC emphasised that this was not an allegation of dishonesty on the part of the Appellant or any witness. Rather, HMRC submitted that the witnesses' subjective beliefs as to commerciality and prospects of success were not borne out by the contemporaneous documentary evidence, the structure of the arrangements, or the inherent improbabilities revealed by the evidence as a whole.

HMRC relied heavily on the IM, the surrounding documentation, and the absence of supporting material which would ordinarily be expected in a commercial venture of the scale described. HMRC submitted that the IM was a promotional and marketing document, containing assertions and optimistic language, but lacking independent verification of the key propositions on which the supposed commercial rationale depended. In particular, HMRC submitted that the underlying research file said to justify the identification of the Wreck, the valuation of the cargo, and the likelihood of recovery was not disclosed to the Tribunal. No application was made to withhold it on grounds of confidentiality or sensitivity. HMRC submitted that, in the absence of that material, the Tribunal was being asked to accept a series of untested assertions rather than evidence capable of scrutiny.

HMRC further submitted that the evidential gaps were significant. No witness from OME was called to give evidence as to the research, the methodology, or the conclusions said to underpin the project. No independent expert evidence was adduced to support the scientific or archaeological propositions advanced in the IM. HMRC submitted that the failure to call such witnesses was striking, given the centrality of those matters to the Appellant's case on commerciality and realistic prospects of profit.

HMRC relied on extensive cross-examination of the Appellant to demonstrate that, notwithstanding his experience as a senior businessman, he undertook no independent investigation of the core commercial risks. HMRC emphasised evidence that the Appellant did not investigate the location of the wreck, the scale of the search area, the implications of historical uncertainty, the possibility that the wreck no longer existed, or the legal and practical

issues surrounding ownership and recovery. HMRC submitted that this lack of enquiry was inconsistent with the notion that the investment was entered into on a genuinely commercial footing, but consistent with an investment whose downside risk was substantially mitigated by anticipated tax relief.

HMRC also relied on the evidence elicited in cross-examination that the Appellant regarded the investment as having no real downside: if successful, there would be a very large return; if unsuccessful, there would be tax loss relief at a high marginal rate. HMRC submitted that this evidence was highly material to the assessment of purpose and commerciality.

As to the search itself, HMRC accepted that activity took place and that substantial sums were expended. However, HMRC submitted that activity alone does not establish the carrying on of a trade on a commercial basis with a view to profit. HMRC relied on evidence that only a small proportion of the relevant search area was surveyed, that the artefacts recovered did not conclusively identify the Wreck, and that contemporaneous reports repeatedly emphasised uncertainty and the need for further work. HMRC submitted that the fact that many years later the Wreck has still not been found reinforced the absence of any realistic prospect of success at the time the arrangements were entered into.

HMRC further relied on the evidence of Mr Colin Emson to submit that the business model was driven by the need to attract investors rather than by a realistic appraisal of commercial prospects. HMRC submitted that the structure was deliberately made attractive through gearing, commissions to promoters, and the emphasis on loss relief. HMRC relied on Mr Emson's acceptance that tax planners were informed of the opportunity, that commissions were paid for marketing, and that gearing was used to enhance attractiveness to investors.

HMRC also placed weight on the absence of legal due diligence. HMRC submitted that it was commercially inexplicable that no legal advice was obtained in advance on ownership, salvage rights, or the likely legal regimes engaged, given the scale of the sums raised and the centrality of legal entitlement to any prospect of profit. HMRC relied on evidence that only minimal legal costs were provided for, and that ownership issues were left entirely unresolved at the investment stage.

In relation to the loan arrangements, HMRC relied on evidence that the loan monies were never paid to the Appellant, that the loans were novated for £1,000 after the failure of the search, and that there was no evidence of any investor having repaid the loans. HMRC submitted that, viewed realistically, there was never a genuine expectation that the loans would be enforced, and that this was consistent with the Appellant's own understanding at the time of investment.

HMRC further submitted that the expert valuation evidence was of limited assistance. HMRC relied on the expert's acceptance that her conclusions depended on the accuracy and completeness of the IM and the Appellant's witness statement, that she had no expertise in marine salvage or asset recovery, that she did not analyse the realism of the assumptions, and that she did not strip out the effect of what HMRC characterised as atypical financing. HMRC submitted that the expert evidence did not address the central question whether the underlying

commercial assumptions were sound.

Issue 1: Value Issue – Section 17 TCGA

(a) Submissions on the Law

HMRC submitted that section 17 TCGA applies where an asset is acquired otherwise than by way of a bargain made at arm's length. In such a case, the acquisition is deemed to take place at market value. HMRC relied on authority, including

Hardy and others v HMRC

[2017] UKFTT 754 (TC)

(

Hardy

) for the proposition that where a subscription forms part of pre-ordained arrangements designed to secure tax relief, the transaction is not made at arm's length, notwithstanding the existence of formal documentation.

HMRC submitted that an arm's length bargain requires genuinely adverse economic interests and commercial negotiation. Where the steps are pre-planned, circular, and directed to a tax outcome, section 17 is engaged.

(b) Application to the Facts

HMRC submitted that the Appellant's subscription was not a bargain made at arm's length. The arrangements were pre-ordained, heavily marketed through tax planners, and structured so as to facilitate loss relief significantly in excess of the Appellant's cash outlay. HMRC submitted that the speculative nature of the activity, combined with prior failed searches and unresolved ownership issues, meant that a loss was highly likely from the outset.

On market value, HMRC's primary submission was that the shares had no value at acquisition, because there was no realistic prospect of profit. Alternatively, HMRC submitted that any value was limited to the Appellant's actual cash contribution, excluding the loan-funded element which HMRC characterised as economically unreal.

Issue 2: Acquisition Cost Issue – Section 38 TCGA

(a) Submissions on the Law

HMRC submitted that section 38 TCGA permits deduction only of expenditure incurred wholly and exclusively for the acquisition of the asset. The focus is on economic reality rather than formal legal structure. Expenditure which does not make the taxpayer economically worse off does not qualify.

(b) Application to the Facts

HMRC submitted that the Loan element did not constitute allowable expenditure. The Appellant never received the loan monies, was never exposed to genuine commercial risk in respect of them and was never realistically expected to repay them. The funds circulated within the structure and remained under the control of the relevant entities.

HMRC further submitted that the fees paid were not wholly and exclusively for the acquisition of the shares but were paid to access the arrangements and the anticipated tax advantages. Accordingly, HMRC submitted that allowable expenditure was nil or, in the alternative, limited to the Appellant's cash contribution.

Issue 3: Value Shifting Issue – Section 30 TCGA

(a) Submissions on the Law

HMRC submitted that section 30 TCGA is a purposive anti-avoidance provision concerned with arrangements whereby the value of an asset is materially reduced and a tax-free benefit conferred. The use of the word "value", rather than "market value", is said to permit a broader, realistic assessment.

(b) Application to the Facts

HMRC submitted that the arrangements reduced the value of the shares and conferred a benefit through the novation of the loan for £1,000. HMRC questioned why a supposedly independent lender would relinquish valuable rights for such a sum and relied on the absence of evidence that the loan would be enforced. HMRC further submitted that, even if repayments were made, the economic reality of transfers between spouses meant that no real loss was suffered.

HMRC submitted that the just and reasonable adjustment under section 30(5) was to reduce the allowable loss to nil. They also explained that section 30(7) and 58(1) did not apply as there was no disposal of an asset by the Appellant to his wife. She acquired the purported rights under the Loan from CML.

Issue 4: Main Purpose Issue – Section 16A TCGA 1992

(a) Submissions on the Law

HMRC submitted that section 16A TCGA applies where one of the main purposes of the arrangements was to secure a tax advantage. The statutory concept of "arrangements" is broad, and it is immaterial whether the advantage accrues immediately or to the taxpayer personally.

(b) Application to the Facts

HMRC submitted that tax advantage was plainly a main purpose. Reliance was placed on the marketing of the investment through tax planners, the payment of commission, the prominence of loss relief in the IM, the Appellant's tax position, and his participation in other tax-advantaged investments. HMRC further submitted that the absence of any realistic prospect of commercial success reinforced the conclusion that tax relief was the driving purpose.

Issue 5: Trading and Relief – Sections 131 and 137 ITA 2007

(a) Submissions on the Law

HMRC submitted that, for Relief to be available, the company must be carrying on a trade on a commercial basis with a view to profit. This requires a realistic assessment of what was actually done, not merely of intentions or descriptions.

(b) Application to the Facts

HMRC submitted that the activities were not those of a trade carried on commercially with a view to profit but were akin to a speculative treasure hunt. HMRC relied on the absence of credible evidence of likely profitability, the unresolved ownership issues, the lack of legal due diligence, and the absence of any example of investor profit. HMRC submitted that the arrangements were designed to generate tax losses rather than commercial returns, and that the statutory conditions for relief were not met.

Findings of fact

From the evidence set out above, and in the context of the Issues we have to determine we make the following findings of fact:

- (1) It is not disputed that OVH chartered a vessel to GSML who then provided the benefit of that charter to CML as part of the joint venture operation. Whilst GSML and CML are connected parties neither is connected to OVH.
- (2) There was no challenge to the commerciality of the charter, in particular to the agreement under A Agreement by OVH, and subsequently down the chain, to amend the terms of the charter such that the part of the charter price was contingent on a successful find. We therefore find that the chartering of the vessel was a commercial transaction.
- (3) We were not provided with a copy of the research file, but the IM summarises its content in some detail, providing excerpts of historical documents and a summary of the findings of the previous search. HMRC were explicit that they did not allege dishonesty. They described the IM as sales/promotional material but did not contend that it was misleading. We therefore determine that there is no basis to conclude that the information provided in the IM by reference to the research file was incorrect. We do so despite the IM recording that the professional advisors had neither prepared nor approved the IM.
- (4) From the IM it is apparent that, not unexpectedly, there are some inconsistencies in the historical accounts of where the Merchant Royal sank and as to its cargo. However, we consider that the reference to court materials and the London Gazette in particular, but more widely the other historical evidence which included evidence of survivors, supports a conclusion that there was an armed ship which sank somewhere in the western approach to the English Channel. We also consider it reasonable to infer that when it sank it carried a cargo which included gold and silver of some sort. Historical records do not indicate that the ship or its cargo has ever been recovered.

- (5) In addition to the historical paper-based research the previous search undertaken by OME in November 2010 and funded by other participants in the joint venture (SRL and LML) identified a debris trail and partial wreck. We have no reason to find that the description of that search and its findings as set out in the IM is inaccurate. In this context we note that the conclusion of the 2010 search was that the information ascertained was estimated to give a high probability that the debris and partial wreck identified was of the right era and of English origin and not that it was the Wreck. It was considered that following the debris trail and a further search may cause the main hull associated with the debris to be found.
- (6) Thus, we are satisfied that there is more than a fanciful chance that the Wreck and its cargo lies at the bottom of the sea and that it may be within Site 30E or close to it. We would not, ourselves, have chosen the language that Site 30E represents a "compelling candidate" for the Wreck. However, we do not consider the supporting evidence justifies a conclusion that a further search of Site 30E, using OVH as the ultimate contractor, represented an endeavour bound to fail.
- (7) We disagree with HMRC that a failure to take legal advice as to the potential challenges to ownership indicates that there was no real intention to find the Wreck. We accept Mr Emson's evidence as rational – until a wreck is found and its location thereby identified, questions as to matters of international law cannot be determined. A find in international waters will carry different challenges to one found in territorial waters. Similarly, unless and until cargo is identified any claims to ownership from consignor, consignee etc are hypothetical. Further, on the basis of the information available to us we consider that it is reasonable to infer that OME are experts in the field of shipwreck archaeological survey, and it is therefore to be anticipated that there was also some basic level expertise as to the general legal issues associated with such surveys.
- (8) We accept Mr Emson's evidence that in an inherently speculative field contractual arrangements which share risk and reward are commercial. Mr Emson stated that, through the A Agreement OVH were paid a sufficient proportion of the commercial charter fee to cover its revenue expenditure associated with the search. He was not cross examined on that statement and we therefore accept it. We consider it reasonable to infer that such a business model was a commercial one and is not dissimilar to other contingent or risk-based arrangements including professional advisors undertaking contingent litigation and the placement fees often charged in financing transactions.
- (9) We also accept Mr Emson's evidence that RFAM evaluated the evidence available to determine whether there was a sufficient potential reward to justify the highly speculative and high-risk nature of the potential for a find to justify proceeding. We accept his evidence that RFAM had considered and rejected other potential shipwreck search opportunities where the research indicated that the risk reward equation and been uncommercial.

- (10) As regards the financing of the structure, the evidence confirms that, at least on paper, BIL loaned CML £5,994,000 which was used then to fund the loans by SCGC to investors but guaranteed by CML and passed to SSVL by way of the subscriptions. The funds were then used by SSVL to pay CML to organise the search by chartering the search vessel through GMSL and OVH. The rationale for that complex series of all but simultaneous transactions is not explained. However, through the arrangements funds were made available to enable investors to gear their investments.
- (11) The IM defines Available Finance as indicating that the sum of £5,994,000 held by SCGC might alternatively be used directly by SSVL to fund the search contract or to fund investment by subscription by the investors. However, taken as a whole the IM, in our view anticipates that the funding will be used by investors. This is, in our view, supported by the language of the Suitability Letter.
- (12) The terms on which the Loan documentation was drafted is, at least formally, that the loans were provided on a full recourse basis. However, the terms provide for novation when the Loan is due for repayment; where the value of the shares is nil the novation fee is £1000. Given that to whom the novation is made was a matter entirely within the control of the investor viewed realistically it is reasonable to expect that the novation would be made to a connected party unlikely to enforce the loan or, if enforced, by way of delivering an alternative benefit (i.e. novation to a child might represent a means of distributing wealth or to a creditor as a means of repayment of that debt).
- (13) We consider it was the intention of RFMA, CML and SSVL (all of whom are connected companies) to ensure that the loan arrangements were as attractive as possible to investors and, in the case of RFMA and CML, provided a return for themselves. This was achieved by creating a business model which provided finance on terms which carried with it the means of avoiding or perpetually deferring repayment through novation to a party unlikely to enforce the loan such that, in law the loans were full recourse, but, in practice, were not.
- (14) The Appellant was an experienced businessman of some wealth. He was advised by S4 who hold themselves out as tax advisors and portfolio managers. In accordance with advice received from S4 (and/or other similar advisors) the Appellant had previously entered arrangements and schemes designed to give rise to a tax advantage, some of which succeeded and others of which did not. S4 Tax Services Limited were his tax advisors.
- (15) When the investment opportunity was presented to the Appellant, he was excited and captivated by the concept of finding a shipwreck in respect of which the available evidence indicated there would be treasure. He was enthralled by the concept of being involved. We consider that he did believe that there was a better than fanciful chance of finding the Wreck and its cargo. We do not consider, had he been asked at the time, that he would have set the probability of successfully finding the Wreck and cargo as 50% or greater as he sought to do in his evidence. We do not consider, even taking account of the positive language of the IM and Suitability Letter, such an assessment to represent a conceivable

reflection of the information provided. The IM and Suitability Letter provide substantial warnings of the risk of an unsuccessful search. We do not consider an educated businessman would have simply viewed all the warnings as boilerplate. Some were in the nature of boilerplate limitations. The majority were not. In our view any belief that there was a greater than 50% chance of a successful search and/or recovery of significant value in the cargo is at best, a belief that has evolved over time in support of his case.

- (16) We do not accept his evidence that he believed it to be a non-recourse loan. The terms of the documentation are clear that it is, notionally, a full recourse loan. Despite his denials in cross examination, we consider that it is likely that he has re-written the memories (and we do not impugn him in this regard as this is a particular fallacy of memory). Rather, we are satisfied that a businessman of the Appellant's experience having read the IM, Suitability Letter and Loan documentation and in discussion with S4 would have understood that the effect of the Loan, once novated was that it would not need to be repaid and/or he would derive some alternative benefit from it such that the effect of the gearing was such that the investment was one which delivered alternative upsides. In any event, nothing turns on this: in either case, a belief that the loan was in some way guaranteed so it was non-recourse has the same effect as the freedom to novate to a party of the investor's choice. In reality, the loan would not be repaid.
- (17) The length of the proposed search (starting in spring 2011 and lasting 99 days) meant that within 12 months the investors would know if there had been a find (thereby propelling the investment into a next phase) or that it had been unsuccessful. The Appellant had sufficient income in the tax year 2010/11 to know that a loss confirmed within 12 months could be offset and thereby quickly recouped.
- (18) We consider that in view of these findings were it not for the perceived or advised Relief upside the Appellant would have been most unlikely to put £24,840 of his own cash resources at risk even though he believed and hoped that there would be an upside associated with a successful search.
- (19) We therefore find that the investment that the Appellant was making or the asset that he was acquiring was a scheme or arrangement comprising two indivisible elements i.e. an opportunity to participate in a low probability, but potentially very high reward shipwreck search coupled with ability to claim tax relief exceeding the cash investment if the search was unsuccessful. The asset thereby had not only no downside but also provided alternative upsides of different potential magnitudes. As such we consider on the evidence that one of his main purposes in making the investment, utilising the offered gearing, was to derive the tax advantage of the Relief.

Discussion

The Appellant was a shareholder in SSVL. Once the search was complete there was no value in SSVL. As such, the shares in the company had negligible value. The Appellant was deemed to have disposed of his shares on that date by virtue of section 24(1A) TCGA. The effect of section 24 TCGA is that the shares were treated as having been sold and immediately reacquired for the negligible value i.e. nil.

We must determine, by reference to the provisions of sections 17 and 38 whether there was a loss. If there was a loss we must then consider whether under sections 16A and 30 TCGA the loss was an allowable loss. If there was an allowable loss it may be claimed against general income only if the SSVL was a qualifying trading company under section 131 (as defined in section 137) ITA.

Issue 1 - Value Issue – Section 17 TCGA

Section 17 TCGA applies where there has been an acquisition or disposal of an asset otherwise than by way of a bargain at arm's length.

In

Mansworth v Jelly

[2002] EWHC 442 (Ch) Lightman J stated:

"... the phrase 'bargain at arm's length' stipulates a particular type of transaction. The formula of words connotes more than a transaction: it connotes a transaction between two parties with separate and distinct interests who have agreed terms (actually or inferentially) with a mind solely on his own respective interests."

That description of an arm's length transaction was considered in

Hardy

. The facts in that case were that shares were purchased in circumstances in which the sale of the shares was pre-ordained and that such sale and its terms "could not be left to chance" because the arrangements involved put and call options one or other of which would, with certainty, be exercised. The Tribunal accepted that any independent interest of the parties was overtaken by their common interest in following the script and that the script/plan was such that a sale and purchase of a particular sum was assumed. On that basis there was no arm's length transaction.

HMRC seek to contend that the same inevitability arises in this case. We disagree. We have found as a fact that the Appellant acquired the shares in SSVL as part of a package which delivered alternative upside rewards. That was what the IM and Suitability Letter offered. The price was fixed by SSVL in order to attract investors to purchase that package. SSVL and the other members of the joint venture were interested in undertaking the search and wanted to raise sufficient capital to fund the search and, for those putting the business model together, to make fees from

it. The Appellant wanted the investment on the terms it was offered i.e. the remote (but not negligible) potential to participate in a significant upside in an endeavour he was enthused about or to be able to claim Relief exceeding the contribution from his own resources if the endeavour failed. That was the "composite bargain" made between the parties. The whole price was paid for that bargain.

It is our view that the interests of the parties were therefore distinct and separate. As such we consider that the transaction was at arm's length and the gateway to an assessment of market value of the asset acquired is not met.

However, were we to have to consider the market value of what the Appellant acquired we are satisfied that its market value was £864 per share or £99,360 in total. It was only by contributing both the £24,840 and taking out the Loan of £74,520 (the funds of which we consider were transferred to or for the benefit of SSVL) that he acquired the full package that he sought. We have no reason to question that the £99,360 was the market price that was required to access this multi-upside investment asset.

We note that in making that finding we were not assisted by Ms Hotson Moore's evidence. As set out above at some, potentially unnecessary, length she was asked to and valued the investment in SSVL without considering the effect of the Loan. She considered that she was entitled or required to exclude the Loan and its ramifications from her assessment of value because of the terms of ISV 2011 paragraph 31(a). Because we have decided that the Appellant was specifically acquiring the combined package interest and not simply participation as a shareholder in SSVL we consider she was asked to value the wrong thing.

Issue 2 – Acquisition Cost – section 38 TCGA

Section 38 TCGA concerns allowable deductions where there has been a disposal of an asset. In this regard the asset we are focussed on is the shares in SSVL and not the wider investment asset we consider the Appellant acquired.

The deduction permissible under section 38 is limited to "the amount or value for the consideration ... given ... wholly and exclusively for the acquisition of the asset." On the facts as we have found them there was no consideration given wholly and exclusively for the shares. £99,380 was paid for the composite package comprised of the right of participation in the company and if the company failed the manufactured Relief; this is because both elements of the payment (the cash element and the sum under the Loan) were required to manufacture the Relief which also depended on the acquisition or issue of the shares. The whole of the consideration therefore did double duty. It is not therefore available as a deduction and no loss has therefore been made on the deemed disposal of the SSVL shares.

That finding is sufficient to dispose of the appeal. Nevertheless, we will consider the other arguments for completeness.

Issue 3 – Value Shifting – Section 30 TCGA

Section 30 TCGA applies, in the circumstances of this appeal, where there is a disposal of an asset, in this case the SSVL shares, the values of which had been materially reduced pursuant to a scheme or arrangements the main or one of the main purposes of which was to achieve such reduction in order to manufacture the Relief.

On balance we do not consider that this provision bites.

We are satisfied that there was a scheme/arrangement by which the Relief was manufactured if the search was unsuccessful. Those arrangements comprise the purchase of the shares at a price funded by the Loan on terms that enabled the Appellant to novate the Loan to a person unlikely to enforce it or to otherwise allow the Appellant to use it for his own benefit. However, on the facts as we have found them, we consider that the search of Site 30E was undertaken on the basis of evidence that did not render a successful search fanciful. In our view, what reduced the value of the shares in SSVL was the depletion of the financial resources of SSVL in carrying out the unsuccessful search for the Wreck and thereby a consequence of the business venture. It was not the scheme or arrangement which materially reduced the value of the shares. Thus, the condition provided in section 30(1)(a) TCGA is not met.

Had we been satisfied that section 30(1)(a) TCGA was met we would have been satisfied that the arrangements (as described) met the requirements of section 30(1)(b) TCGA. Those arrangements are the means by which the Relief was manufactured. We agree with HMRC that even were Mrs Wilders to call in the Loan, as she is a connected person, the provisions of section 30(1)(b) TCGA would be met. The Appellant's contention that section 58(1) TCGA would preclude such a conclusion is misplaced as, in this case, there has been no interspousal transfer. The Loan was novated to her by CML not the Appellant.

Issue 4 – Main Purpose – Section 16A TCGA

If we were wrong in our conclusion on the application of section 38 TCGA we would have concluded that the provisions of section 16A TCGA applies to descope any calculated loss as being treated as an allowable loss.

Section 16A TCGA provides that "allowable loss" does not include a loss accruing in consequence of arrangements the purpose or main purpose of which is to secure a tax advantage. Arrangements are broadly defined in section 16A(2). As indicated already we are satisfied that the geared structure underpinning the share issue, and the terms of the Loan which permitted the Appellant to novate it to a person unlikely to enforce or otherwise for the benefit of the Appellant are arrangements and through them the claim to Relief was manufactured. We have found as a fact that manufacturing the Relief was one of the main purposes of the Appellant. We therefore have no hesitation in concluding that there is no allowable loss by virtue of the provisions of section 16A TCGA.

Issue 5 – Trading – Section 131 and 137 ITA

Finally, though not material given our decision on section 38 and section 16A TCGA, we consider that the activities of SSVL were such that the shares purchased by the Appellant were shares in a qualifying trading company. We expressed our provisional view in this regard during the hearing.

In our consideration of this issue, we note the following:

(1) In

Eclipse Film Partners No. 35 LLP v HMRC

[2021] EWCA Civ 95 the Court stated (by reference to the judgment in

Ransom v Higgs

[1974] 3 All ER 949

):

"111. ... "[i]n considering whether a person 'carried on' a trade it seems to me to be essential to discover and examine what exactly it was that the person did", ... It is necessary to stand back and look at the whole picture and, having particular regard to what the taxpayer actually did, ask whether it constituted a trade."

(2) In

Ingenious Games LLP v HMRC

[2019] UKUT 226

(TC) considered the distinction between an aim to make a profit and with a view to a profit:

"A profit for an LLP would doubtless be welcome, but that does not mean that the business was conducted with a view to profit. Take the example of an amateur runner entering the London Marathon. Victory would doubtless be very welcome, but for most it would not be an aim. In contrast, the runner's aims might be or include beating a target time, doing better than one or more running colleagues, raising a target amount for a charity, or simply crossing the finishing line. None of these is inconsistent with winning the marathon, but winning is not (at least realistically) one of the aims."

(3) In

Seven Individuals v HMRC

[2017] UKUT 132

(TC) Nugee J stated:

"42. In

Samarkand Film Partnership No 3 v HMRC

[2011] UKFTT 610 (TC)

, the FTT quoted this passage from

Wannell v Rothwell

and said (at [253]):

"It seems to us that the serious interest in a profit is at the root of commerciality."

On appeal to the UT (Judge Sinfield and myself), we said that we agreed with the FTT on this point, and upheld the FTT's conclusion that there was in that case a lack of commerciality: see

[2015] UKUT 211 (TCC)

at [96]-[97] where we said:

"96. 'Commercial' and 'with a view to profit' are two different tests but that does not mean that profit is irrelevant when considering whether a trade is being carried on a commercial basis. The reference in

Wannell v Rothwell

to the serious trader who is seriously interested in profit is not only relevant to deciding whether a person is a serious trader or an amateur or dilettante. We consider that the FTT were right when they said, at [253], that the serious interest in a profit is at the root of commerciality. We also consider they were correct in regarding "profit" in the context of commerciality as a real, commercial profit, taking account of the value of money over time, and not simply an excess of income over receipts.

97. The FTT were, in our view, right to conclude that a trade that involved transactions that were intended to produce a loss in net present value terms, with no compensating collateral benefits, was not conducted on a commercial basis. No-one who was seriously interested in running a business or trade on commercial lines would pay £10 for an income stream with a net present value of £7 unless there were some good reason to do so. Of course in this case the reason why the partnerships 10 were willing to do this was because they believed that tax relief would be available to the partners.

...

46. I agree that a trade can fail the commerciality limb in different ways. This is indeed what Robert Walker J says in

Wannell v Rothwell

where he refers to a trade being uncommercial either because the terms of trade are uncommercial, the prices not covering the costs, or because of the way the trade is conducted in other respects. So I agree that a trader can fail the commerciality limb either because of a lack of commercial organisation ... or because of a lack of any interest in making money ... But I do not

think it follows that as long as the trade is sufficiently organised and the trader hopes to make a profit ... that is always enough. Let us assume that a trade is well organised. The question whether such a trade is being carried on on commercial lines is not to my mind answered simply by pointing to a hope by the trader to make profits. A trade run on commercial lines seems to me to be a trade run in the way that commercially minded people run trades. Commercially minded people are those with a serious interest in profits, or to put it another way, those with a serious interest in making a commercial success of the trade. If therefore a trade is run in a way in which no-one seriously interested in profits (or seriously interested in making a commercial success of the trade) would run it, that trade is not being run on commercial lines."

We have considered the direction as to what we should consider and how in light of the facts we have found on the evidence viewed realistically. It is our view, on balance, that SSVL through its involvement in the joint venture was involved in a commercial trade with a view to a profit albeit a high risk and speculative trade. We reach this view because: (1) the search was based on the information within the research file and following the earlier search such that whilst the prospects of finding the Wreck and cargo were remote, they were not fanciful and (2) despite the uncertainties that may follow in terms of establishing ownership if the search were successful there was an outline plan to assess the basis on which ownership could be established and a profit made.

HMRC accept that a range of speculative businesses are nevertheless engaged in trades. Many such businesses fail but failure is not the barometer for establishing whether there was a trade. We cannot accept, on the facts as we have found them, that the endeavour pursued by SSVL was in the nature of a gambling transaction. In our view it was a speculative business commercially undertaken with a view to a profit.

Decision

For the reasons stated we dismiss the appeal.

Right to apply for permission to appeal

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

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Prepared on 22 October 2026 · Esheria