

THE SPECIAL COMMISSIONERS

ABERDEEN MILK CO LTD

Appellant

- v -

COMMISSIONERS OF INLAND REVENUE

Respondent

Special Commissioners: T Gordon Coutts QC and J Gordon Reid QC

Sitting in Aberdeen on 9 February 1998

Mr Hugh McKay of Counsel, instructed by Messrs Reeves & Nylan, Chartered Accountants, for the Appellant

Mr Stephen Woolman, Counsel, instructed by The Solicitor of Inland Revenue Scotland for the Respondent

DECISION

This appeal, which we have decided to allow, raises a pure question of statutory interpretation. No evidence was led. The basic factual background is contained in an agreed Statement of Facts. The issue relates to the carrying back of surplus Advance corporation Tax ("ACT") under Section 239(3) of the Income and Corporation Taxes Act 1988 {"the 1988 Act"}.

In 1993, Parliament resolved to deregulate the pre-existing statutory regime for marketing of milk and related milk products. Hitherto, milk and milk products had been marketed through the medium of a number of statutory bodies of which the Aberdeen and District Milk Marketing Board {"the Board"} was one; it was established in 1934. The Agriculture Act 1993 c. 37 {"the 1993 Act"} provided the framework for the marketing of milk. Its purpose was to help Britain's farming and food industry to compete effectively in the European Community and elsewhere in the world. The Board, among others, had to submit a Scheme for the reorganisation of the marketing of milk in its area for ministerial approval. The Board submitted such a scheme. It provided for the establishment of, inter alia, the appellant company, Aberdeen Milk Company Limited {the "Taxpayer"} to take over the milk marketing business of the Board; it also provided for the establishment of another company, namely Aberdeen Milk Services Limited, to succeed to the Board's commercial division which operated the Board's creamery, selling milk products. The Board's Scheme, with amendments, was finally approved in the summer of 1994; a variation a few months later was also approved. The Scheme, as amended and varied, {"the Scheme"} in accordance with the statutory framework contained in the 1993 Act, provided for the transfer of the Board's assets and liabilities, with exceptions, to the Taxpayer on 1/11/94, the Vesting Day. No point was taken by either party on the minutiae of the Scheme or a related Business Plan identified certain categories of assets and liabilities. We did not therefore require to consider the details of these documents. The issue for us, as noted above, falls to be resolved by the process of statutory interpretation and in particular the combined effect of the 1993 Act and section 239 of the 1988 Act. Section 239 of the 1988 Act provides inter alia as follows:-

Where the case of an accounting period of a company there is an amount of surplus advance corporation tax, the company may...claim to have...that amount treated for the purposes of this section...as if it were advance corporation tax paid in respect of a distribution *made by the company* in any of its accounting periods beginning in the six years preceding that period....[emphasis added].

Paragraph 1 of Schedule 2 to the 1993 Act provides inter alia as follows:-

1-(1)The following provisions of shall apply for the purposes of the Corporation Tax Act, namely- (a)any trade...carried on by a milk

marketing board which is transferred...to a qualifying body shall be treated as having been, at the time when it began to be carried on by the board and at all times since that time, carried on by that body; (b)where any trade...carried on by a...board is transferred...to a qualifying body, the trade carried on by that body after the transfer...shall be treated as the same trade as that which, by virtue of paragraph (a)above, it is treated as having carried on before the transfer...; (c)any property, rights or liabilities of a ...board which are transferred...to a qualifying body shall be treated as having been, at the time when they became vested in the board and at all times since that time, property, rights or liabilities of that body; (d)..... .

The question for us is, whether, in the accounting period in question, the Taxpayer can bring itself within the quoted provisions of Section 239(3). The accounting period to which the taxpayer seeks to carry back surplus ACT relates to the 1990 accounting period of the Board. The Taxpayer did not exist in 1990; it was incorporated in 1993. On the face of it, the Taxpayer cannot bring itself within section 239(3). It did not make a distribution in 1990. It did not have an *accounting period* in 1990. However it was submitted by counsel for the Taxpayer, that a close analysis of the 1993 Act, applying a purposive construction, required one to construe its (accounting periods) as meaning *its or its predecessor bodies*..

Counsel submitted that (1) a "purposive" approach to statutory construction should be adopted and cited observations of Lord Steyn in [IRC v McGuckian](#) [1997] STC 908 at 914-j; 915-c; 915d-e; and 915j. With these observations, we humbly agree and record that counsel for the Revenue did not dispute the soundness of this approach although he drew our attention to a further passage in the speech of Lord Steyn where his Lordship that the House of Lords had rejected formalism in fiscal matters in favour of a "more realistic legal analysis". Again, we respectfully agree with this approach; (2) the purpose of the statutory scheme set out on Schedule 2 to the 1993 Act was to achieve tax neutrality in relation to the transfer of property, rights and liabilities from the Board to the successor body, in this case the Taxpayer. Tax neutrality prevented charges arising that would otherwise arise by virtue of the legislation; it also prevented the loss of accrued tax benefits. He developed this submission by detailed reference to the provisions of Schedule 2 to the 1993 Act, and in particular to paragraphs 1, 2, 5-9, 11-15, 16-18, 19, 28 and 31; he also drew our attention to Sections 1-3, 5, 11 and 12 of, and to Schedule 1 paragraphs 4, 11 and 16 to the 1993 Act , (3) while Parliament had dealt with a number of specific situations in certain paragraphs of Schedule 2, the issue fell to be resolved in favour of the Taxpayer by reference to the general rule to be found in paragraph 1(1) (a)-(c) of Schedule 2, which in summary provided [for present purposes] that the Taxpayer is deemed to have or is treated for the purposes of the Corporation Tax Acts as having carried on the Board's trade when the Board actually carried on that trade; that that trade is to be treated as the same trade as previously carried on by the Board; and that the Board's rights, transferred to the taxpayer are to be treated as from the date of vesting of such rights in the Board, as if they had been the rights of the Taxpayer; (4) subject to certain exceptions. not material for present purposes. all of the back surplus ACT

under section 239(3) of the 1988 Act was a right vested in the Board, that was transferred to the Taxpayer under the Scheme on Vesting Day.

Counsel for the Revenue submitted that the interpretation placed on section 239(3) of the 1988 Act by the taxpayer involved a variation of section 239(3). Such an interpretation was unwarranted because (1) Parliament could readily have achieved the result urged upon us by the taxpayer by express provision, but chose not to do so; he illustrated this point by reference to the British Steel Act 1988, section 11(1), the Electricity Act 1989, section 1(1), the Ports Act 1991, section 35(1), the British Technology Act 1991, section 12(1), and the Finance No 2 Act 1992, Schedule 17 paragraph 2 (1); (2) Parliament could have made express reference in the 1993 Act to section 239 of the 1988 Act, but again chose not to do so; (3) the theme of tax neutrality applied only to the transfer occasioned by the reorganisation; it would be surprising if the principle of tax neutrality applied only to the transfer occasioned by the reorganisation; it would be surprising if the principle of surpluses in effect to be traded for their tax credit value; (4) the detailed provisions in Schedule 2 to the 1993 Act would be unnecessary if the Taxpayer's argument were sound; (5) the Taxpayer's argument would lead to anomalous results where there were multiple successors, as envisaged e.g. in relation to paragraphs 7 and 11 of Schedule 2; (6) the statutory Scheme deliberately kept the identity of the Board separate from the identity of the successor company, here the Taxpayer, except in expressly defined circumstances such as in Schedule 2 paragraph 6; thus, where Parliament intended the merging of the two separate personae of the board and the successor body, express provision was made therefore; and (7) the Board's right under section 239(3) only arises when it pays ACT.

The first question is whether the ability to carry back surplus ACT was a *right* that was vested in the Board immediately prior to the Statutory Vesting day. We consider that it was such a right, not in the sense of a claim but in the sense of a privilege which might be exercised at some date in the future. The phraseology of section 239(3) of the 1988 Act is permissive, not mandatory. Moreover, the word *rights* in the familiar statutory phrase *property, rights and liabilities* should, in our opinion, be construed broadly. The phrase is intended to be all embracing and we can see no reason why *rights* should be restricted to immediately enforceable claims. The revenue contended that the right only arose on payment of ACT. Even so, that would still not exclude the Taxpayer's argument on construction. A *claim* may not be made until there is an amount of surplus ACT. However the potential for set off exists as soon as mainstream corporation tax has been paid. The *right* vested in the Board was contingent upon there being any subsequent accounting period an amount of surplus ACT. When that circumstance occurred, the contingent right became an enforceable claim. Such an analysis prevents the loss of a fiscal advantage that would otherwise be lost by reason of statutory deregulation.

In our view, this fits with the general purpose of schedule 2 to the 1993 Act, which as Mr McKay put it, was to achieve tax neutrality i.e. the taxpayer is put in no better or worse position than would have occurred if there had been no interference by Parliament in introducing deregulation. There are a number of provisions in Schedule 2 that support the argument that the purpose of the Schedule was to achieve tax neutrality. Paragraph 1 provides that, for the purpose of the Corporation Tax acts, the Board's trade is to be treated as the same trade as that carried on by the board: and the

Board's property, *rights* and liabilities that are transferred are to be treated as the property, rights and liabilities of the Taxpayer from the date such property, rights and liabilities became vested in the Board. These provisions {paragraph 1(1)(a) (b) & (c)} are broadly drawn and were, in our view, correctly described by counsel for the Taxpayer as representing the "general rule". Applying that general rule means that the taxpayer is to be treated as the same person as the Board for Corporation Tax purposes in relation to the rights transferred. These deeming provisions affect only the Taxpayer. It was not suggested by either counsel that anything turned on paragraphs 1(2) or (3) for present purposes. Paragraph 5 appears to deal with chargeable gains on *degrouching* to the effect that the gain does not arise on vesting under the statutory transfer scheme, but may arise on the occasion of a subsequent transfer. Paragraph 6 gives the Board tax relief from a chargeable gain by enabling the gain to roll forward; and this is achieved by treating the Board and the Taxpayer as the same legal person. This is not exactly equivalent to the Taxpayer being treated as the same person as the Board for Corporation Tax purposes. Although this provision {paragraph 6} expressly treats the Board and the taxpayer as the same person, this does not, in our view, detract from the general rule referred to above. Rather than transferring a right or liability, paragraph 6 relieves the Board from a liability it would otherwise have. As counsel for the Taxpayer put it, it prevents the orphaning of liability in the Board leaving it unrelieved and unrelievable. Paragraphs 7, 8 and 9 deal with the apportionment between unallowed capital losses. Apportionment is necessary because not all the property, rights and liabilities of the Board are transferred to the Taxpayer. According to the agreed Statement of Facts, the Board has some £79,000 following the Vesting Day that it distributed to its members. Paragraphs 11 to 14 of schedule 2 deal with the apportionment of losses and capital allowances between the statutory boards and successor bodies. Parliament, here, appears to be attempting to cater for a variety of eventualities; this is, perhaps, not surprising given the generality of the principal deregulating provisions in the main body of the 1993 Act. We do not consider that any difficulty is likely to arise in practice where there are two successor bodies; any potential difficulty would no doubt be resolved in the scheme before it received ministerial approval. Paragraph 16 neutralises a series of circumstances that would otherwise constitute chargeable events. Paragraph 17 disapplies section 22 of the Taxation of Chargeable Gains Act 1992 to the events mentioned in paragraph 16. Paragraph 19 neutralises the tax consequences of the acquisition of production equipment by or by former registered producers. Finally, our attention was also drawn to paragraph 28 of Schedule 2; it provides exemption from stamp duty for *inter alia* transfers effected under section 11 of the 1993 Act.

In our view, the foregoing examination of Schedule 2 plainly indicates the intention of tax neutrality at least in relation to the specific topics dealt with by the various paragraphs. There was no satisfactory reason why the carrying back of surplus ACT should have been excluded from the general principle of tax neutrality. Likewise, there was no justification advanced as to why it has been omitted from the specific provisions of Schedule 2. The draftsman envisaged a variety of possibilities, which were specifically referred to in Schedule 2, but expected there to be other circumstances that would require the application of the general principle of tax neutrality, hence the broad wording of paragraphs 1(1) (a), (b) & (c). Although there are clearer examples of this effect in other legislation, that other legislation has to be considered in the context of the overall intention of Parliament in relation to the particular subject matter e.g. the creation of one public limited company from one

public corporation; the privatisation of a public utility in a more fragmented manner or the deregulation of an existing private enterprise. The British Steel Act 1998 c 35 was concerned with privatisation, and one successor company; hence the relatively simple provision in section 11(1) of that Act. The privatisation of the ports authorities under the Ports Act 1991 c 35, made similar provision for identity of the successor company with the relevant authority {section 35(1)}; as did the British Technology Group act 1991 c 66 section 12(1). Transfer schemes were involved in the other statutory examples cited to us. The northern Ireland electricity provisions contained in the Finance [No 2] Act 1992 Schedule 17 paragraphs 1 and 2; and the Electricity Act 1989 c 29 Schedule 11 paragraph 1 both provided for transfer schemes. There, the statutory wording is similar to the provisions of the 1993 Act Schedule 2 paragraph 1(1). We do not considered that these statutory examples assist the Revenue. Where provision has been made for a Scheme or schemes the provisions for tax neutrality have been broadly drawn, presumably because the precise nature and scope of the scheme or schemes were not known when the tax neutrality provisions were drafted. In privatisation legislation with a known successor company or companies, it is easier to frame the tax neutrality provisions by deeming the successor company to be the same legal person as the transferring body.

Was the *right* was transferred to the Taxpayer? The framework of the 1993 Act and the Scheme approved by the secretary of state are such that the *right* was certainly transferred to the Taxpayer. This can be seen from the provisions of Section 11 of the 1993 act and the Scheme sections 5.1 and 5.2 and section 2 of the Business Plan referred to in the Scheme. There was no discussion of these documents during the appeal. As we have already mentioned, there was no suggestion by either party that the precise terms of the transfer provisions in the scheme were critical to the resolution of the issue before us.

What is the effect of the transfer of that right? To answer this question we return to section 239(3) of the 1988 Act, but bearing in mind the express statutory effect of the 1993 Act on the Corporation Tax Acts. For the purpose of the Corporation Tax Acts, the Taxpayer is treated as if it had carried on the Board's trade prior to the transfer of the property, rights and liabilities; indeed, since the Board began to carry on that trade. This must be applies to section 239(3) of the 1988 Act. How is this to be done? If the Taxpayer's trade is treated as the Board's trade, this must include the Board's trade over all its accounting periods before the transfer. The Board's accounting periods must be treated as the Taxpayer's accounting periods. An accounting period is simply a period of time. We have already held that that effect of paragraph 1(1) of Schedule 2 to the 1993 Act is that for Corporation Tax purposes the Taxpayer is to treated as the same person as the Board. If so, then *its accounting periods* must include the Board's accounting periods as well as the Taxpayer. A distribution made by the Board in any of its accounting periods before the transfer must be treated as a distribution by the Taxpayer. A distribution made by the Board in ant of its accounting periods before the transfer must be treated as a distribution by the Taxpayer. In any event, the contingent right vested in the Taxpayer by virtue of the transfer becomes enforceable as a claim under section 239(3) of the 1988 Act when if has surplus ACT to carry back to an earlier year. It must be one of the purposes of paragraph 1 of Schedule 2 to the 1993 Act that it can be applied to statutory provisions such as section 239(3) of the 1988 Act. The phrase

distribution made by the company in any of its accounting periods

must be interpreted so as to mean

distributions made by the company, or its statutory predecessors.

For the foregoing reasons the appeal succeeds. We therefore sustain the Taxpayer's appeal against the Inspectors decision of 17/9/96 to refuse the claim back the ACT, paid in respect of a dividend of £157,000 in its accounting period ended 31/3/96, and set it against mainstream corporation tax that the Board had paid in respect of the accounting period ended 31/3/90.

T GORDON COUTTS Q.C.

J GORDON REID Q.C.

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6 March 1998