[2015] UKUT 0262 (UTTC)
Appeal number: FTC/002/2014

Income tax – Appeal against closure notice – "Investment bonus" to be paid to hedge fund managers in connection with the transfer of management of the hedge fund from one company to another – Whether payment within Schedule D Case VI – In the circumstances, yes – Appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

PHILIP MANDUCA **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: The President of the Upper Tribunal Tax and Chancery Chamber

Sitting at the Rolls Building, Fetter Lane, London WC1A 2EB on 5 May 2015

Charles Bradley instructed by Graham Taylor for the Appellant

Jonathan Bremner instructed by the General Counsel and Solicitor to HMRC, for the Respondents

DECISION

1. The Appellant appeals against the decision of the First-tier Tribunal (Judge Staker and Ms Gable) released on 17 April 2013 ('the Decision') in which the tribunal upheld the closure notice issued by the Respondents ('HMRC') in respect of the Appellant's 2002-2003 self-assessment. Permission to appeal was granted by the Upper Tribunal on 7 January 2014.

2. The appeal relates to the tax treatment of a payment of £310,000 received by the Appellant from Dexia Banque Internationale a Luxembourg ('Dexia') under the terms of an out of court settlement of High Court litigation brought against Dexia by the Appellant. The Appellant had returned this payment in his self-assessment as subject to capital gains tax. The closure notice gave effect to HMRC's decision that the settlement sum was assessable to income tax under Schedule D Case VI (pursuant to section 18 of the Income and Corporation Taxes Act 1988).

3. The facts are not in dispute and were set out clearly in the Decision. The Appellant ('Mr Manduca') has considerable experience in investment banking and fund management. He went into business with a colleague Mr Leon de Jerez. They decided to set up a new hedge fund called the One Europe Fund ('One Europe').

4. A hedge fund works in the following way. It is usually structured as an off-shore limited liability company in which the shares are owned by the investors in the fund. The shares are bought and sold as new investors join and existing investors leave. The limited liability company is assisted by (1) an independent board of directors; (2) an independent administrator; (3) a locally based management company set up by the fund manager and (4) the fund manager. The fund manager is the company that procures investors, provides investment advice and research and employs the individuals who provide those services. The fund manager must be appropriately regulated and provides the 'institutional envelope' or 'regulatory umbrella' for the fund.

5. A fund manager is usually paid two fees: an annual fee which is a percentage of the value of the fund and a quarterly performance fee which is a percentage of the annual growth in the value of the fund. The performance fee is the main profit earned by the manager. This is used to pay the staff their bonuses and about half is kept by the fund manager for providing the regulatory and overhead support.

6. The first company that Mr Manduca and Mr de Jerez found to act as sponsor and fund manager for their venture was Tilney Investment Management Ltd ('Tilney') through its division Tilney Capital Management ('TCM'). Mr Manduca and Mr de Jerez raised all the initial funding for the seed capital for One Europe themselves. Mr Manduca and Mr de Jerez joined Tilney as employees in April 1999 and One Europe was launched through TCM in October 1999. It was they who put together the team to undertake the research and take the investment management decisions on which the success of the fund would depend. The people engaged by Tilney to operate One Europe were therefore not previously Tilney people but people chosen by Mr Manduca and Mr de Jerez and then employed by Tilney. The company which owned the assets of One Europe was a Bermudan limited liability company. Neither Mr Manduca nor Mr de Jerez ever owned any shares in that company.

7. In January 2001 Tilney decided to leave the hedge fund market. They therefore gave Mr Manduca and Mr de Jerez a deadline by which to find a new fund manager for One Europe. Mr Manduca and Mr de Jerez decided that the new fund manager would be Dexia - an unrelated company. Dexia took over the management of One Europe on 30 April 2001 and was the regulatory umbrella for One Europe from that date. Dexia thereafter was entitled to receive the annual management fee and the quarterly performance fee of which they could retain half. Tilney did not receive any financial remuneration from the transfer to Dexia. According to an internal Dexia memorandum dated 29 March 2001 this was because it was 'in financial and strategic disarray'.

8. Mr Manduca and Mr de Jerez ceased to be employed by Tilney and took up employment with Dexia. Their contracts of employment with Dexia were dated 18 April 2001 and referred to the commencement of their employment 30 April 2001. These contracts provided that they would each be paid a salary of £175,000 per year and also would be entitled to participate in the performance related bonuses in each financial year.

9. In addition to the employment contracts there was a separate document also dated 18 April 2001 signed by two managing directors of Dexia and addressed to Mr Manduca and Mr de Jerez ('the Bonus Agreement'). The opening words of the Bonus Agreement described the purpose of the agreement as follows:

> "This letter is to set out the manner in which we intend to recognise your role in transferring to [Dexia] the business of the so-called TCM division of Tilney Investment Management LTD (Tilney), the essence of which is an investment management agreement between One Europe Convergence Fund Limited (OEF) and Tilney International Limited (TINT), a Bermuda subsidiary of Tilney, and an investment advisory agreement between TINT and Tilney, and in sustaining and expanding our Alternative Investment Management business."

10. The Bonus Agreement provided that:

(1) within 30 days of Mr Manduca and Mr de Jerez joining Dexia, Dexia would invest US$1.2 million into One Europe. The sum was referred to in the document as the First Investment Bonus ('the Bonus').

(2) subject to certain conditions, the Bonus, plus or minus any return achieved within One Europe would be shared equally between Mr Manduca and Mr de Jerez and paid to them six months later.

(3) again subject to certain conditions, Dexia would pay a second bonus of US$2 million into One Europe one year after Mr Manduca and Mr De Jerez joined Dexia.

(4) The second bonus would also, if certain conditions were met, be divided equally between and released to Mr Manduca and Mr de Jerez one year after it was invested.

11. Clause 3 of the Bonus Agreement provided:

> "3. You shall co-operate to the fullest extent in bringing about the transfer to Dexia-BIL of the OEF agreements mentioned above and (to) the transfer to Dexia-BIL of key staff within the TCM Division. In the latter regard, we confirm that a first year bonus pool of up to USD 600,000 shall be established from which to meet existing guaranteed bonus

obligation towards TCM staff, and we further confirm that such staff as are transferring to us shall be offered substantially the same terms and conditions as they currently enjoy."

12. Mr Manduca and Mr de Jerez started working for Dexia on 30 April 2001. Unfortunately, their relationship with Dexia deteriorated for various reasons. There was a delay in the payment of the Bonus. It was not paid until 2 August 2001 with the result that the payment to the two men was delayed. However, on 5 November 2001 (before the payment out to them of the Bonus) Mr Manduca and Mr de Jerez were told that they were going to be made redundant. The One Europe Fund was liquidated on 13 November 2001 and the amount which Dexia had paid in as the Bonus was withdrawn.

13. Dexia terminated Mr Manduca's and Mr de Jerez's employment contracts on 19 April 2002 by reason of redundancy. The men received redundancy payments which are not in issue in this appeal. Mr Manduca and Mr de Jerez brought proceedings against Dexia in the High Court relating to Dexia's failure to pay the Bonus. Dexia defended the action on the basis that the Bonus was a performance related bonus that had not been earned. Mr Manduca's and Mr de Jerez's case was that this was not a bonus in the usual employment sense but a payment of consideration for securing a successful transfer within a particular timeframe of their business of running the One Europe Fund.

14. The litigation was settled. Under the settlement Mr Manduca received a sum from Dexia as compensation for Dexia's failure to pay the Bonus. It is common ground between the parties in this appeal, as it was before the First-tier Tribunal, that the correct tax treatment of the settlement sum is the same as the correct treatment of the Bonus if it had been paid by Dexia to Mr Manduca in accordance with the terms of the Bonus Agreement.

15. As to the nature of the Bonus, the Tribunal records in the Decision that Mr Manduca's witness statement described it in the following terms:

> "The rationale behind the payment was that although the OEF had proved attractive to investors and was regulated historically by Tilney, in effect its inherent value was attributable to ... [Mr de Jerez] and me as the key men operating it with a strong supporting track record and industry credibility, together with our team, who transferred to Dexia with us. Without us, the clients would leave the OEF. Its asset base was necessarily somewhat fragile because of the discussions, corporate changes and inherent monthly liquidity. On a change of fund manager, investors in the fund could and would withdraw their funds if they were unhappy with any instability surrounding the fund managers or dissatisfaction with the new legal owner. It was an important part of our role not only to develop and launch successfully the new Japanese/Asian fund, but to "transfer over" the OEF to Dexia and to keep the clients satisfied and remain as investors in the OEF now operated at Dexia. Dexia wanted to avoid us receiving the payment at the inception of our relationship and leaving immediately thereafter, severely de-stabilising the business before it had a chance to settle under its new regulatory and corporate umbrella. ... As the Dexia letter of 18 April 2001 confirms, the sole and exclusive rationale behind these payments was to reward the successful transfer of the OEF fund manager role from TCM to Dexia."

16. Mr Manduca therefore described the bonuses as 'earn-out payments' in respect of the transfer of the fund management business being agreed by Dexia as payable to him and Mr de Jerez. In 2003 the Inland Revenue indicated that it considered that the settlement sum was received by Mr Manduca under the terms of his employment contract and so was taxable as emolument under Schedule E. Dexia was accordingly advised to deduct tax under PAYE. However, during the enquiry into Mr Manduca's self-assessment opened in January 2005, HMRC took the view that the settlement sum did not fall under Schedule E but under Schedule D Case VI. The closure notice against which Mr Manduca appeals reflects that conclusion. Mr Manduca contends that the Bonus was in the nature of a capital sum that is subject to capital gains tax and not income tax.

The Legislation

17. Section 18 of the Income and Corporation Taxes Act 1988 provides as follows:

"**18 Schedule D**

(1) The Schedule referred to as Schedule D is as follows:—

SCHEDULE D

Tax under this Schedule shall be charged in respect of—

(a) the annual profits or gains arising or accruing—

(i) to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere, and

(ii) to any person residing in the United Kingdom from any trade, profession or vocation, whether carried on in the United Kingdom or elsewhere, and

(iii) to any person, whether a Commonwealth citizen or not, although not resident in the United Kingdom from any property whatever in the United Kingdom or from any trade, profession or vocation exercised within the United Kingdom, and

(b) all interest of money, annuities and other annual profits or gains not charged under Schedule A, B, C or E, and not specially exempted from tax."

(2) Tax under Schedule D shall be charged under the Cases set out in subsection (3) below, and subject to and in accordance with the provisions of the Tax Acts applicable to those Cases respectively.

(3) The Cases are—

Case I: tax in respect of any trade carried on in the United Kingdom or elsewhere;

Case II: tax in respect of any profession or vocation not contained in any other Schedule;

Case III: …

Case IV: …;

Case V: …;

Case VI: tax in respect of any annual profits or gains not falling under any other Case of Schedule D and not charged by virtue of Schedule A, B, C or E."

The Decision

18. Neither counsel in this appeal appeared in the case before the First-tier Tribunal. Having set out the facts and the arguments of the parties, the Decision largely focused on challenges to the closure notice that are no longer pursued. The Tribunal dealt first with what it called 'the capital v revenue' argument. Before the Tribunal Mr Manduca argued that the Bonus was in effect the purchase price paid by Dexia for certain intangible assets transferred by Mr Manduca and Mr de Jerez to Dexia. That was rejected on the facts and there is no appeal against those findings. The Tribunal also rejected an argument that the payment was in consideration of the men giving up their personal connections with clients to Dexia. Again, that rejection is not challenged in this appeal. The Tribunal then turned to an analysis of what the payment was actually for. They referred to evidence that indicated that initially Dexia thought that Mr Manduca and Mr de Jerez owned the business themselves – that was clearly incorrect. It found then that the subsequent documents indicate that the Bonus was intended to be payment for their role in facilitating the transfer of Tilney's fund management business to Dexia and they quoted passages from relevant documents. The Tribunal concluded:

> "63. The Tribunal finds on its consideration of the evidence as a whole that the First Investment Bonus was a reward for the part played by the Appellant in enabling Dexia to acquire the OEF business from Tilney. It was not a capital sum. The conclusion of HMRC in this respect was correct. It follows that the "capital v revenue argument" fails."

19. They then went on to dismiss a procedural argument which is no longer pursued.

The Appeal

20. Mr Manduca applied to the First-tier Tribunal for permission to appeal on the grounds that the Tribunal had misdirected itself in law as to the nature of the capital asset because the Bonus was payment for goodwill which counts as a business asset for capital gains tax purposes. Permission was refused on the basis that there was no error of law identified.

21. Permission was also refused on the papers by Judge Berner in the Upper Tribunal. At that stage Mr Manduca was still maintaining that the Bonus was a payment for the transfer of intangible assets. He also put forward a new ground that if the Bonus was indeed income, it was chargeable under Schedule D Case II and not Case VI. Judge Berner rejected this on the grounds that the point had not been argued before the First-tier Tribunal and that it did not have a reasonable prospect of success.

22. At the hearing of the renewed oral application for permission, three different new points were raised including the two that were argued before me. These two were:

(1) that the Tribunal gave no consideration to the actual terms of Case VI of Schedule D or to any relevant case law; and

(2) had it done so, it would have been bound to hold that the Bonus was not within Case VI because it was not a profit or gain falling within that Case.

23. Permission to appeal to argue those two points, and a further one which was not in the event pursued, was given by Judge Herrington.

24. Mr Manduca accepts that the fact that permission to appeal was granted on the second ground does not preclude HMRC submitting that he should not be allowed to rely on that ground because it could have been but was not argued before the First-tier Tribunal. I therefore heard argument as to whether Mr Manduca should be allowed to raise this new point. Both parties acknowledged that logically the issue whether Mr Manduca should be allowed to raise the new point should be dealt with before considering the substantive ground, but both in fact found it more convenient to deal with the substantive point first without prejudice to the procedural point. I shall follow the same course in this judgment.

The grounds of appeal

25. The First-tier Tribunal did not spell out why they concluded that the Bonus fell within Case VI. They concluded, once they had rejected the various submissions as to the capital nature of the Bonus, that it was income and therefore that the closure notice should be upheld. It is clear that the Tribunal proceeded on the basis that it was faced with a binary choice – either the Bonus was a capital payment or the closure notice should be upheld because the Bonus fell within Case VI.

26. I do not consider that the Tribunal can be criticised for not expressly dealing with a point that was not raised squarely before it. Judgments are necessarily directed at the points raised by the parties, particularly where the parties are professionally represented. However, the absence of detailed reasoning as to the application of Schedule D Case VI means, in my judgment, that the submissions made to me by the parties about whether the applicability of Case VI is a question of fact or law or both and as to the intensity of review appropriate from the appellate court are not particularly helpful. Subject to the procedural question considered later, I must come to a conclusion on the validity of Mr Manduca's arguments.

27. Mr Bradley argues that the Bonus cannot fall within Case VI because it is not a payment of the same kind as those listed in the other Cases of Schedule D. He relies primarily on the decision of the House of Lords in *Leeming v Jones (H M Inspector of Taxes)* (1930) 15 TC 333 ('*Leeming*'). In *Leeming*, broadly, the taxpayer had received a sum as a member of a syndicate which had sold interests in two rubber estates. He was assessed to tax under Schedule D Case VI on the basis that he had acquired the property with the sole object of turning it over again at a profit and not as an investment. At the first hearing in the King's Bench Division the matter was remitted to the Commissioners to make a finding as to whether there was or was not a concern in the nature of trade. The Commissioners found that the transaction was not a concern in the nature of trade which meant that it could not fall

within Case I of Schedule D. The case came before the House of Lords as to whether it fell within Case VI. Viscount Dunedin said at page 359:

> "Now, Case VI sweeps up all sorts of annual profits and gains which have not been included in the other five heads, but it has been settled again and again that that does not mean that anything that is a profit or gain falls to be taxed. Case VI necessarily refers to the words of Schedule D, that is to say it must be a case of annual profits and gains, and those words again are ruled by the first section of the Act which says that when an Act enacts that Income Tax shall be charged for any year at any rate, the tax at that rate shall be charged in respect of the profits and gains according to the Schedules."

28. Viscount Dunedin then referred to earlier authority which establishes that the word 'annual' in the phrase 'annual profits or gains' does not mean something that recurs every year but that nonetheless the receipt must be of the nature of income. He referred to the statement by Lord Blackburn in *Attorney General v Black* L.R. 6 Ex 308 where he said that 'profits and gains in Case VI must mean profits and gains *ejusdem generis* with the profits and gains specified in the preceding five cases'. He then held that in the case of an isolated purchase and sale, the receipt could only be income if the transaction was in the nature of a trade. Since the Commissioners had found that it was not, the receipt could not fall in Case VI.

29. Other cases were referred to by the parties before me as falling on either side of the line dividing receipts which are regarded as income for services falling within Case VI and receipts which are not. In *Brocklesby v Merricks (HM Inspector of Taxes)* (1934) 18 TC 576 (CA) the taxpayer was an architect and surveyor. On a social occasion he met the owner of an estate who told him that he was anxious to sell. The taxpayer arranged a meeting between the vendor and a client of his, Mr Dashwood, who later bought the estate. Neither at the time of the meeting nor at the time of the sale was there any agreement on the part of Mr Dashwood to pay the taxpayer. A few weeks after the sale, the taxpayer and Mr Dashwood entered into an agreement whereby the taxpayer would help Mr Dashwood dispose of the estate and would also carry out all architect and surveyor work involved without charge. In return the taxpayer would receive one third of the profits on the sale. Mr Dashwood eventually sold the estate and paid the taxpayer one third of the profit. The taxpayer's evidence was that he took no part in the acquisition and resale of the estate and carried out no work as architect or surveyor. The profit he received was assessed as income under Case VI. Finlay J noted that the taxpayer undoubtedly had a contractual right to sue for the one third profit. He noted that the money would not be taxable if it were an ex gratia payment made after the rendering without charge of the introduction effected by the taxpayer to the original owner of the estate. But he held that it was a payment for services even though the taxpayer had done very little because the onward sale had been achieved without much difficulty and without the need for much involvement of the taxpayer. He acknowledged that the very favourable price for the services rendered was the result of the previous introduction that the taxpayer had made without charge. But he went on: (page 583)

> " … the circumstance that, so to speak, an inducement for the favourable terms which he there got was the fact that he had rendered an important service to them, does not prevent it, to my mind, from being a contract in respect of services rendered. After all one has to consider what he was paid for. He was paid this sum, because he had an

enforceable right to get it, and that enforceable right was based on this, that he had got a contract in respect of which, for certain services to be rendered by him specified in the contact, he was to be entitled to remuneration.

30. The judge therefore upheld the assessment holding that it was a case in which, induced very probably by the voluntary service, the parties chose to enter into a contact for remuneration in respect of services.

31. Two cases were relied on by Mr Bradley as falling on the other side of the line. In *Bradbury (HM Inspector of Taxes) v Arnold* (1957) 37 TC 14 ('*Bradbury*') the taxpayer had a controlling interest in a company which arranged ice shows and reviews. The company proposed to put on an ice show in a theatre in London. Another man, Major Martineau was a keen ice skater and wanted to be involved in the production. The company had assets and activities other than ice shows so it was not practicable to transfer part of the interest in the company to the taxpayer. The two men agreed that Major Martineau would pay the taxpayer £9000 in return for a half share in the profits of the show. The Revenue assessed the sum as taxable under Case VI but the Commissioners upheld the taxpayer's contention that the £9000 was in fact paid for a right to future profits of the ice show and was therefore a capital transaction. Upjohn J noted that the Commissioners had accepted that any services of introduction rendered by him to Major Martineau were only trifling and that the payment of the £9000 would not be attributable to such services. This was not challenged by the Crown on appeal. Upjohn J said (page 669):

> "There is no doubt that a contact for services may, and clearly does, form a matter for assessment under Case VI of Schedule D, and not the less so that the services to be rendered are trivial or that they are to be rendered once and for all so that the remuneration may be regarded as a casual profit arising out of a single and isolated transaction."

32. The question for the judge in *Bradbury* was whether the £9000 was remuneration for the taxpayer having introduced Major Martineau to the company and for procuring the company to enter into the agreement to share the profits of the show. He emphasised that the transaction stood entirely on the documents and his decision was particular to the facts of the case. He asked "can you really say as a matter of business common sense that in and by that transaction, Tom Arnold undertook to perform services?" He did not think you could and he therefore held that the payment was not income.

33. Mr Bradley also referred to the share receipt discussed in *Versteegh Ltd and others v HMRC* [2013] UKFTT 642 (TC). There the First-tier Tribunal rejected the submission that the issue of shares to the share recipient in a complex transaction was income chargeable under Case VI. They held that the role of the share recipient had been passive and a failure to do something, for example, disclaim the shares could not be regarded as having any similarity to a trading or professional activity: see paragraph [135].

34. Having reviewed these cases, Mr Bremner, for HMRC, put his case in two ways. He said first that the principles derived from the case law showed that there was no need to consider what the taxpayer actually did in performance of the agreement under which the

payment was made. It was enough that the payment was made under a binding agreement (rather than as a gratuity) and that the agreement bound the taxpayer to provide some kind of services. Alternatively if it was necessary to look at what Mr Manduca did in return for the Bonus, then there was sufficient evidence to show that he did in fact perform services that fell within Case VI.

Discussion

35. In my judgment the Bonus was remuneration for services provided to Dexia by Mr Manduca and those services fall firmly within Case VI. I accept Mr Bremner's submission that *Brocklesby v Merricks* and *Bradbury* show that once it is established that the payment was an income receipt rather than a capital receipt and that it was paid pursuant to a binding contract in return for some kind of service then there is no need to go further to inquire into the extent of the services in fact provided.

36. Further, in my judgment it is clear that the Bonus was to pay for services which are akin to profits and gains that fall within the other Cases. Mr Bremner drew my attention to an extract from Whiteman and Sherry on Income Tax paragraphs 12-001 to 12-041. After discussing *Leeming v Jones*, the authors give as examples of income which is **not** ejusdem generis betting winnings, gifts and receipts by finding. Mr Bradley argued that all Mr Manduca and Mr de Jerez agreed to do in return for the Bonus was to tell Tilney that it was Dexia, rather than any other potential acquirer, to whom Tilney should transfer the business. That, and entering into the employment contract, was all that was required of the two men. He therefore argued that the supposed services were akin to the passive receipt of shares in *Versteegh* or the introduction of Major Martineau to the ice show promoter in *Bradbury*.

37. I reject that characterisation of the facts here. Mr Manduca recognised in his evidence before the Tribunal that he and Mr de Jerez had the track record and expertise to launch One Europe and put together the team to undertake the research and make the investment management decisions for the Fund and they managed the team. He and Mr de Jerez grew the business from its inception. He says in his evidence that in order for Dexia to make money after the transfer it was important that the independent directors and administrator stayed with the Fund and even more important was that the investors kept their investment in the Fund so that ongoing performance bonuses could be made. Further, although he said that Dexia would give the Fund access to their own client base as a source of potential further investors, 'without fail, investors want to invest in a fund with an established 'presence' and track record (via the reputation and track record of the individuals behind the fund manager)'.

38. Applying the business common sense referred to by Upjohn J in *Bradbury*, I consider that Dexia would have been concerned that during the crucial period of uncertainty shortly before the transfer was effected, there was a risk that investors and staff might drift away from the business, diminishing its value. Mr Manduca and Mr de Jerez were the key people on whose reputation the continued confidence of employees and investors rested. It was important for Dexia to obtain their commitment to the transfer, before the formal employment relationship started. The role they would play in facilitating the transfer was to cooperate and so conduct themselves as to ensure that staff and investors stayed on board and that such a drift of money and talent did not occur in that interim period. I do not see any difficulty in

describing that as a service provided by Mr Manduca or in holding that that service is *ejusdem generis* with the services listed in the other Cases in Schedule D.

39. I therefore would uphold the closure notice and dismiss the appeal on the substantive argument.

Permission to raise a new point on appeal

40. HMRC argue that the point now relied on by Mr Manduca was not raised before the First-tier Tribunal and he should not be permitted to raise it on appeal. The test for whether an appellant should be permitted to raise on appeal a point that was not raised before the first instance tribunal was discussed by the Upper Tribunal in *HMRC v S & I Electronics plc* [2012] UKUT 87 (TCC) paragraphs 22 – 27. The Upper Tribunal there reviewed the authorities and applied the test set out by the Court of Appeal in *Crane (t/a Indigital Satellite Services) v Sky In-Home Ltd* [2008] EWCA Civ 978. The test is that the court must be satisfied that the other party will not be at risk of prejudice if the new point is allowed because it might have adduced other evidence at trial, or otherwise conducted the case differently. Arden LJ in *Crane* said that permission to raise a new point should not be given lightly unless there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet.

41. Mr Bradley took me to passages in Mr Manduca's skeleton argument before the First-tier Tribunal which he argued raised the point now relied on. It is true that the skeleton referred to *Brocklesby v Merricks* but this was in the context of an argument that because the amount of the Bonus was so out of proportion to the alleged services provided, that must indicate that it was in fact a payment for something else, that is a capital payment for the intangible assets that Mr Manduca contended had been transferred to Dexia. Having considered the passages in the skeleton argument to which Mr Bradley drew my attention I have concluded that they did not raise before the First-tier Tribunal the issue as to whether the Bonus fell within Case VI even if the Tribunal found that it was not a capital payment.

42. Given, therefore that this is a new point not raised below, should I give permission for it to be raised now? On this point, I accept Mr Bremner's submission that the case may well have been conducted differently by HMRC if they had realised that the decision of the tribunal was not the binary one that the Bonus is either a capital payment or it falls within Case VI. Mr Manduca was cross-examined at the hearing and HMRC would have had the opportunity to draw out more information as to what Mr Manduca and Mr de Jerez did to keep the fund going over the transfer period before they started their employment with Dexia. In his statement, Mr Manduca describes the negotiations they had with the Dexia executives but he does not describe in detail how the two men discussed the transfer with investors or employees who were going to be transferred. HMRC would have been able to explore those topics to draw out evidence of the nature of the cooperation that Mr Manduca was bound to give Dexia under clause 3 of the Bonus Agreement. In any event, I have found that there was sufficient evidence to justify a finding that services were provided by Mr Manduca. But that evidence might have been more conclusive if it had been pursued in evidence before the First-tier Tribunal.

43. I therefore conclude that the point that Mr Manduca wishes to pursue now is not open to him and it would not be fair to HMRC for me to give permission to him to raise it now. That is another ground on which I dismiss the appeal.

TRIBUNAL JUDGE: MRS JUSTICE ROSE CHAMBER PRESIDENT

RELEASE DATE: 26 May 2015