

**THE SPECIAL COMMISSIONERS**

**MICHAEL RICHARD INWARDS**

**Appellant**

**and**

**D M WILLIAMSON (INSPECTOR OF TAXES)**

**Respondent**

**Special Commissioners: THEODORE WALLACE  
JULIAN GHOSH**

**Sitting in public in London on 23 and 24 April 2003**

**Patrick Way, Counsel, instructed by BDO Stoy Hayward, for the Appellant**

**John Smith, Inspector of Taxes, appeal for the Respondent Inspector**

## DECISION

1 This appeal concerned reinvestment relief for capital gains tax under section 164A of the Taxation of Chargeable Gains Act 1992, and a provision which was repeated in 1998. The dispute concerned the applicability of the return of value provisions in section 164L where there was a delay between the payment for the shares under an informal arrangement and the date of their issue.

2 We were provided with an agreed chronology of events and a common Bundle of Documents. The only witness was the Appellant who confirmed and amplified his witness statement and was cross-examined.

### **The Facts**

3 The Appellant was the 100 per cent shareholder and a director of four companies, Secure Storage (Southall) Ltd ("Southall"), Secure Storage (Poplar) Ltd ("Poplar"), Secure Storage Ltd ("Storage") and Secure Parking Ltd ("Parking"). All four companies were incorporated and resident in the United Kingdom for tax purposes. At all material times, Poplar, Storage and Parking were unquoted trading companies. Southall was a dormant company. Parking provided a park-and-ride service for Heathrow travellers and had around 90 full-time employees; the other companies stored and refurbished cars. At 31 March 1995 Parking owed £379,154 to Storage.

4 On 7 October 1993 the Appellant granted an option for £1 to an otherwise unrelated company, Neil Smith Motors Ltd, to acquire, from him, the "B" £1 ordinary shares in each of Southall, Poplar and Storage which represented 51 per cent of the issued capital in each company. Each company had accumulated losses. Under clause 5.1 of the option agreement, the purchase consideration was £375,000, apportioned as to £51 for the shares in Southall, £62,500 for the shares in Poplar and £312,449 for the shares in Storage. Under clause 5.3 the consideration was payable upon the date on which Neil Smith Motors Ltd should have received aggregate distributions from Southall, Poplar and Storage, of £375,000 or 29 September 2000 if earlier. Clause 8.1 required the distribution of surplus cash by dividends to the holders of B shares as soon as practicable after exercise of the option.

5 On 6 April 1995 Neil Smith Motors Ltd exercised the option and thus acquired 51 per cent of the shares in each of Southall, Poplar and Storage.

6 On 30 June 1995 Storage paid £375,000 to Neil Smith Motors Ltd. On the same day Neil Smith Motors Ltd paid £375,000 to the Appellant in satisfaction of the consideration price under the option. Also on 30 June the Appellant transferred £375,000 to Parking and Parking immediately used these funds in repaying most of the loan which it owed to Storage. These transactions appear on copies of the bank statements of Storage, The Appellant and Parking, at different branches of National Westminster Bank

plc, recording deposits and withdrawals, all on 30 June 1995. The Appellant told us that there was a single letter of instructions to the bank prepared by BDO Stoy Hayward.

7 On 29 March 1996 the authorised capital of Parking was increased from 100 to 500,000 £1 shares. Prior to that date the issued capital consisted of two £1 shares both held by the Appellant.

8 A letter dated 29th March 1996, from the Appellant, addressed to the directors of Parking, read as follows:

"Please capitalise the sum of £375,000 being the amount standing to the credit of my loan account with the company being payment in full of £1 per share on 375,000 shares of £1 each in the company, and I request you to allot me that number of shares..."

9 The minutes of a directors' meeting on 29 March 1996 attended by the Appellant and Mr Rayne (now retired), recorded as follows:

"Allotment of Shares It was reported that an application for shares from Mr M. R Inwards had been received requesting that his loan account of £375,000 be capitalised.... and it was RESOLVED that 375,000 ordinary shares of £1 each in the capital of the Company be and are hereby allotted against the application received."

It was also resolved that the Common Seal of the Company be affixed to the Share certificate. The minutes were signed by the Appellant as chairman.

10 Companies Form No 88(3) "Particulars of a contract relating to shares allotted as fully or partly paid up otherwise than in cash" stated the consideration as "capitalisation of £375,000 directors loan account" and stated under "6. If the allotment is made in consideration of the release of a debt, e.g. a director's loan account, state the amount released", "£375,000". This was signed by the Appellant.

11. The exercise of the option, by Neil Smith Motors Ltd, had the effect that the Appellant disposed of the shares in Southall, Poplar and Storage on 6 April 1995, see TCGA 1992, section 28(2). Their base value in the Appellant's hands appears to have been nil. The result was that in the year of assessment 1995/1996, subject to any rollover relief, the Appellant realised chargeable gains of £375,000. This gave rise to a charge to capital gains tax of £147,600 after the annual exemption of £6,000 for which the Appellant was assessed.

### **The Appellant's Evidence**

12 On 11 May 1995, the Appellant received a letter of advice from BDO Stoy Hayward, which included the following,

"The procedure then for the payment of the £375,000 consideration for the shares and the investment of this into [Parking] so as to avoid capital gains tax would be:

1. [Storage] and [Poplar] will declare dividends, aggregating £375,000 on the 'B' ordinary shares payable to [Neil Smith Motors Ltd]...
2. [Neil Smith Motors Ltd] will use the cash received from the dividend to pay you the agreed consideration of £375,000 for the 'B' ordinary shares of [Storage, Poplar and Southall].
3. You will then reinvest the sale proceeds by subscribing for new shares in [Parking], upon which you will make a claim for 'Reinvestment Relief' from capital gains tax in order to avoid a charge to capital gains tax made on the disposal of the various 'B' shares.
4. [Parking] will then be in a position to repay the loan which it has received from [Storage]."

13 The Appellant gave evidence that the deposit of £375,000 on 30 June 1995, which he had received from Neil Smith Motors Ltd on the same date, the issue of shares by Parking to him on 29 March 1996, and the repayment of the loan, by Parking, to Storage, on 29 March 1996, were all intended to implement the proposals put to him by BDO Stoy Hayward in their letter of 11 May 1995. He said that he intended to pay the money as a subscription. The Appellant said that he sought to follow the advice in the letter. He knew that he had to subscribe for the shares in order to get reinvestment relief. There was no loan agreement and no interest had been paid to him. He said that had not discussed the subscription with his co-director in June 1995. He said that the documents referred to at paragraphs 8 and 10 above were prepared for him by BDO and contained the same mistake as to a debt.

14 The Appellant said that his subscription for shares in Parking enabled Parking to satisfy its existing indebtedness to Storage. He said that it was important to strengthen Parking's balance sheet for the accounting period ended 31st March 1996. As at 31 March 1995 Parking was technically insolvent being supported by the loans from Storage and a guarantee to the bank by the Appellant. It had been hit by the recession which had affected traders in its sector at that time due to the Gulf War and the effect of the ERM on exchange rates which had affected air travel. In 1993 he had needed to sell half of his shares in Storage, Poplar and Southall and had been forced to agree to deferred payment; part of the arrangement in 1993 was a loan by Neil Smith Motors Ltd of £200,000 to Storage. He had had to work hard in Storage to make the necessary money to get the £375,000 consideration.

15. There was no substantial challenge by Mr Smith to the matters recorded above; indeed there was little cross-examination on any of the Appellant's oral evidence. We accept that the deposit of £375,000 on 30 June 1995 and the share issue of 29 March 1996 were intended by the Appellant to implement the proposals put to him in the letter from BDO Stoy Hayward of 11 May 1995.

16 The Appellant said that he always intended the payment on 30 June 1995 of £375,000 to be a subscription for shares and that he did not ever intend that payment to

be a loan. He did not intend that there would ever be any repayment of that sum to him. There was no question of any interest payable by Parking to him in respect of that payment at all. He said that, since the objective of the exercise was to obtain reinvestment relief, as set out in the letter from BDO Stoy Hayward of 11 May 1995, on the one hand, and to strengthen Parking's balance sheet, on the other, it would have been pointless to replace one debt (the loan owed by Parking to Storage) with another (a debt owed by Parking to him). The Appellant said, in response to a question from the Tribunal, that, so far as he was concerned, so long as Parking had issued shares to him before the end of its accounting period (that is, before 31 March 1996), he considered that he would have properly implemented the arrangements set out in that letter of 11 May 1995. He further said that he was wholly unconcerned about the nine month delay between the deposit of cash on 30 June 1995 and the issue of shares on 29 March 1996, since he was the 100 per cent shareholder in Parking, which meant that he was commercially protected from anything untoward occurring in relation to that share issue.

17. As for the documentation referred to at paragraph 10 above, which he had signed stating that the Parking shares were issued in a capitalisation of his loan account, the Appellant said that this misdescribed the deposit and subsequent share issue, and that he had not intended to create an indebtedness between himself and Parking. He said that he had intended to remove the existing indebtedness to Storage by the deposit, which was a subscription for shares and not any form of loan. He said that he only expected to be issued shares and did not expect to ever be repaid the £375,000 in cash. His evidence was that all of the documentation had been sent to him in a single package without prior discussion and he had signed it without reading it. He said that he left all of what he described as the “legalities” and details of the arrangements the letter of 11 May 1995 to his advisers, BDO Stoy Hayward.

18 We find as a fact that the Appellant intended the payment on 30 June 1995 to be a subscription for shares to be issued rather than a loan. There was no suggestion at any time that he was keeping his options open.

### **The Legislation**

19. Sections 164A to 164N (Part V, Chapter 1A) of the Taxation of Chargeable Gains Act 1992, which was repealed by the Finance Act 1998 for acquisitions after 5 April 1998, contained the regime for roll-over relief on reinvestment. For this appeal the relevant provisions were as follows:

“s. 164A(1) Subject to the following provision of this Chapter, roll-over relief under this section shall be available where –

- (a) a chargeable gain would (apart from this section) accrue to any individual (‘the reinvestor’) on any disposal by him of any asset (‘the asset disposed of’); and
- (b) that individual acquires a qualifying investment at any time in the qualifying period.

.....

(8) For the purposes of this section a person who acquires any eligible shares in a qualifying company shall be regarded as acquiring a qualifying investment unless...

There is then a proviso dealing with an acquisition of eligible shares of a company where the chargeable gain which the reinvestor sought to shelter arose from a disposal of other shares or securities of the same company or a company in the same group. It was common ground that the proviso did not apply. Subsection (9) provided:

“(9) For the purposes of this section the acquisition of a qualifying investment shall be taken to be in the qualifying period if, and only if, it takes place –

- (a) at any time in the period beginning 12 months before and ending three years after the disposal of the asset disposed of, or
- (b) at such time before the beginning of that period or after it ends as the Board may by notice allow.”

20. Section 164L (1) to (3) provided as follows:

“(1) For the purposes of this Chapter an acquisition of shares shall not be treated as an acquisition of eligible shares if the arrangements for the acquisition of those shares, or any arrangements made before their acquisition in relation to or in connection with the acquisition, include –

- (a) arrangements with a view to the subsequent re-acquisition, exchange or other disposal of the shares;
- ..., or

(c) arrangements for the return of the whole or any part of the value of his investment to the individual acquiring the shares.

(2) If, after any eligible shares in a qualifying company have been acquired by an individual, the whole or any part of that individual’s investment is returned to him, those shares shall be treated for the purposes of this Chapter as ceasing to be eligible shares.

(3) For the purposes of this section there shall be treated as being a return of the whole or a part of the value of the individual who is to acquire or has acquired any shares in a company if the company –

(a) repays, redeems or repurchases any of its share capital or other securities which belong to that individual or makes any payment to him for giving up his right to any of the company’s share capital or any security or its cancellation or extinguishment;

(b) repays any debt owed to that individual, other than a debt which was incurred by the company –

- (i) on or after the acquisition of the shares; and
- (ii) otherwise than in consideration of the extinguishment of a debt incurred before the acquisition of the shares;

- (c) makes to that individual any payment for giving up his right to any debt on its extinguishment;
- (d) releases or waives any liability of that individual to the company or discharges, or undertakes to discharge, any liability of his to a third person;
- (e) provides a benefit or facility for that individual;
- (f) disposes of an asset to that individual for no consideration or a consideration which is or the value of which is more than the market value of the asset; or
- (g) acquires an asset from that individual for a consideration which is or the value of which is more than the market value of the asset; or
- (h) makes any payment to the individual other than a qualifying payment.

...

- (9) In this section –
  - (a) any reference to a payment or disposal to an individual includes a reference to a payment or disposal made to him indirectly or to his order or to his benefit; and
  - (b) any reference to an individual includes a reference to an associate of his and any reference to a company includes a reference to a person connected with the company.

...

- (11) In this section –  
‘arrangements’ include any scheme, agreement or understanding, whether or not legally enforceable; “...”

21. Section 164G covers the meaning of “qualifying company”, which, among other requirement, must be unquoted.

### **The Contentions of the Parties**

22 Mr Way, for the Appellant, advanced three propositions as to why reinvestment relief was available to the Appellant and was not denied by section 164L:-

- (1) No loan ever existed; the payment by the Appellant of £375,000 to Parking on 30 June 1995 did not give rise to a debt thus the issue of the shares in Parking on 29 March 1996 did not repay a "debt" at all and section 164L had no application in this case;
- (2) Alternatively, if the cash deposit of £375,000 did create a debt by Parking to The Appellant, that debt was protected by the exception to section 164L(3)(b) as a debt incurred "on" the acquisition of the Parking shares;
- (3) The arrangements which are the subject of the present case are outside the mischief of section 164L and section 164L should be construed in a manner which prevents its application to these present arrangements.

23. Mr Way said that the payment on 30 June 1975 was an advance payment of the share subscription and did not give rise to a loan. He submitted that there was an implied contract the terms of which were set out in BDO Stoy Hayward's letter of 15 May 1995. The Appellant paid the money as a subscriber and the company received it on that basis. Inevitably the Appellant was wearing two hats. There was no reason why he would not have had the authority to agree on behalf of the Company to issue the shares.

24. Alternatively he argued that if the payment did give rise to a debt it was "on ... the acquisition" of the shares within section 164L (3)(b)(i) because the payment was part of the process of acquisition and the release of the debt was not "the extinguishment of a debt incurred before the acquisition of the shares" within subsection (3)(b)(ii). He said that although the acquisition was completed on 29 March 1996 it involved a process which started on 30 June 1995 with the payment. It was normal for payment to precede allotment and issue. "On ... the acquisition" in subsection (3)(b)(i) referred to the process of acquisition as a whole rather than to its completion.

25. Mr Way said that section 164L(3)(b) was directed at the capitalisation of a pre-existing debt. Circumstances such as this where someone put money into a company with a view to getting shares were not within the mischief. The debt came into being as part of the acquisition process and was not covered because it was only created by the arrangement in question. The legislation should not be interpreted so as to deny relief because of the mere fact of a delay however short between payment for shares and their issue. This would deprive the relief of its intended effect.

26. He said that *National Westminster Bank plc v Inland Revenue Commissioners* (1994)67TC1 concerned the question whether shares had been issued before 16 March 1993. Here the question was when they were acquired. "Acquisition" covered a purchase as well as an issue and must be given a sensible meaning. Although it was decided that the shares were not issued until the process including registration was complete, Lord Templeman referred at page 38A to "the whole process whereby unissued shares are applied for, allotted and finally registered." Although section 164 A(9) must refer to a specific date, the references in section 164L(3)(G) to "acquisition" could and should be treated as applying to the whole process of acquisition.

27. Mr Smith, for the Respondent Inspector, said that the payment by the Appellant on 30 June 1995 of £375,000 gave rise to a debt from Parking to the Appellant which preceded the acquisition of the shares; the subsequent issue of the shares satisfied that debt and was a return of value within section 164L (1)(c) and (3)(b).

28. Mr Smith said that regardless of any implied contact in June 1995 there was no acquisition of a qualifying investment within section 164 A(1)(b) until the shares were issued in March 1996. Any contract in June 1995 was a conditional contract; until the company was in a position to issue the shares, there was a debt. He accepted that if the acquisition had been from a third party the acquisition would have been the time of contract under section 28(1), but said that where shares were issued the acquisition was

the time of issue. Until then the shares were not in existence. In June 1995 the company could only issue shares in return for £375,000 by creating a large share premium since there were then only 98 unissued £1 shares.

29. He did not accept that there was any contract in 1995. It would involve the same person both subscribing and acting for the company.

30. Mr Smith said that the legislation was designed to deny relief where the investor was able to get a return of value. Here there was a debt before the acquisition. He said that where it is clear that a payment is a genuine subscription for shares, which were authorised at the time, the Revenue would not regard that as an attempt to avoid tax; there would technically be a debt but the legislation would not be invoked. On the facts the payment could not be a subscription because there were not enough shares authorised without a premium. Mr Smith said that he was reluctant to say what the position would have been had the payment been only a few days before the resolutions on 29 March 1996. He said that if there was a genuine subscription for shares which were already authorised relief would be allowed. Mr Smith accepted that the payment in June 1995 and the issue of the shares were all part of one arrangement.

31. In reply, Mr Way said that the Revenue argument was very arbitrary. The real objection appeared to be that there was insufficient authorised capital in June 1995; however the existing capital could have been used with a share premium. No clear criteria had been advanced for deciding what delay between payment and issue was acceptable.

32. He submitted that section 164L(3)(b) should be interpreted as excluding a debt which was that not in existence before the arrangements. The mischief was that an investor was not using new money but seeking to eat his cake and have it. Here there was no pre-existing debt at the time of the arrangement in June 1995.

### **The Issue**

33. It is common ground that Parking was a “qualifying company” and that the Appellant acquired his shares in Parking within the “qualifying period” being the period beginning 12 months before and ending three years after the disposal of the B ordinary shares; in the present case the “qualifying period” would have expired on 6 April 1999, that is, three years after the shares in Southall, Poplar and Storage were disposed of when Neil Smith Motors Ltd exercised the option. It is also common ground that the shares issued to the Appellant on 29 March 1996 would be “eligible shares”, provided that section 164L did not apply. The application of section 164L is the issue in this case, more specifically the application of section 164L (1)(c) which denied relief if the arrangements for the acquisition of the shares included arrangements for a return of value within the meaning of section 164L(3).

## **Our Decision**

34 We reject Mr Way's first proposition that there was no debt. Mr Way invited us to conclude from the Appellant's evidence that there was, prior to the payment of the deposit of £375,000 on 30 June 1995, an implied contract between the Appellant and Parking, Parking having concluded that contract through the Appellant in his capacity as a director of Parking. Such a contract would be a contract for the issue and allotment of shares. Mr Way submitted that it was pursuant to such contract that the Appellant deposited £375,000 on 30 June 1995; that until 29 March 1996 the Appellant had only a right to enforce that contract by calling for the issue of shares and could not, without rescinding the contract, call for a return of the cash of £375,000. Mr Way suggested that the documentation, to which we refer above, which described the issue of shares by Parking as the capitalisation of Mr Inwards' loan account was misdrafted and the Appellant had signed it in error.

35 We find it impossible to infer the existence of any contract, whether oral, written, or arising by conduct, between the Appellant and Parking from the evidence put to us. We do not consider it to be critical that Parking's authorised share capital was insufficient for the issue of the 375,000 £1 shares, eventually issued on 29 March 1996. It could have been one of the terms of a contract that Parking would take steps to increase its authorised share capital to permit such an issue of shares. However there was no evidence of an offer, made either by the Appellant to subscribe for shares, or by Parking to issue shares, or of an acceptance of any such offer. The Appellant said in evidence that the deposit of £375,000 was pursuant to an "agreement" with Parking, whereby Parking would issue shares, in consideration of the deposit. However any such agreement would have to be inferred, and such inference is particularly difficult to draw in the absence of any documentation when the same individual is acting on each side.

36 The very subject matter of any contract, namely the shares to be issued by Parking, was at large at the time of the payment of the deposit. The Appellant's evidence was that no details of the issue of the shares by Parking were discussed with BDO Stoy Hayward, prior to his signing the documentation on 29 March 1996. On any view there were matters of substance to be decided, including the number of shares, their nominal value and their date of issue. We find as a fact that the Appellant paid the deposit of £375,000 as part of an informal "arrangement" between himself and Parking, which he had not discussed with his co-director. The Appellant's own evidence, that he was protected from any mishap between the time of the deposit and the issue of the shares by Parking, because he was the 100% shareholder in Parking, shows that he did not feel any need for there to be a contract. His evidence that he relied entirely on his advisers, in relation to the implementation of the arrangement set out in BDO Stoy Hayward's letter of 11 May 1995 further shows that the payment of the deposit was the first step in implementing an informal arrangement, as opposed to fulfilling the precise, specific, terms of a contract.

37 It follows from the absence of any contract between the Appellant and Parking that Parking was, as a matter of English Law, a volunteer, in relation to the £375,000

until the shares were issued to the Appellant on 29 March 1996. Parking therefore had a debt of £375,000 to the Appellant for the interim period. We were not directed to any principle or authorities which qualified this general proposition. We reject the suggestion (see paragraphs 17 and 34 above) that the documentation of March 1996 was based on a mistake as to the status of the £375,000 paid by him in June 1995.

38 The issue of the Parking shares to Mr Inwards on 29 March 1996 was therefore in consideration of capitalisation of the loan account (see paragraph 8 above) and constituted the repayment of a debt.

39 We also reject Mr Way's second proposition that "acquisition" in section 164L(3)(b) means "a process of acquisition", rather than a single point in time, so that the debt owed by Parking to Mr Inwards arose "on" the acquisition of the Parking shares, within that provision.

40 Mr Smith said out that the term "acquisition" means a single point in time in the context of section 164A. Otherwise, for example, the calculation of the "qualifying period" in section 164A(9) could not be made; neither could any indexation allowance (for years of assessment prior to 1998/1999) or taper relief (for years of assessment 1998/1999 onwards) be calculated. Mr Smith contended that the term "acquisition" should take the same meaning (that is, a single point in time) for the purposes of section 164L and section 164L(3)(b) in particular. In the case of shares, the only sensible point in time they could be said to have been "acquired" was on their "issue". Until then a subscriber only had a right to be issued shares (which may be formal rights under a contract of allotment), rather than the shares themselves.

41 We accept Mr Smith's approach. For the reasons given by Mr Smith, it is clear that section 164A and particular section 164A(1) and (9) treats "acquisition" as a single point in time. We see no reason why the term "acquisition" should be given a different meaning in section 164L. Since section 164L is concerned with denying reinvestment relief on, inter alia, the "acquisition" of otherwise "eligible shares", it seems to us that section 164L, and in the present case section 164L(3)(b) in its reference to a "debt... incurred...on or after the acquisition of the shares...", is concerned with the same "acquisition" as that for which section 164A gives relief. Furthermore the reference in section 164L(3) to an individual "who is to acquire or has acquired any shares..." makes it clear that the acquisition is an event which is a single point in time, from which one may look backwards or forwards. The draftsman is not using the term "acquisition" as a synonym for a "process". We make our conclusion quite apart from our observation that Mr Way's alternative construction of section 164L(3)(b) does such violence to its language as to make that construction impermissible.

42 As for debts incurred "on" an acquisition of shares, it strikes us that an investor could easily subscribe for a mixture of share capital and loan capital in a single company and seek reinvestment relief in respect of the subscription for share capital. The company could very well incur a liability in respect of the loan capital at exactly same time as it issues shares, especially if the share subscription and loan subscription were covered by a

single instrument. Section 164L(3)(b)(i) and (ii) applies to protect the reinvestment relief on the share subscription. Thus it is perfectly possible to give a sensible, natural, commercial meaning to the notion of incurring a liability “on” the acquisition of shares, even if “acquisition” means a single point in time. We consider that the time of acquisition of shares which are subscribed for, rather than acquired from, an existing shareholder (on which we make no observation, since such an acquisition is not relevant to this case) is their time of issue. We take this from the decision of the House of Lords in *National Westminster Bank plc*. Since shares are “issued” at a single point in time (the time at which the allottee is registered in the Members’ Register), we consider that they are also “acquired” at that time. Until then the holder’s asset is a right to shares, rather than the shares themselves. Section 22(2) of the Companies Act 1985 only treats a person as being a “member” of a company on being entered on the Register of Members. Gower’s *Principles of Modern Company Law* (6<sup>th</sup> Edition) observes that “[o]nly when the allottee...has been entered on the register will anyone become a shareholder and member” ( at page 335). A fortiori, a person who subscribes for shares where there is no contract of allotment, only becomes a member and shareholder when entered on the register. As it happens, for tax purposes, TCGA 1992, section 123(1) also distinguishes between a right to acquire shares on a rights issue, or bonus issue (“in respect of [other] shares”), on the one hand and shares, on the other. We also, add, in passing, that even if there had been a contract of allotment in the present case, TCGA 192, section 28(1) [date of disposal and acquisition of an asset is the time of conclusion of the contract, not its completion] would not have applied to determine the time of acquisition. Section 28(1) does not apply to an issue of shares, since section 28(1) only applies if an asset is both disposed of and acquired (and there is no disposal on the issue of shares).

43 We do, however agree with Mr Way’s third proposition that the repayment of the debt by Parking, owed to the Appellant, on the issue of the shares on 29 March 1996 is outside of the mischief of the return of value provisions in section 164L(3). Section 164L(3)(a) to (h) provides an exhaustive definition of a return of value. All of the categories of a return of value involve money or money’s worth which travel from the direction of the investee qualifying company to the reinvestor, that is, in the opposite direction to the subscription funds paid by the reinvestor to the company.

44 The self-evident rationale of the return of value provisions in section 164L(3) is to ensure that the reinvestor truly has increased his investment in the qualifying company, by reason of his acquisition of eligible shares, whether by subscription or on the acquisition of such shares from another person. The implementation of an arrangement for a return of value within section 164L(3) would mean that a reinvestor who had not, economically, increased his investment in the qualifying company to the extent of the amount the return of value received. In other words, the making of a “qualifying investment” for the purposes of section 164A(1) requires a true divestiture of the acquisition funds, whether on an acquisition from another party of existing shares, or on the subscription of new shares. The relief, it seems from the terms of section 164L(1) and (3), ought not to be available if the flow of funds from the investor to the company is linked in any way with arrangements for a flow of value in the other direction, from the company to the reinvestor. The draftsman is not concerned with a flow of money or

money's worth from the company to a person other than the reinvestor, although we note that section 164L(3) would catch any return of value made indirectly to, or to the order of, the reinvestor, or any "associate" of his: section 164L(9). The draftsman is only concerned with securing that the reinvestor who seeks relief has made a real investment of the amount of the relief he seeks. The fact that section 164L(1) and (3) applies to deny relief entirely even if only a part of the value invested is returned merely emphasises that the relief is only available if an amount equal to the chargeable gain the reinvestor seeks to shelter has been truly reinvested.

45 However, the repayment of a debt, where the debt itself only arises as an incidence of the share acquisition, which does not involve the utilisation, by the reinvestor, of any part of the funds which he uses to acquire the eligible shares, and which leaves him with a net increased investment in the qualifying company of an amount equal to the chargeable gain he seeks to relieve, is in our judgment outside the scope of section 164L(3). We agree with Mr Way that the application of section 164L(1) and (3) to deny relief, in such circumstances, simply because subscription funds were advanced to the issuing company, otherwise than under a contract of allotment, before the share issue, thus creating a debt which is repaid or discharged by the share issue, would be an absurdity.

46 In this case the Appellant did not in the intervening period have the use of any part of the £375,000 he deposited with Parking on 30 June 1995. There was simply a technical repayment of a debt when Parking issued its shares to the Appellant on 29 March 1996. The Appellant, upon the full implementation in March 1996 of the arrangements proposed in the BDO Stoy Hayward letter of 11 May 1995, had an increased investment of £375,000 in Parking.

47 Before setting out what we consider to be the correct approach to section 164L, we record our rejection of Mr Smith's approach to that provision. Mr Smith submitted that section 164L(1) and (3) would apply to an arrangement for the repayment of any debt, incurred prior to the acquisition of shares. Technically, he submitted, section 164L(1) and (3) would apply to every case where subscription funds were deposited with a company before that company issued shares to the subscriber, unless the payment was made pursuant to a contract for the allotment of shares; in any case where the payment was not made under such a contract, including where a cheque sent to a company together with an application for an allotment of shares was cashed before allotment, the Inland Revenue could, according to Mr Smith, apply section 164L(1) and (3). Mr Smith described what he had been advised was an Inland Revenue practice, which was that, provided that a company's authorised share capital, at the time that the payment was received, was sufficient to issue the shares ultimately issued and any delay between the deposit of the subscription funds and issue was not "unreasonable" the Inland Revenue would forbear from applying section 164L(1) and (3) by concession. Mr Smith was unable to specify the criteria which would make a delay "unreasonable" but submitted that the nine-month delay in the present case, between 30 June 1995 and 29 March 1996 was unreasonable on any view. However, in any event, if the company's authorised share capital, at the time at which he subscribed, was insufficient for the issue of the

shares ultimately issued to the investor, as was the case for the Appellant's subscription for the Parking shares, Mr Smith submitted that section 164L(1) and (3) did apply, no matter how short a period of time (even a day or so) there was between the deposit of the subscription funds with the company and its increase in authorised share capital.

48 We find this approach untenable. We would, without the clearest statutory guidance, be most reluctant to adopt an approach to the construction of a statutory provision which, in order to make the provision workable in common commercial circumstances, is dependant on the exercise of Inland Revenue discretion and concession, see *Vestey v Inland Revenue Commissioners* [1980] AC 1198. The results of such an approach is in our view arbitrary and unpredictable. For example the focus on the issued company's authorised share capital strikes us a wholly misconceived. Whether or not the Inland Revenue sought to apply section 164L might depend on whether a company ultimately chose to issue shares with a low nominal value but at a large premium, or a large number of shares with a low nominal value but at a large premium, or a large number of shares at par, which required, as in the present case, an increase in its authorised share capital.

49 We consider the correct approach to section 164L(1), in the context of the relationship between section 164L(1)(c) and (3), to be as follows: arrangements fall within the scope of section 164L(1), if the arrangements are "for the acquisition of" the shares, or are arrangements "in relation to, or in connection with" the acquisition and "include", in the context of this case, "arrangements" for the return of the whole or any part of the value of the investment: section 164L(1)(c). Here it is said, by the Inland Revenue, that the arrangements included arrangements "for the repayment of any debt owed" to the Appellant: section 164L(3). As a matter of language the offensive "arrangements" caught by section 164L(1) and (3) must, in fact, contain two distinct features. Firstly, they must be "for", or "in relation to, or in connection with" an acquisition of eligible shares. Secondly, and distinctly, they must include arrangements for a return of value (here the repayment of a debt). We agree with Mr Smith that there need be no actual repayment of a debt to invoke section 164L(1), merely an "arrangement" for such a repayment (actual returns of value, post acquisition of eligible shares, are governed by section 164L(2) which is of no application in this case). However, the "arrangements" for or in relation to, or in connection with the acquisition of the shares and the "arrangements" for the repayment of the debt are separate features, used in contra-distinction, of the "arangements" described by the draftsman in section 164L(1) and (3). In our judgment, arrangements for the repayment of a debt, when the debt itself only arises as a necessary incident of the share acquisition are not within section 164L(1). There are not two distinct features of the "arrangements" in such a case, one "for" (or "in relation to, or in connection with") a share acquisition and another "for" the repayment of a debt but only one "arrangement", being "for" the acquisition of shares; the debt has no existence independent of the arrangement for the acquisition of the shares. When a debt arises under arrangements as a mere incident of the share acquisition with no commercial life or rationale of its own, in that it only arises in the implementation of the arrangement for the acquisition of the shares and is then repaid on the share issue, this does not invoke the application of section 164L(1).

50 Put another way, in the case of a debt which arises as a mere incident of a share acquisition, the arrangements of the share acquisition are outside section 164L(1), since, absent the share acquisition, there is no debt and no “arrangement” for the repayment of a debt.

51 This approach prevents section 164L(1) and (3) from applying to any arrangement under which a debt arose (and was repaid) merely as an incident of a share acquisition. Section 164L(1) and (3) would not apply to a debt which arose simply because a qualifying company was a volunteer which received the subscription funds in advance of a share allotment or share issue. This approach to the language of section 164L(1) and (3), accords with what we perceive to be the mischief of section 164L(1) and (3), since it would not, on this construction, apply to deny relief for “arrangements” where the only repayment of a debt was a technical repayment which took place on the share issue itself, where the reinvestor had made a genuine investment in the qualifying company. We are reinforced in our conclusion by our observation that this approach permits us to give the term “acquisition” in section 164L(3)(b) what we consider to be its proper meaning, that is the single point in time at which the shares are issued, which we consider would be the time of acquisition of shares acquired by subscription for all other TCGA purposes. We also take comfort from the reference in section 164L(3)(b) to “any debt owed to” the reinvestor. Section 164L(3)(b) does not refer to “any debt owed to *or which will or may become owed* to the reinvestor. This indicates that section 164L(1) and (3) did not apply to an arrangement to repay a debt which did not exist before the arrangement for the share acquisition but which arose and was repaid as an incident of the share acquisition. It is not every arrangement relating to the repayment of a debt incurred after the commencement of the implementation of arrangements to acquire shares and repaid on or before the acquisition, which was protected from the application of section 164L(1) and (3). We merely say that arrangements to repay debts which arise (and are repaid) as a mere incident of the share acquisition, so that the reinvestor has made a net increased investment in the qualifying company under the “arrangements”, are outside its scope.

52 In the present case, the indebtedness of Parking to the Appellant only arose because the Appellant deposited the subscription funds before Parking issued its shares to him and the subscription was not made pursuant to a contract. This indebtedness (and its repayment) arose as a mere incident of the Appellant implementing the arrangements “for” the acquisition of the Parking shares, as set out in the letter from BDO Stoy Hayward of 11 May 1995. Mr Smith expressly accepted that the advance of £375,000 and the share issue by Parking was part of a single arrangement. On the facts of this case and in view of the wide meaning given to “arrangement” in section 164L(11), we consider that he was right to do so. The nine months delay between the deposit of £375,000 by Mr Inwards on 30 June 1995 and the issue of shares by Parking on 29 March 1996 did not alter the nature of Parking’s indebtedness to the Appellant. Mr Smith did not suggest that the nature of this indebtedness changed at all over these nine months. The indebtedness and subsequent repayment on the issue of the Parking shares, cannot be said to have arisen from any “arrangements” separate to those “for” the acquisition of the Parking shares. The indebtedness (and its repayment) only arose as a result of the

Appellant having advanced the subscription funds to Parking prior to the issue of the Parking shares otherwise than under a contract. There were no “arrangements” for the repayment of any debt owed to the Appellant independent of the “arrangements” “for” the acquisition of the Parking shares, since without the latter arrangements there would have been no debt. The arrangements implemented by the Appellant are outside the language of section 164L(1) and (3). The Appellant made, under those arrangements, a net increased investment in Parking. The arrangements are thus outside the mischief of section 164L(1) and (3). Accordingly section 164L(1) and (3) do not apply to deny Mr Inwards reinvestment relief.

53 We allow the appeal and discharge the assessments.

54 Finally, this was not an easy case. We do not understand why the Revenue was not legally represented.