SLAUGHTER AND MAY/

A NEW CHAPTER IN THE UNALLOWABLE PURPOSE TALE: THE FTT'S DECISION IN *SYNGENTA*

CLIENT BRIEFING

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In *Syngenta*, the First-tier Tribunal denied interest deductions on a loan created in an intra-group reorganisation under the unallowable purpose rule in CTA 2009 s 441. This case highlights that commercial purposes need to be clearly articulated and that the FTT will approach with scepticism documents that it considers have been reviewed by tax advisers with a view to minimising the prospect of an HMRC challenge. But, on a more positive note, the FTT rejected HMRC's argument that an intra-group transaction's circular funds flow could evidence a tax motive.

In *Syngenta Holdings Ltd v HMRC* [2024] UKFTT 998 (TC), a new decision on the unallowable purpose rule in CTA 2009 s 441, the First-tier Tribunal denied all interest deductions because the relevant loan had a tax avoidance purpose. It came out shortly after *BlackRock* [2024] EWCA Civ 330, *Kwik-Fit* [2024] EWCA Civ 434 and *JTI* [2024] EWCA Civ 652 reached the end of the road (the Court of Appeal's decisions are final after the Supreme Court denied permission to appeal). So, as one chapter closes, another one opens (although it is unclear whether *Syngenta* will go beyond the FTT).

Syngenta in summary

The Swiss-headed Syngenta Group is a global agriculture business. Before an intra-group reorganisation in early 2011, a Dutch intermediate holding company (Syngenta Alpha) held two UK sister companies, Syngenta Holdings and Syngenta Limited, each with UK (and in Limited's case also non-UK) subsidiaries. The intra-group reorganisation (originally proposed in early 2010 by the UK tax team as a 'tax project' called 'debt push down') involved the acquisition of Limited by Holdings from Alpha. The consideration was $950m in cash, debt-funded by a loan from a Dutch group treasury company, and a $1.258bn share issue. Following the acquisition, Alpha was able to make an interim distribution of $950m to its parent (which was helpful to the Syngenta Group given investors' high dividend expectations).

The FTT agreed with HMRC that all tax deductions for interest on the $950m loan should be denied under the unallowable purpose rule.

It was common ground that Holdings' directors' decision-making had not been usurped, so their purpose determined whether Holdings had an unallowable purpose in respect of the loan. But (as is clear following *BlackRock*, *Kwik-Fit* and *JTI*) the wider group's purpose can be relevant to this assessment and the FTT started with that. It concluded that the Syngenta Group's purpose was to obtain a significant tax saving through the reorganisation and creation of the loan, that Holdings' directors had effectively adopted that purpose and therefore, in entering into the loan, Holdings had a main purpose of obtaining a tax advantage, so an unallowable purpose. In fact, obtaining the tax advantage was Holdings' only purpose, so all interest deductions had to be attributed to it and denied.

Syngenta Group's purpose

The FTT rejected the taxpayer's contention that the Syngenta Group's purpose for the reorganisation was legal entity simplification and/or dividend planning. Both featured rather less prominently in the documentary evidence than the anticipated tax saving of around $7m a year: because of a difference between the tax rates in the UK and the Netherlands, the interest deductions would save significantly more tax in the UK (mainly through Holdings surrendering interest deductions to profitable operating companies) than the Dutch group treasury company would pay in the Netherlands.

The FTT accepted that unifying the UK sub-group under Holdings produced benefits but concluded that these were minimal compared to the costs of the reorganisation and the size of the tax saving. In cross-examination, one of the witnesses confirmed that, as 'perceived by' him, the potential benefits of unifying the UK sub-group 'weren't a significant benefit' for Holdings, and there was no evidence that the pre-reorganisation structure had 'unduly impeded the business' of Holdings or Limited. The FTT then noted an email that had referred to entity simplification as 'being used to "help with our business purpose arguments"', and concluded that the evidence suggested 'that legal entity simplification is being used as a "cover",

to minimise any perception that the Transaction was entered into for tax purposes'.

The FTT also accepted that enabling Alpha to pay a $950m distribution was a benefit of the reorganisation, but considered that 'dividend planning' was not a purpose. It was not mentioned before October 2010 and then only vaguely as to 'simplify the dividend planning process' (which also suggested something different than the benefit of the one-off distribution that was actually derived from the transaction).

Holdings' directors' purpose

What did Holdings' directors know about the Syngenta Group's purpose? Based on the information available to them, the directors would have concluded that the Syngenta Group's purpose was to achieve a tax saving (and not legal entity simplification and/or dividend planning). The witness I mentioned above (who confirmed that, as 'perceived by' him, the potential benefits of unifying the UK sub-group 'weren't a significant benefit') was one of Holdings' directors. His witness statement also suggested that he had become aware of the dividend planning benefit only a decade or so after the reorganisation when he read the group tax manager's witness statement (although in cross-examination he said 'I was probably aware of it at the time, but it wasn't foremost').

Did Holdings' directors adopt the Syngenta Group's purpose? The taxpayer argued that, from Holdings' perspective, the loan had a commercial purpose of funding the investment in Limited. The FTT disagreed. The materials provided to the directors did not present the acquisition of Limited as a desirable investment; their focus was to get the directors comfortable that it wasn't a bad one. In a similar vein to *BlackRock* and *JTI*, the directors were happy for Holdings to play its part in the plan devised by the group, provided they would not be exposed to liability for making a bad investment. So the Syngenta Group's tax avoidance purpose was also Holdings' purpose in entering into the loan.

The FTT noted that, in this case where the loan came as a package with the acquisition of Limited, 'the use that was made of the funds … is less informative than if the borrowing had not been packaged with the acquisition'. This statement could set hares running given that debt-funding for any acquisition arguably comes in a package with it (in the sense that, without the debt-funding, the acquisition could not proceed). But I think it must be seen in the context of this case where the FTT had found, in essence, that creating the loan (and associated tax saving) was the Syngenta Group's primary aim and the acquisition of Limited by Holdings was what allowed them to create it.

What can we learn from the case?

There needs to be a commercial rationale for the loan/transaction

Here, the reorganisation started as a tax project ('debt push down'), was managed by the tax team and the benefits were described in terms of the expected tax saving. For instance, a slide entitled 'UK reorganisation – tax savings' with the calculation of the tax saving (and without reference to any other benefits) was provided to finance leaders in the Syngenta Group and Holdings' directors. The notes to that slide started with 'This slide shows the benefits of the transaction'; the FTT's comment: 'We note the only benefits are tax ones.'

The commercial rationale needs to be articulated beyond management buzzwords

Commercial rationales put forward from a Syngenta Group perspective were legal entity simplification and dividend planning, but neither was articulated in much more detail (beyond those buzzwords) in the contemporaneous documents. This militated against the FTT's finding that they were a purpose of the reorganisation.

In the FTT's words:

- If 'the primary purpose of this transaction was to be part of [a legal entity simplification project which the FTT accepted did exist] we would expect that to be more explicit, perhaps referring to an earlier or framework document setting out the benefits of legal entity simplification. We might also expect some indication of how the project was going, for example "This is the [nth] such project globally and the [nth] in the UK. So far the project has reduced the number of legal entities from [n] to [n], and increased the number of jurisdictions where there is a single holding company from [n] to [n]".'
- Given his testimony as to the importance of generating distributable profits to allow a dividend to be paid, we find such vague and general words in the corporate finance proposal ("simplify the dividend planning process") inapt to convey the idea of generating distributable profits.'

The commercial rationale put forward from Holdings' perspective was the acquisition of Limited as an investment. But as per the FTT: 'None of these slides are about SHL making a good investment, in the sense of enhanced profits by SHL. They emphasise the risks and the (tax) benefits to the group, however they do not suggest that SHL may wish to acquire SL due to capital growth or the dividend income exceeding loan repayments.'

The FTT may be sceptical of documents reviewed by tax advisers painting a different picture from other contemporaneous evidence

Having concluded that the evidence suggested legal entity simplification was 'being used as a "cover", to minimise any perception that the Transaction was entered into for tax purposes', the FTT said the following about Holdings' board minutes (which it found had been reviewed by EY's senior corporate tax manager who was working on the transaction): 'we therefore find it likely that those minutes were checked with an eye to reducing the likelihood of a challenge by HMRC. This causes us to approach these minutes generally with caution, not just the paragraph added as a "(defense) argument". They may not fairly

reflect the purposes of the directors when entering into the Transaction.'

Not discussing tax benefits at the board meeting or downplaying them in the minutes will not immunise a loan from an unallowable purpose challenge (given that the wider context is taken into account in any event). In fact, as illustrated here, it can have the opposite effect in that it may lead the FTT to approach certain documents with scepticism.

Was there anything positive?

Circular cashflow didn't indicate tax purpose

The FTT accepted that the cash portion of the consideration moved around the Syngenta Group in a single day and in a circular (or almost circular) way: from the Dutch group treasury company to Holdings (loan), from Holdings to Alpha (consideration for the acquisition of Limited) and Alpha to its parent (interim distribution). Alpha's parent was also the treasury company's parent, and it is conceivable/ likely that the parent then deposited the amount back with the treasury company where it had started (in which case the cashflow would be fully circular).

The FTT did dismiss HMRC's suggestion that the cashflow could be used to infer tax motivation: 'HMRC suggest that this is potentially relevant to whether the Transaction was tax motivated. We disagree. As with many multinationals the group has a treasury company that effectively operates as a bank for the group. It is therefore not surprising that for a transaction that is internal to the group the cash flows are circular.'

Limits on further disclosure during the appeals process

Related to the substantive appeal discussed in this post, there is an earlier case management decision ([2021] UKFTT 236 (TC)) (by a differently constituted FTT) concerning HMRC's application for disclosure of further documents and information – over and above the 'significant amount of information, documents and explanations' (HMRC's own words) that Holdings had already provided during HMRC's enquiry into the reorganisation and loan. There are two points I want to highlight.

Holdings' cooperation in the enquiry did not preclude HMRC from applying for further disclosure during the appeals process, but it is considered when assessing what disclosure would be proportionate. In the FTT's own words: 'When considering proportionality I shall take into account the fact that there has been a six-year enquiry during which [Holdings] has co-operated fully and provided extensive information and documentation which was not seriously challenged by HMRC during the course of that enquiry; nor (save for the odd exception) during that enquiry, did HMRC ask [Holdings] for the additional documents and information which are the subject of this application.' The FTT proceeded to order disclosures on significantly narrower terms than requested by HMRC.

The FTT also considered whether it could order disclosure of documents held by another non-UK group company. At one end of the spectrum, you may have two companies (we'll call them A and B), without any prior history of cooperation, but A could ask B for the relevant documents – here, the FTT would not have jurisdiction to order disclosure. At the other end, imagine a situation where B allows A's employees to access B's archives and systems, without the need to involve or notify B's employees – in this case, the FTT could order disclosure. Syngenta fell in the middle. On previous occasions, the UK tax lead had, through liaising with other group companies' employees, been able to obtain (and provide to HMRC) documents requested by it. The FTT decided that this level of past cooperation (which fell short of allowing Holdings 'to inspect and take copies of documents itself ') did not give Holdings a sufficient level of control to allow the FTT to order disclosure – which is a good reminder to consider how information is shared within your corporate group!

And more facetiously, tax professionals are highly commercial

Any tax professional who has ever felt that their colleagues in other areas considered them something of a roadblock or troublemaker might like to know that this is not how the FTT sees you: 'In general tax professionals are highly commercial individuals, in addition to being knowledgeable about tax. This is all the more so for tax advisors who work in-house.'

(Here, unfortunately, this didn't count in the witness's favour. The FTT's next sentence implied that, if the tax team talks only about tax (and not also other commercial) benefits, that might just suggest that there aren't any: 'We do not believe that such individuals would only discuss tax and disregard other commercial considerations, if there were any. Mr Kuntschen's suggestion is fanciful.' I assume the fanciful suggestion is the one (mentioned in the decision's preceding paragraph) that 'when one tax person spoke to another tax person they focus on the tax without “bring[ing] in addition legal or whatsoever consideration; we look at our tax project”'.)

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