A company share buyback: the battle of Boulting

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We look at a case where HMRC determined that a share buyback was not undertaken for the benefit of a company's trade.

Key Points

What is the issue?

The case of *Boulting* concerns whether a company share buyback, supported by HMRC clearance, genuinely benefited the company's trade so as to qualify for capital gains tax treatment.

What does it mean to me?

HMRC can revisit clearances, but tribunals will look at the full commercial context and focus on the company's purpose, not just valuation or partial buybacks.

What can I take away?

Well-documented commercial reasons for a buyback – especially resolving management deadlock – can still support capital treatment, even where the buyback is only partial.

In my October 2020 article 'On the way to the forum', I looked at an unsuccessful judicial review claim reported as *R (oao Boulting) v HMRC* [2020] EWHC 2207 (Admin). In that case, Mr Boulting sought to challenge HMRC's decision to revoke a clearance that it had previously given in relation to a company's purchase of its own shares. In the clearance (given under Corporation Tax Act 2010 s 1044), HMRC confirmed that Mr Boulting's sale of his shares back to the company met the conditions in s 1033 to be treated as a capital transaction. However, following an enquiry into Mr Boulting's tax return (which unsurprisingly reported the transaction as falling within the capital gains tax rules), HMRC changed its mind.

The judicial review claim failed because of the principle that judicial review is generally a remedy of last resort. It was the judge's view that the dispute between Mr Boulting and HMRC was essentially whether the conditions were met for the share buyback to be treated as a capital transaction. That being the case, the dispute could be effectively resolved via a statutory appeal against the closure notice which HMRC issued at the end of its enquiry into Mr Boulting's tax return. As there was a viable alternative remedy, there was no need to engage the High Court through judicial review proceedings.

As a result, the appeal against the closure notice was notified to the First-tier Tribunal, and the decision in relation to that appeal is reported as *Boulting v HMRC* [2025] UKFTT 1272 (TC).

The facts of the case

Mr Boulting had been the founder and principal shareholder of a company following the management buyout of a business in 1993. Following a share-for-share exchange, the company became a 100% subsidiary of a new holding company in

1998. Over the next 15 years, the shareholdings in the holding company changed slightly but Mr Boulting retained a 50% shareholding. Nevertheless, tensions developed within the business, with the younger generation disagreeing with Mr Boulting about the future strategy of the companies. These tensions (and the acknowledgement that Mr Boulting could effectively block the decisions that he did not approve of) led to steps being taken to facilitate Mr Boulting's retirement.

Broadly speaking, Mr Boulting agreed to sell back to the holding company those shares that the company could afford to purchase and to give his son those shares that he was unable to sell. At the time, the company's cash reserves were limited to £5 million. In order to determine how many shares would be bought back by the company, Mr Boulting sought a valuation of the company. That valuation meant that the company could buy back eight shares for £4.8 million, with the remaining shares being gifted to Mr Boulting's son.

The company obtained a s 1044 clearance confirming that the transaction would qualify for capital gains tax treatment. However, following the submission of Mr Boulting's tax return for the year, HMRC considered that he had been overpaid for the shares.

HMRC therefore revoked the clearance on the basis that the company had failed to declare a material fact when obtaining clearance (namely, the 'fact' that Mr Boulting would be overpaid by the company) and concluded that Mr Boulting should instead be taxed as if he had received income of £4.8 million. HMRC considered this fact to be material because being overpaid for the shares was an indicator that the transaction did not satisfy the conditions for capital treatment but was instead a means of transferring significant funds to Mr Boulting. HMRC said that it would not have given the clearance had it known the full facts.

The relevant legislation

Section 1033 of the Corporation Tax Act 2010 sets out the conditions for a share buyback to be treated as a capital transaction: otherwise, the transaction is treated as a distribution and taxed on the seller as income.

First and foremost, s 1033 requires the company to be an unquoted trading company, or the unquoted holding company of a trading group (s 1033(1)(a)). There are then two principal routes to capital treatment, the most important of which (for

the purposes of this case) being that the purchase is made wholly or mainly for the purpose of benefiting an ongoing trade carried on by the company or any of its 75% subsidiaries (s 1033(2)(a)), provided that a host of detailed procedural conditions are also met.

The First-tier Tribunal's decision

The case came before Tribunal Judge Anne Fairpo and Member Duncan McBride.

In order to determine whether the company buyback was made wholly or mainly for the purpose of benefiting a trade carried on by the holding company's 100% subsidiary, the tribunal looked at the wider circumstances of the case. In particular, it acknowledged the management difficulties and the fact that steps leading to Mr Boulting's retirement were being taken to remove the management deadlock within the business.

The tribunal noted the slightly different valuation ranges put forward by the experts instructed by Mr Boulting and HMRC respectively. However, given the wider factual circumstances, the tribunal did not consider it necessary to delve into the valuation exercises. In particular, the tribunal noted that Mr Boulting (as part of his exit) was not seeking to extract a disproportionate sum for his shares but was instead seeking to sell to the company those shares that it could afford to purchase (at a fair price), with any remaining shares being given away.

The tribunal made clear that its role was not limited to considering the share buyback in isolation but extended to the wider factual picture, including the other disposals being made by Mr Boulting. HMRC's argument that the buyback had to be looked at in isolation was therefore rejected.

HMRC had also argued that a significant part of the motivation was to flatter Mr Boulting by giving the company a high valuation. However, the tribunal noted that HMRC's valuation expert had acknowledged that flattery can be used as a negotiating technique. More importantly, it recognised that Mr Boulting's personal wishes were known to the company and were used as a part of its strategy in achieving its own objectives (namely, Mr Boulting's departure from the business).

The tribunal focused on the company's reasons for entering into the transaction, rather than Mr Boulting's. It decided that the statutory test focused on 'why the

company purchased the shares, not necessarily why it paid £4.8 million for them'.

Much of the argument centred on the wording of HMRC's Statement of Practice 2/82. Paragraph 2 noted: 'If there is a disagreement between the shareholders over the management of the company and that disagreement is having or is expected to have an adverse effect on the company's trade, then the purchase will be regarded as satisfying the trade benefit test provided the effect of the transaction is to remove the dissenting shareholder entirely.' Although this supported Mr Boulting's case in principle, HMRC focused on the final word 'entirely', noting that the share buyback did not involve all of his shares.

HMRC also pointed to paragraph 3 of the statement which expands upon this: 'If the company is not buying all the shares owned by the vendor … it would seem unlikely that the transaction could benefit the company's trade, so the trade benefit test will probably not be satisfied.' However, the tribunal noted the caveat that follows: 'There are exceptions, for example, where a company does not currently have the resources to buy out its retiring controlling shareholder completely but purchases as many of his shares as it can afford with the intention of buying the remainder where possible. In these circumstances, it may still be possible for the company to show that the main purpose is to benefit its trade.'

The tribunal considered that, even under HMRC's Statement of Practice, a partial sale back to the company accompanied by a gift of the remaining shares was not necessarily precluded from amounting to a disposal for the purposes of the company's trade. The tribunal reminded the parties that the Statement of Practice is guidance, rather than a definitive interpretation of the law. The tribunal therefore concluded that the statutory conditions in s 1033 were met and that Mr Boulting was entitled to treat the receipt as falling within the capital gains tax rules. Mr Boulting's appeal was therefore allowed.

Commentary

The purpose of Mr Boulting's earlier judicial review claim was to avoid the necessity of an appeal hearing. That hearing, when it eventually took place, lasted three days and, as two expert witnesses were instructed to advise on valuation matters, clearly involved a lot of prior preparation. When I wrote my previous article, whilst I was of the view that the judicial review claim should have been permitted to proceed, I

considered that the judgment might not have fully articulated why it was better for the dispute to be resolved by the tribunal instead. Now I have the benefit of the tribunal's decision, however, I feel that it only reinforces my original conclusion that the judicial review should have been allowed to go ahead.

That said, I suspect that HMRC might be disappointed by the outcome. One possible area for challenge was the tribunal's decision to focus on the company's reasoning for entering into the transaction, thereby rendering Mr Boulting's reasons and motivations less relevant. That is certainly a tenable view of the legislation (which focuses on a 'payment made by a company on the … purchase of its own shares' and the requirement that the 'purchase is made wholly or mainly for the purpose of benefiting [the relevant company's] trade'.

However, a purchase of shares is also, when looked at from another angle, a sale of shares. As a result, it is also arguable that one should take into account the seller's purposes. It will be interesting to see whether HMRC pursues that line of argument and, if so, how the Upper Tribunal views the legislation.

What to do next

The case is a good reminder that share buybacks are primarily treated as distributions for tax purposes but can, if certain conditions are met, qualify as capital transactions. Although this case focused on the benefit of a trade test, the procedural conditions should not be overlooked.

Mr Boulting benefited from the fact that the management dispute was clearly documented, as were the steps undertaken to effect his retirement. Similar documentation would be required in any other case where HMRC seeks to challenge the capital gains tax treatment (even, as seen in this case, if a clearance has previously been given).

This is a case where HMRC might challenge the tribunal's approach. We should keep an eye out for any further developments.

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