Reprinted from British Tax Review Issue 5, 2022

Sweet & Maxwell
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)

To subscribe, please go to
http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=338&productid=6614.

Full text articles from the British Tax Review are also available via subscription to *www.westlaw.co.uk*, or *https://www.checkpointworld.com*.

SWEET & MAXWELL

Case Notes

HMRC v Euromoney Institutional Investor Plc: an example of tax planning as "icing on the cake"

Share for share exchanges are a common feature of many a corporate transaction, large and small, given both the commercial and tax benefits that can follow from providing the seller with a continuing economic stake in the company being sold. As a result, for many tax advisers, there is a level of familiarity with sections 135 and 137 Taxation of Chargeable Gains Act 1992 (TCGA) (and the statutory clearance process under section 138 TCGA) that very few tax provisions can equal—helped, no doubt, by the fact that they have been broadly left unchanged over time.[1]

In practice, planning around these provisions is often limited to including loan notes as part of the exchange consideration.[2] This way, the selling shareholder receives a future right to (in effect) a fixed amount of cash (on redemption of the loan notes) with the benefit (as a minimum) of deferring any tax charge until that redemption occurs. HMRC have generally been relaxed about this, provided the term of the loan notes was for a reasonable period[3]—but, as both Mr Snell[4] and Mr and Mrs Coll[5] found, not if the objective of the shareholder in accessing the deferral provided by section 135 TCGA is to enable them to achieve exemption, rather than simply a timing benefit (in both these cases, through planning to become non-UK resident before redeeming the loan notes).

The case of *Euromoney Institutional Investor Plc v HMRC* (*Euromoney*)[6] similarly involves a taxpayer combining the benefit of the deferral provided by section 135 TCGA with obtaining exemption (here, by accessing the substantial shareholding exemption (SSE) in Schedule 7AC TCGA). It is therefore unsurprising that HMRC, having declined to give clearance under section 138 TCGA for the relevant transaction, assessed the taxpayer (Euromoney) to corporation tax on its gain on the basis that, as far as HMRC were concerned, what it had done "was on all fours" with the actions of Mr *Snell*.[7]

However, the First-tier Tribunal (FTT) did not agree, finding a way to distinguish Euromoney's situation from that of the taxpayer in *Snell v HMRC (Snell)*.[8] HMRC appealed (and, in response

[1] The original "roll-over" relief for exchanges of shares was set out in Finance Act 1965 Sch.7. Paragraph 6 was not subject to any proviso as to the purposes of the transaction—the purpose test was added by Finance Act 1977 s.40.
[2] Relief under TCGA s.135 is available where either shares or debentures are issued in exchange for shares in the target company.
[3] HMRC, Internal Manual, *Capital Gains Manual* (5 September 2022), CG52570, "Share exchange: examples".
[4] *Snell v HMRC (Snell)* [2006] EWHC 3350 (Ch); [2007] S.T.C. 1279.
[5] *Coll v HMRC (Coll)* [2010] UKUT 114 (TCC); [2010] S.T.C. 1849.
[6] *HMRC v Euromoney Institutional Investor Plc (Euromoney (UT))* [2022] UKUT 205 (TCC); [2022] S.T.C. 1457.
[7] *Euromoney Institutional Investor Plc v HMRC (Euromoney (FTT))* [2021] UKFTT 61 (TC); [2021] S.F.T.D. 891 at [91].
[8] *Snell* [2006] EWHC 3350 (Ch).

to their appeal, so did Euromoney)[9] to the Upper Tribunal (UT)—which has gone even further than the FTT, effectively telling HMRC that their view of *Snell* was wrong.

As a result, *Euromoney* is one of those rare cases where a taxpayer that has clearly structured a transaction to gain a tax benefit has been able to persuade the tribunal that it nevertheless did not have a main purpose of tax avoidance. Further given the limited number of cases on section 137(1) TCGA, it offers some insight into the application of section 137(1) TCGA in the context of corporate takeovers where tax often plays a role in structuring the form of consideration to be given to the selling shareholder(s) who, for understandable reasons, want to manage their resulting tax liabilities.

The facts

The case concerned the sale by Euromoney of its shares in Capital Data Ltd (CDL).

The buyer had originally offered US $80 million cash for Euromoney's shares in CDL. Commercial negotiations followed, resulting in an agreed total consideration of US $85 million, comprised of new ordinary shares in the buyer and US $26 million in cash. Had that been the final deal, then section 135 TCGA should have applied to the exchange of CDL shares for buyer shares, but Euromoney would have been taxable on any gain on the (part) disposal of its holding for cash.[10]

At this point, at what the FTT referred to as "a very late stage" in the negotiations,[11] tax input was sought. Euromoney's parent company's tax director suggested that, instead of cash, the buyer should issue Euromoney with redeemable preference shares—this was because, given the size of Euromoney's ordinary shareholding in the buyer, SSE was expected to be available on a future disposal of the preference shares (once the minimum holding period condition had been met).[12] Or as Euromoney's managing director put it:

> "The preference shares are the mechanism to avoid paying tax on the capital gain for the cash element of the transaction. In 18 months we convert the preference shares into cash and avoid paying 20% tax on the gain".[13]

The suggestion was put to the buyer, who agreed. On 5 November 2014, the sale was agreed, with completion following on 18 December. On the same date (5 November) Euromoney applied for clearance under section 138 TCGA. After requesting further information, HMRC responded, refusing clearance, by a letter dated 19 December 2014 (so received after the sale had completed).

Euromoney nevertheless took the position in its tax return that section 135 TCGA had applied on its sale of CDL. Following an enquiry, HMRC remained of the view that they had been right to refuse clearance and assessed Euromoney to tax on the overall gain on the sale of CDL (an amount of just under £10.5 million tax).

[9] Euromoney had to seek permission for a late appeal: notwithstanding its delay in applying for permission was "significant", permission was nevertheless granted taking account all relevant circumstances: see *Euromoney Institutional Investor Plc v HMRC* [2021] UKFTT 321 (TC).
[10] TCGA ss.128 and 129.
[11] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [39].
[12] It seems that Euromoney's shareholding in CDL was not itself eligible for SSE: see *Euromoney (UT)* [2022] UKUT 205 (TCC) at [5].
[13] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [17].

The question

As the sale of CDL was clearly within one of the circumstances listed in section 135(2) TCGA, the only question for determination was whether, as a result of section 137(1) TCGA, section 135 TCGA had been dis-applied. Under section 137(1) TCGA, section 135 TCGA cannot apply to a share-for-share exchange

> “unless the exchange…is effected for bona fide commercial reasons and does not form part of a scheme or arrangements of which the main purpose, or one of the main purposes, is avoidance of liability to capital gains tax or corporation tax”.[14]

As HMRC had assessed Euromoney on the basis that the exchange (of shares in CDL for both ordinary and preference shares in the buyer) was part of such a scheme or arrangements, it fell to Euromoney to prove that this was not the case.[15] Euromoney did not dispute that there had been arrangements, but disagreed with HMRC as to what those arrangements were—and additionally contended that as it did not have an avoidance purpose (and so could not have a tax avoidance main purpose) section 135 TCGA was not dis-applied.

The FTT, referencing *Snell*, said that there were two distinct questions that it had to answer in applying section 137(1) TCGA to Euromoney’s sale of CDL: first, was the exchange part of a scheme or arrangements, and if so what were they; and secondly, did the purpose of that scheme or arrangements include the purpose of avoiding a liability to corporation tax on chargeable gains, and if so, was it a main purpose?[16]

“Scheme or arrangements”

As *Snell* had provided definitions of both “scheme” and “arrangements” (or rather confirmed they should carry their ordinary meanings),[17] the focus of the FTT was on identifying whether there were, on the facts, arrangements in place—and if so what they were. As above, as Euromoney accepted that there were arrangements, the issue was what “things” should be combined when determining the extent of those arrangements.

Euromoney argued that that the relevant “combination of things” had to encompass the entirety of the agreement for the sale of CDL (and so both the issue of ordinary shares as well as the preference shares were comprised in the relevant arrangements), as well as the plan to redeem the preference shares with the benefit of SSE.[18] Euromoney said that this was the only possible reading of the statutory language—as the “exchange” had to be part of the arrangements, it had to follow that the “arrangements” could not be limited to just part of the exchange.[19]

[14] TCGA s.137(1).
[15] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [75].
[16] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [71]: this case note takes the same approach.
[17] *Snell* [2006] EWHC 3350 (Ch) at [28]: a “scheme” was said to be a “plan of action devised in order to attain some end” and “arrangements” a “structure or combination of things for a purpose”.
[18] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [74]: note that the parties appear to have agreed that the arrangements included the intention to hold the preference shares until they qualified for SSE, and so this was not argued. The FTT saw holding on to the shares to meet the SSE minimum holding period condition as no different to Mr Snell’s plans to become non-resident—presumably because both involved a plan to do/not do something until exemption was available (*Euromoney (FTT)* [2021] UKFTT 61 (TC) at [88]–[89]).
[19] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [79].

Unsurprisingly, HMRC wanted the tribunal to focus only on the "arrangement" relating to the replacement of the proposed cash consideration with preference shares (given the clear tax motivation for this late change to the deal structure).[20] HMRC argued that *Snell*—where the arrangements were taken to be the issue of loan notes (in exchange for shares) coupled with a plan to become non-resident prior to redemption—was authority for taking a narrower view of arrangements in this context.[21] Following *Snell*, therefore, the (part) exchange of CDL shares for ordinary shares in the buyer fell to be disregarded.

The FTT clearly preferred Euromoney's argument but seemed to struggle when working out how to support a decision in Euromoney's favour in light of *Snell*. Faced with a binding precedent, the FTT looked to find a way to distinguish *Snell* on the facts.

Euromoney had referenced the case of *IRC v Brebner* (*Brebner*)[22] which it said was justification for looking at a transaction in the round (given the "lack of reality" that would follow if specific elements were considered separately).[23] This seemed to give the FTT the basis for distinguishing *Snell* it was looking for—whilst acknowledging that *Brebner* was not directly on point, it nevertheless saw a parallel between the cases in the context of the "reality" of the situation.[24] This meant it had to find a way to explain why it had been realistic, in *Snell*, to focus on one element of the consideration only, whilst, for Euromoney, reality required the two constituent elements to be looked at together. The FTT's approach here has a sort of logic to it, although not one that would immediately spring to mind when looking at the language of section 137 TCGA. The difference between the two cases, it said, was that, in *Snell*, the loan stock represented the "fundamental part of the arrangements" given that they represented nearly 90 per cent of the total consideration of £7.32 million received by Mr Snell whereas, for Euromoney, the preference shares accounted for only around 25 per cent. As a result, it concluded that "to identify the arrangements…as those concerning only the preference shares would give a wholly distorted view of the circumstances".[25] A novel approach—and one that begs the question as to what percentage of the total consideration the preference shares would need to have represented for the tribunal to have instead sided with HMRC's view of reality.

During proceedings in the UT, Euromoney dropped reliance on *Brebner*—something the UT appears to have encouraged.[26] The UT's approach was much more straightforward: it said the existence, and nature, of "arrangements" was simply a question of fact—and therefore something that the FTT had to decide on the facts of the particular case in question.[27] In its view, *Snell* offered little guidance on determining the extent of "arrangements", not least because there had been no argument on this issue.[28] Instead, all *Snell* was authority for was that "arrangements" bore its ordinary meaning, and that any arrangements (once identified) had to be examined as a

[20] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [73].
[21] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [86]–[89].
[22] *IRC v Brebner (Brebner)* 43 T.C. 705, [1967] 2 A.C. 18 HL.
[23] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [81].
[24] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [84]–[85].
[25] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [90].
[26] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [41] and [58].
[27] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [38].
[28] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [39]–[40] and [56].

whole.[29] There was therefore no need to distinguish *Snell* as such—it was decided on its own facts, and so *Euromoney* had to be too.

Having failed in its argument to use *Snell* to define the scope of the arrangements to which section 137(1) TCGA applies, HMRC took a different approach, suggesting to the UT various alternative interpretations of section 137(1) TCGA designed to get to the same end result (i.e. an arrangement relating to the preference shares alone). These included suggesting that section 137(1) TCGA required one to look at each and every possible subset of arrangements that could exist on the facts separately such that if any one subset had a main tax avoidance purpose, section 135 TCGA would not apply, aided it seems by a Venn diagram.[30] But even with the use of such a mathematical aid, HMRC could not persuade the UT to their way of thinking—the UT described HMRC's arguments here as "over-complicated and apt to confuse".[31]

Overall, the UT was comfortable that the FTT had correctly applied section 137(1) TCGA when it determined that the relevant "arrangements" were not to be confined to those relating to the preference shares only. This was notwithstanding that it disagreed with some of the FTT's reasoning on this—in particular, describing its reliance on *Brebner* as flawed.[32]

And, rather bluntly, it reminded HMRC that the FTT's approach was not "incorrect" just because HMRC disagreed with the outcome.[33]

Purposes and main purposes

Having established the relevant arrangements, the FTT had then had to identify the purposes (and then the main purposes) of those arrangements. (Note here that, unlike some other main purpose tests, section 137(1) TCGA requires regard to be had to the purposes of the arrangements, rather than those of a specific party to them—although the purposes of the parties will clearly be pertinent.)[34] As it was Euromoney that had asked to include the preference shares as part of the consideration for CDL, the FTT had examined the purposes of Euromoney when examining purposes of the arrangements. The FTT, and the parties, accepted that the test to be applied required regard to be had to subjective purposes[35]—though the UT effectively reserved its position on whether the test to be applied was subjective, objective or a mixture of both.[36]

Evidence was given by Euromoney's managing director, and its parent's tax director, and the FTT also had access to contemporaneous documents/correspondence.

By deciding that the relevant "arrangements" for section 137(1) TCGA included the exchange of shares in CDL for ordinary shares, it was not difficult to find a strong commercial purpose for those arrangements. Similarly, there was no getting away from the tax motivation for the

[29] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [44].
[30] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [42(1)] and [49]: disappointingly for the writer, the Venn diagram is not included in the judgment.
[31] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [43] and [49]: HMRC's argument was presumably not helped by their inability to explain their view of how TCGA s.137(1) should be construed (at [52]).
[32] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [58].
[33] See for example *Euromoney (UT)* [2022] UKUT 205 (TCC) at [54]: "HMRC's arguments that the FTT followed an incorrect "approach" simply represent a disagreement with the factual determination that the FTT made."
[34] This is commented on in *Euromoney (UT)* [2022] UKUT 205 (TCC) at [57].
[35] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [101].
[36] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [44(3)].

inclusion of the preference shares as part of the consideration—and for the FTT, the plan to access SSE on redemption of those preference shares meant that the arrangements had a purpose of avoiding corporation tax on chargeable gains.[37]

Before the FTT, Euromoney had argued that its tax planning was not avoidance, but simply structuring a transaction to access a relief that Parliament intended to be available on disposals of shares.[38] Given the deliberate swap of cash for preference shares to access SSE (which, in the words of Euromoney's own managing director, meant it could avoid CGT), this argument received short shrift in the FTT—in particular, the tribunal judge commented that the preference shares did not represent the type of at-risk equity investment at which SSE was targeted.[39] Although Euromoney appealed this particular issue, it was not addressed by the UT (as, having already decided against HMRC, it was not necessary to address this)—disappointing in some ways, as some insight into how the UT would have approached what was (in effect) that classic question of whether what Euromoney had done was mitigation or avoidance would have been welcome.

Given it had found a tax avoidance purpose, the FTT then had to decide if it had been a main purpose of the arrangements. The FTT started by citing *Travel Document Service v HMRC* (*TDS*)[40] to define "main" as having a connotation of importance. Taking account of all the evidence (and the findings of fact it had made on the basis of that evidence),[41] and employing yet another numerical comparative (this time, the amount of tax saved on the cash element (£2.8 million) against the value of the transaction overall), the FTT decided that obtaining the tax saving had not been a main purpose, but instead "no more than a bonus and not important in the context of the transaction as a whole".[42] Euromoney had, according to the FTT, been focused on the transaction mainly from a commercial perspective and the tax saving was not something that they had seen as particularly significant and so obtaining that tax saving could not have been a main purpose.

The facts that helped the FTT to this conclusions included: (a) tax input was provided late in the day, with very little time (or expense in the form of adviser fees) spent on tax, particularly when contrasted with the amount of time spent on the non-tax aspects of the transaction; (b) had the buyer said no, or asked for something in return, Euromoney would have simply accepted the cash (and so paid tax on that element of the consideration); (c) for some reason, Euromoney had not appreciated that if the preference shares triggered section 137(1) TCGA, the entirety of the consideration (and not just the original cash element) would have been taxable—noting that the managing director had said that, had he realised this potential downside, he thought he would have said no to including the preference shares; and (d) although Euromoney had made a clearance application under section 138 TCGA, it had agreed and completed the transaction before receiving any reply.[43]

[37] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [97].
[38] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [108]–[109].
[39] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [114]–[115].
[40] *Travel Document Service v HMRC (TDS)* [2018] EWCA Civ 549; [2018] S.T.C. 723.
[41] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [51]–[56].
[42] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [107].
[43] For the evidence relating to those findings, see *Euromoney (FTT)* [2021] UKFTT 61 (TC) at (in relation to (a)) [39], [44], [48] and [49]; (in relation to (b)) [43] and [45]; (in relation to (c)) [35] and [41]; and (in relation to (d)) [46].

Before the UT, HMRC argued that some of the considerations that the FTT had taken into account were irrelevant and that overall its conclusion had been irrational.[44] They pointed to a number of examples of irrelevancies. First, HMRC said, the relative value of the tax saving to the overall consideration was not a relevant fact—particularly as there was nothing to suggest Euromoney had approached the transaction in this way. Secondly, the fact that Euromoney had not identified the potential downside (namely, that the entirety of the consideration would be taxed if section 137(1) TCGA was not met) was not relevant to whether it had a main purpose of achieving the upside. Finally, the amount of time and expense incurred on planning for the preference shares was irrelevant when looking at the importance of the tax saving that resulted.

Each of these arguments was firmly rejected by the UT who emphasised that it was for the FTT to decide, on the evidence, what weight it should accord to particular factors when assessing the importance of a particular purpose. To reinforce the point, it referenced a (non-tax) case (concerning whether a product branded as Greek yoghurt had to originate from Greece)[45] in which the Court of Appeal had emphasised the need for appellate courts to be wary of interfering with findings of fact (and inferences from fact) made by judges at first instance—with the added gloss of Lord Justice Lewison that:

> "[a] trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping".[46]

The UT, clearly feeling that HMRC were in effect asking it to retry the case (to get a "better" result than they had achieved before the FTT), had no intention of hopping between the particular islands that HMRC were trying to float before it.

As all HMRC's submissions had been roundly rejected, the decision of the FTT was affirmed—and, as result, the UT saw no need to consider the cross-appeals made by Euromoney (for which, as above, it had had to seek permission to make).

Comment

Determining whether a taxpayer has a main purpose of tax avoidance is of course a question of fact, based on the evidence (and inferences from the evidence). By providing an example of where a tribunal considered that the taxpayer, although definitely engaging in tax planning, did not have a tax avoidance main purpose, *Euromoney* provides a useful counterweight to all the cases that have gone the other way. However, that being said, its precedent value on "main purpose" is limited given that the main purpose test is so fact dependent (and certainly the comments of the FTT on how to apply a main purpose test add nothing to what other cases—including *TDS*—have said on this). But that did not stop the taxpayer in *JTI Acquisition Co (2011) Ltd v HMRC*[47] arguing (albeit unsuccessfully) on the basis of *Euromoney* that, because its tax saving (in the form of relief for interest payments) was only US $9 million, as compared to a deal size of US $1 billion, it could not have had a main purpose of securing a tax advantage for the purposes of sections 441 and 442 Corporation Tax Act 2009 (the loan relationship

[44] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [60]–[66].
[45] *FAGE UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] E.T.M.R. 26.
[46] *Euromoney (UT)* [2022] UKUT 205 (TCC) at [66].
[47] *JTI Acquisition Co (2011) Ltd v HMRC* [2022] UKFTT 166 (TC) at [106].

unallowable purpose test). What this does is illustrate the cross-over between the different main purpose tests: for the FTT in *Euromoney*, cases on unallowable purpose were the natural place to go when working out how to apply the main purpose test in section 137(1) TCGA.[48] This is useful for tax advisers to note—particularly where (as is the case for section 137(1) TCGA) there is limited precedent on the specific provision itself to look to for assistance.

On the other hand, the UT's approach to the meaning of "arrangements" for the purposes of section 137(1) TCGA clearly has precedent value. Although section 137(1) TCGA (and its statutory predecessors) have been in existence since 1977, the only two cases on it (until *Euromoney*) were *Snell* and *Coll v HMRC* (*Coll*).[49] HMRC's view of *Snell* appears to have been that, where (part) of a share exchange has a tax avoidance element to it, then section 137(1) TCGA should apply to that part only—maximising their chances of success on any main purpose argument. Whereas the FTT explained its decision against HMRC on this issue as being (in part) as a result of the "specific circumstances" of the case,[50] the UT rejected outright HMRC's interpretation: instead, confirming that, when identifying the extent of "arrangements" within section 137(1) TCGA, each case has to be looked at on its own facts. That means, it is ultimately about the findings made by the FTT on the evidence available to it (and, as a result, taking account of the approach the UT took to HMRC's criticisms of the FTT's decision in *Euromoney*, means that grounds for any appeal against a decision that either party (HMRC or taxpayer) does not like will in practice be limited).

Sarah Squires[*]

[48] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [100] and [101].
[49] *Coll* [2010] UKUT 114 (TCC).
[50] *Euromoney (FTT)* [2021] UKFTT 61 (TC) at [92].
[*] Barrister, Old Square Tax Chambers.