

Analysis

Farnborough Airport Properties Ltd: control for group relief purposes

Speed read

In *Farnborough Airport Properties Ltd and others v HMRC*, the First-tier Tribunal held that a company placed into receivership was, from the date of appointment of the receiver, no longer entitled to surrender group relief to other companies in its group, as entering into receivership constituted ‘arrangements’ for the company to cease to be under the same control as the other group members. Although the tribunal’s decision was fact specific, the case represents an interesting extension of HMRC’s views about when certain other insolvency procedures (such as administration and administrative receivership) amount to a change of control for group relief purposes (which itself is not free from controversy); and has potentially significant ramifications.



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HMRC is known to take the view that the commencement of certain types of insolvency procedure constitutes a change of control for corporation tax purposes, such that group relief surrenders may be denied. In particular, this view has been expressed in HMRC’s published guidance (see, for example, HMRC’s *Company Taxation Manual* at CTM97760) in relation to liquidations, administrations and administrative receiverships.

The specific legislative provision dealing with group relief, which is often cited in this regard and needs to be considered upon the commencement of an insolvency procedure, is now found at CTA 2010 s 154 (formerly ICTA 1988 s 410). Broadly, this provision stipulates that two or more companies are not to be treated as members of the same corporate group for the purposes of group relief if certain ‘arrangements’ are in place with specified effects. Namely, these are arrangements whereby:

- the companies could cease to be members of the same group of companies by virtue of one company becoming a member of another group;
- a third person (i.e. not an existing group member) could obtain ‘control’ of one of the companies but not of the other(s); or
- a third company (again, not an existing group member) could start to carry on the whole or part of the trade of one of the group companies as its successor.
- This provision is often construed by advisers as being primarily concerned with countering tax avoidance,

necessitating a narrow construction. However, in recent years HMRC has interpreted it more widely, increasingly seeking to rely on it as a de facto definition of when a group does and does not exist for group relief purposes.

The impact of CTA 2010 s 154 on a somewhat less publicised insolvency procedure from HMRC’s perspective – the Law of Property Act (LPA) or fixed charge receivership, as opposed to administrative receivership – has recently been considered by the First-tier Tribunal (FTT) in *Farnborough Airport Properties Ltd and others v HMRC* [2016] UKFTT 0431 (TC) (reported in *Tax Journal*, 15 July 2016). The tribunal’s decision has potentially significant ramifications (subject to any appeal).

The facts

Farnborough Airport Properties Company Ltd, Farnborough Properties Company Ltd and Piccadilly Hotels 2 Ltd (PH2L) were all at least ‘75% subsidiaries’ of Kelucia Ltd, pursuant to CTA 2010 s 152; and thus were members of the same group for group relief purposes.

On 27 June 2011, PH2L was placed into receivership and a receiver was appointed over all of PH2L’s property under a deed of debenture, which granted PH2L’s lender a fixed charge over some of the company’s assets and a floating charge over the whole of its assets. The receiver’s powers, as set out in the deed of debenture, were drafted to mirror the powers conferred on an administrative receiver by the Insolvency Act 1986 Sch 1. As such, the receiver was authorised to do all such things as may be necessary for the realisation of the property of PH2L and to carry on the business of PH2L.

In May 2014, both Farnborough companies submitted amended corporation tax returns for the period ended 31 May 2012, including claims for group relief (amounting to approximately £10.6m) surrendered to the companies by PH2L.

HMRC subsequently opened enquiries into the amended returns in October 2014. The Farnborough group’s advisers wrote to HMRC setting out why they believed the applications for group relief to be valid. They requested a ‘determination’ against which an appeal could be made if HMRC was still unable to accept the group relief claims.

In December 2014, HMRC issued closure notices which amended the returns to deny the group relief claims. The Farnborough companies appealed HMRC’s decision to the FTT.

The decision of the FTT

The FTT dismissed the taxpayers’ appeal and found in HMRC’s favour.

In essence, the tribunal was required to consider whether PH2L was in the same group as the taxpayers for the purposes of CTA 2010 s 154; and, in particular, whether the placing of PH2L into receivership constituted ‘arrangements’ effecting a change of control of PH2L, meaning that the group relief surrenders should be denied.

In reaching the decision that the receivership did constitute ‘arrangements’ for a change of control of PH2L, the following points were held to be key.

First, the counsel for the taxpayers held that

CTA 2010 s 154 is to be properly construed as a provision designed to prevent tax avoidance through the manipulation of artificial group arrangements. (This argument was based on certain extracts from the proceedings before the Parliamentary Standing Committee, in which the group relief provisions of the Finance Bill 1973 were discussed.) In response, it was held that there was nothing obvious to justify the conclusion that what is now CTA 2010 s 154 has 'the dominant or principal objective' of combatting tax avoidance. Accordingly, there was no requirement to read the section narrowly, so as to disallow a claim for group relief only where there was an element of artificiality or manipulation. Rather: 'the clear purpose of s 154, read purposively, is simply to make group relief unavailable between companies which are not under the same control' (para 47).

Second, the question was raised of whether the receivership in this instance constituted 'arrangements' for the purposes of CTA 2010 s 154. It was held that the term should be interpreted widely; and that it is not necessary to ascertain whether group relief is available through the application of a 'motives' based test. Instead: 's 154 is designed to be of straightforward and practical application, both for taxpayers, their advisers and HMRC, without needing to inquire into concepts such as meetings of minds, or consensus' (para 51). Thus, the tribunal concluded that the appointment of the receiver over PH2L constituted 'arrangements' for the purposes of s 154.

Third, the issue was to determine whether the receiver could obtain 'control' of PH2L (within the meaning of CTA 2010 s 1124). The tribunal held that the fact that the whole of the property of the company was put into the hands of the receiver, coupled with the receiver's very extensive powers under the deed of debenture (in particular, the specific power of the receiver to carry on the company's business), was determinative. Thus, 'the entire affairs of PH2L, read practically, were put into the hands of the receivers' (para 68). Also: 'once the receivers had been appointed, the affairs of PH2L were no longer being conducted in accordance with the wishes of the Appellants' shareholders. That was sufficient to degroup PH2L. Whilst the Appellants' shareholders continued to have control over the Appellants, they did not have control over PH2L, in the sense that they were no longer able to secure that PH2L's affairs were conducted in accordance with their wishes' (para 70).

Implications and comment

The FTT's decision should not be taken to mean that the appointment of LPA/fixed charge receivers will always result in degrouping for group relief purposes. In its conclusion that the entry into receivership constituted 'arrangements' for a change of control, the key factors were that the receiver was granted full powers to run the underlying business and took all of the company's assets into its hands. That would not be the case for a fixed charge receiver enforcing security over individual assets without the ability to affect the day-to-day running of a business.

However, the tribunal's decision is noteworthy, insofar as it goes some way in supporting HMRC's view as to when a change of control occurs for the purposes of CTA 2010 s 154. HMRC has argued that in the cases

of administration or administrative receivership, for example, the institution of the relevant process results in control being lost at shareholder level, as well as company level. This is largely because the shareholders are no longer in a position to secure that the company's affairs are conducted in accordance with their wishes (following the definition of 'control' under CTA 2010 s 1124).

The FTT's decision in this case effectively extends that logic to LPA/fixed charge receiverships, by saying that the receiver in question was able to take 'control' of PH2L. However, this is not a very satisfactory position if one considers that a fixed charge receiver, and even an administrator and administrative receiver, are not entirely free to manage a company's affairs in accordance with their 'wishes'. Nor do they strictly derive their powers from the holding of shares, the possession of voting power or via the conferring of powers on them by a 'document regulating' the relevant company (as required by CTA 2010 s 1124).

Furthermore, the conclusion that there is a change of control in the case of receivership is, it can be argued, somewhat at odds with earlier case law on what 'control' really means, as defined in CTA 2010 s 1124. This is most notable in *Irving v Tesco Stores (Holdings) Ltd* [1982] STC 881, in which the High Court favoured a pragmatic approach and held that control at board level is sufficient to give 'control' under what is now CTA 2010 s 1124. In other words, the shareholders of a company in receivership could still exercise a requisite degree of 'control' notwithstanding the appointment of the receiver.

The decision adds greater weight to HMRC's position that companies in administration, administrative receivership and now certain types of LPA/fixed charge receivership are degrouped for the purposes of group relief

Unfortunately, the FTT did not analyse the vagaries of, or the legal nature of, receiverships in its decision. It restricted itself to a narrow interpretation of the terms of the deed of debenture pursuant to which the receiver was appointed.

What next?

It remains to be seen whether the decision will be appealed to the Upper Tribunal; and, if so, whether all or some of the key issues referred to above will be addressed in greater detail.

In the meantime, the FTT's decision can be expected to add greater weight to HMRC's position that companies in administration, administrative receivership and now certain types of LPA/fixed charge receivership are degrouped for the purposes of group relief. ■

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► Cases: *Farnborough Airport Properties Company and Farnborough Properties Company v HMRC* (13.716)