Some of the examples in this document (in particular 8 and 11) are finely balanced and subject to review. And whether or not the view expressed is the right outcome may depend on the specific facts and circumstances.

Preference shares - when are they Ordinary Share Capital (OSC)?

- Instruments that have come across in practice

- The following answers are given in respect of the definitions of ordinary share capital in section 989 ITA 2007 and 1119 CTA 2010:

  "Ordinary share capital", in relation to a company, means all the company's issued share capital (however described), other than capital the holders of which have a right to a dividend at a fixed rate but have no other right to share in the company's profits

Description
1. A share with no dividend rights
Is OSC - the definition is silent on rights, other than fixed rate of return
2. A fixed rate preference share with a zero coupon.
Is OSC - a right to nothing is not a right to something and so this is not a share that entitles its holder to a return at a fixed rate
3. A fixed rate preference share with a zero coupon of 0.000001% (i.e. negligible)
Is not OSC - although negligible, it is hard to argue this is not a fixed rate. However, in avoidance cases one might expect the courts to consider the reality and decide otherwise
4. A fixed rate of 10% cumulative.
Is not OSC - the holder knows the return is fixed even when profits not available (and so is more like debt than equity)
5. A fixed rate of 10% non-cumulative.
Is OSC - some years no dividend will be paid so there is no fixed rate. The return is dependent on the results of the business, so more like equity than debt
6. A preference share with a right to "tiered" dividends
Is OSC - although the terms are fixed, the rate is not, so we regard this as not a fixed rate return
7. A share which has a right to the greater of a specified sum or the dividend paid in respect of another class of shares.
Is OSC - there is no fixed rate. Usually this type of condition will be dependent on the results of the business's again pointing to equity more than debt.
8. A fixed rate preference share, but the holders receive a payment above the par issue price based on the figure for reserves when redeemed, or when the company is sold, or placed in liquidation.
Is OSC- the holder is entitled to a fixed rate of return, but the payment above par is an "other right to share in the profits" of the company, so bringing the share back into OSC
9. A preference share with 2 alternate fixed rates, the rate used depending upon certain events during the year (e.g. level of profits).
Is OSC - there is no fixed rate, but rather a rate that varies between two pre-ordained rates that vary according to business results. Again, the share is dependent on the results of the business and so more like equity than debt

10.	*A fixed rate preference share, but the holders receive a further dividend payment were certain events to occur (usually unlikely except in exceptional circumstances e.g. breach of banking covenants).*
	Is OSC – as with 8 this will be an "other right to share in the profits". However, as with 3, if the circumstances are truly unlikely, and the shares are issued as part of some sort of avoidance arrangements, one might expect the courts to view the shares on a realistic view of the facts
11.	*A preference share where the coupon compounds over time.* *OR* *A preference share where a rate of interest is added if the dividend is unpaid. The cautious view is that these are ordinary share capital, but there could be arguments to the contrary.*
	In both cases, providing the rate is fixed and cumulative, these will not be OSC. The additional amount payable in respect of the unpaid dividend is interest on amounts outstanding, rather than a return on the original equity investment.
12.	*A fixed rate of 10% cumulative, but dividend can only be paid if Regulator (e.g. FCA) authorises.* OR *A fixed rate of 10% non-cumulative, but dividend can only be paid if Regulator (e.g. FCA) authorises.*
	As with cumulative and non-cumulative shares. It does not matter that there is a third party involved, the right to the income remains either fixed or non-fixed according to whether the dividend rights are cumulative or non-cumulative
13.	*LIBOR plus a fixed percentage* (LIBOR of course fluctuates daily)
	Is OSC – a rate that varies is not fixed, even where the point of reference may be fixed. This is different to shares which, in the past, varied according to the rate of ACT payable on distributions (which could still be considered fixed rate)