[2021] UKUT 0289 (TCC)

Appeal number: UT-2020-000387

INCOME TAX – settlements legislation – chapter 5 Part 5 Income Tax (Trading and Other Income) Act 2005 – meaning of "settlement" – meaning of "settlor" – whether there were multiple settlors – application of s 644 and s 645 Income Tax (Trading and Other Income) Act 2005 – whether dividend or distribution taxable under s 383 Income Tax (Trading and Other Income) Act 2005 – whether taxpayer subject to tax by reference to the income of the settlement under transfer of assets abroad regime – chapter 2 Part 13 Income Tax Act 2007

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

MARK DUNSBY **Appellant**

- and -

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

TRIBUNAL: The Hon. Mrs Justice Bacon
Judge Timothy Herrington

Sitting in public at The Rolls Building, Fetter Lane, London EC4 on 2–3 November 2021

Michael Jones QC, instructed by Reynolds Porter Chamberlain LLP, for the Appellant

Laura Poots, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mark Dunsby ("Mr Dunsby") appeals against a decision by the First-tier Tribunal ("FTT") (Judge Ashley Greenbank) released on 24 June 2020 and amended on 21 August 2020 ("the Decision"). The FTT dismissed Mr Dunsby's appeal against an amendment to his tax return for the year 2012/2013. The amendment was made in a closure notice dated 31 March 2017, and brought an amount of £195,400 into account as taxable income. That amount had been received by Mr Dunsby as a result of transactions that formed part of a tax avoidance scheme (the "Scheme") in which Mr Dunsby participated.

2. The Scheme was devised and promoted by De Sales Promotions Limited ("De Sales") and was designed to allow shareholders in private companies with distributable profits to receive those profits free of income tax. Mr Dunsby was the sole shareholder and sole director in such a company (the "Company") which implemented the Scheme by carrying out the following steps:

> (1) the creation of a new class of shares and the issue of a share (the S share) in that new class to a non-resident individual, Mrs Fiona Gower;
>
> (2) the transfer by the non-resident individual of that share to a trust ("the Trust") in which Mrs Gower retained an interest, but from which Mr Dunsby could benefit;
>
> (3) the declaration of a dividend on the new class of shares, in circumstances where, under the terms of the Trust, Mr Dunsby received almost all of the benefit of the dividend.

3. The Scheme was intended to operate on the basis that the income would fall within the ambit of the settlements legislation in Chapter 5 of Part 5 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"), such that under s 624 ITTOIA the sums paid to Mr Dunsby would be treated as the income of Mrs Gower and not as his income.

4. HMRC disagreed. They found in their closure notice, and submitted before the FTT, that Mr Dunsby was taxable on three alternative bases as follows:

> (1) On a realistic view of the facts, Mr Dunsby received a dividend or distribution from the Company in respect of his ordinary shares and was subject to income tax on that distribution under s 383 ITTOIA.
>
> (2) Mr Dunsby was the settlor of a settlement, and the full amount of income arising to the settlement should therefore be treated as his income under the settlements legislation.
>
> (3) Mr Dunsby was the transferor under the transfer of assets abroad regime in Chapter 2 of Part 13 of the Income Tax Act 2007 ("ITA"), and the full amount of income was accordingly to be treated as arising to him.

5. In relation to those issues the FTT concluded that:

(1) The payment received by Mr Dunsby was not a dividend or distribution on the ordinary shares within s 383 ITTOIA (the "Distribution Issue").

(2) Mr Dunsby was, however, a settlor of a settlement, and the income arising under the settlement should therefore be treated as his income under the settlements legislation ("the Settlements Issue").

(3) To the extent that Mr Dunsby was not taxable under the settlements legislation, he was taxable under the transfer of assets abroad regime ("the Transfer of Assets Abroad Issue").

6. Permission to appeal against the findings in respect of the Settlements Issue and the Transfer of Assets Abroad Issue was given to Mr Dunsby by Judge Greenbank in the FTT on 24 August 2020. In their response to the notice of appeal filed on 2 October 2020, HMRC indicated that they wished to challenge the FTT's findings in respect of the Distribution Issue.

7. We were told that this was a lead case designated under rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

The facts

8. The FTT made its findings of fact at [7] to [27] of the Decision. Mr Michael Jones QC , who appeared for Mr Dunsby, helpfully summarised those findings in his skeleton argument which we largely adopt as follows.

9. At all material times, Mr Dunsby was the holder of 2 ordinary shares of £1 each ("ordinary shares") in the Company, which comprised all of the Company's issued ordinary shares. He was also the Company's sole director.

10. From 11 March 2013 onwards, the Company and Mr Dunsby implemented the Scheme, using generic documents provided by De Sales.

11. On 11 March 2013:

(1) the board of directors resolved to approve:

(a) the creation of a new class of 'S' ordinary shares of £100 each (the "S shares") and the related amendments to the articles of association;

(b) the form of a written resolution of the shareholder to create the new S shares and amend the Company's articles of association;

(2) the Company resolved by written resolution of the sole shareholder to create the new S shares and to make the related amendments to the articles of association; and

(3) the board of directors approved the allotment and issue of one new S share as fully paid to Mrs Gower for a subscription price of £100.

12. These steps were implemented by Mr Dunsby as the sole director and shareholder in the Company.

13. Mrs Gower paid £100 to the Company, by way of subscription monies, on 18 March 2013. Mrs Gower was an individual who was not resident in the UK, and was not known to Mr Dunsby or to the Company before these steps. She was introduced to the Company by De Sales, and undertook the same role in implementing the Scheme for other users.

14. The rights attaching to the S share were, in summary as follows:

(1) the S share carried a right to participate in the income profits and distributions either as a single class or together with all existing shares in the Company (i.e. the ordinary shares), as the board may recommend;

(2) the S share carried no voting rights;

(3) the rights of the S share on a return of capital (on a liquidation, reduction of capital or otherwise) were limited to the nominal value of the share (i.e. £100).

15. On 14 March 2013, Mrs Gower entered into a deed of settlement with a trust company incorporated in Jersey, as trustee. Under the deed, Mrs Gower created the Trust and settled the S share on the terms of the Trust.

16. The principal terms of the Trust were as follows.

(1) During the Initial Period, the income of the Trust was held:

(a) as to the first £500, for Jersey Hospice Care (the "Charity");

(b) as to the next £100, for Mrs Gower;

(c) as to any further income:

(i) 0.5% for the Charity;

(ii) 1.5% for Mrs Gower;

(iii) 98% upon protective trusts for the benefit of Mr Dunsby during his life.

The "Initial Period" was defined as beginning on 14 March 2013 and ending on 5 April 2013 or such earlier date as the trustee specified in writing. The protective trusts, in summary, gave Mr Dunsby an immediate right to the relevant income during the "Protected Period" (broadly, Mr Dunsby's life), but were subject to being determined if Mr Dunsby took steps to dispose of his beneficial interest.

(2) After the Initial Period, the trustee held the income of the Trust on discretionary trusts for the beneficiaries, with a power to accumulate. The beneficiaries of the Trust included:

(a) Mr Dunsby;

(b) the spouse, children and descendants of Mr Dunsby;

(c) Mrs Gower;

(d) the Charity.

(3) Subject to those trusts and various powers, any income was to be held by the trustees on trust for Mrs Gower absolutely; or in default of her, for the Charity; or in default of the Charity, for charitable purposes generally.

17. Also on 14 March 2013, Mrs Gower transferred title to the S share to the trustee. On the same day, the trustee wrote to Mr Dunsby, as director of the Company, giving an irrevocable instruction that any dividend declared on the S share on or before 28 March 2013 should be remitted to the beneficiaries directly. In particular, the trustee directed the Company to pay 98% of any such dividend to Mr Dunsby, after paying out the first £600 to the Charity and Mrs Gower.

18. On 15 March 2013, the board of directors, that is Mr Dunsby as sole director, resolved to pay an interim dividend of £200,000 in respect of the S share.

19. The Company paid £195,400 directly to Mr Dunsby, by way of bank transfer, on 18 March 2013.

The law

Dividends and distributions

20. One of the issues to be determined on this appeal is whether the amount received by Mr Dunsby is taxable as a distribution under ss 383–385 ITTOIA, which are to be found under Chapter 3 of Part 4 of ITTOIA. So far as relevant, and at the material time, those provisions were in the following form:

"**383 Charge to tax on dividends and other distributions**

(1) Income tax is charged on dividends and other distributions of a UK resident company.

(2) For income tax purposes, such dividends and other distributions are to be treated as income.

(3) For the purposes of subsection (2), it does not matter that those dividends and other distributions are capital apart from that subsection.

384 Income charged

(1) Tax is charged under this Chapter on the amount or value of the dividends paid and other distributions made in the tax year. …

385 Person liable

(1) The person liable for any tax charged under this Chapter is–

(a) the person to whom the distribution is made or is treated as made (see Part 6 of ICTA and sections 386(3) and 389(3)), or

(b) the person receiving or entitled to the distribution. …"

21. In these provisions, "distribution" has the meaning given by Chapters 2–5 of Part 23 of the Corporation Tax Act 2010 ("CTA") excluding s 1027A (see s 989 ITA). The relevant provisions for present purposes are in paragraphs A and B of s 1000(1) CTA, which at all material times provided as follows:

"**1000 Meaning of "distribution"**

(1) In the Corporation Tax Acts "distribution", in relation to any company, means anything falling within any of the following paragraphs.

A. Any dividend paid by the company, including a capital dividend.

B. Any other distribution out of assets of the company in respect of shares in the company, except however much (if any) of the distribution—

(a) represents repayment of capital on the shares, or

(b) is (when it is made) equal in amount or value to any new consideration received by the company for the distribution.

For the purposes of this paragraph it does not matter whether the distribution is in cash or not."

22. The term "in respect of shares" is defined in s 1113. Under s 1113(3):

"For the purposes of this Part a thing is regarded as done in respect of a share if it is done to a person–

(a) as the holder of the share …"

The settlements legislation

23. Some of the issues in this appeal concern the application of legislation applicable to settlements in Chapter 5 of Part 5 of ITTOIA, which we refer to in this decision as the "settlements legislation". That legislation is anti-avoidance legislation: it is intended to prevent a settlor from gaining a tax advantage by diverting income to another person who is not liable to tax (or is taxable at a lower rate).

24. Section 619 ITTOIA contains the charge to tax on income that is treated as the income of the settlor. At all material times, so far as relevant, it was in the following form:

> "**619 Charge to tax under Chapter 5**
>
> (1) Income tax is charged on–
>
> > (a) income which is treated as income of a settlor as a result of section 624 (income where settlor retains an interest),
> >
> > …
>
> (2) For the purposes of Chapter 2 of Part 2 of ITA 2007 (rates at which income tax is charged), where income of another person is treated as income of the settlor and is charged to tax under subsection (1)(a) or (b) above, it shall be charged in accordance with whichever provisions of the Income Tax Acts would have been applied in charging it if it had arisen directly to the settlor."

25. The definitions of "settlement" and "settlor" for the purposes of the settlements legislation are found in s 620 ITTOIA. It provides, so far as relevant:

> "**620 Meaning of 'settlement' and 'settlor'**
>
> (1) In this Chapter–
>
> 'settlement' includes any disposition, trust, covenant, agreement, arrangement or transfer of assets …, and
>
> 'settlor', in relation to a settlement, means any person by whom the settlement was made.
>
> (2) A person is treated for the purposes of this Chapter as having made a settlement if the person has made or entered into the settlement directly or indirectly.
>
> (3) A person is, in particular, treated as having made a settlement if the person–
>
> > (a) has provided funds directly or indirectly for the purpose of the settlement,
> >
> > (b) has undertaken to provide funds directly or indirectly for the purpose of the settlement, or
> >
> > (c) has made a reciprocal arrangement with another person for the other person to make or enter into the settlement.
>
> (4) This Chapter applies to settlements wherever made. …"

26. Under s 624 ITTOIA, income that arises under a settlement is treated for income tax purposes as the income of the settlor if it arises (i) during the life of the settlor and (ii) from property in which the settlor has an interest.

27. Section 625 ITTOIA sets out the circumstances in which a settlor is to be regarded as having an interest in property. They include where the property or any related property (including income from that property) is or may be payable to the settlor or applicable for the settlor's benefit.

28. Section 644 ITTOIA deals with circumstances where there is more than one settlor. It provides that the settlements legislation applies to each settlor as if that settlor were the only settlor, and by treating references in the settlements legislation to "the property comprised in the settlement" and to "income arising under the settlement" as references only to property and income "originating from" the settlor in question.

29. Section 645 ITTOIA sets out the meaning of property or income "originating from" a settlor. For present purposes the relevant provisions are in ss 645(1) and (2):

> "**645 Property or income originating from settlor**
>
> (1) References in section 644 to property originating from a settlor are references to–
>
> (a) property which the settlor has provided directly or indirectly for the purposes of the settlement,
>
> (b) property representing property so provided, and
>
> (c) so much of any property which represents both property so provided and other property as, on a just and reasonable apportionment, represents the property so provided.
>
> (2) References in sections 627 and 644 to income originating from a settlor are references to–
>
> (a) income from property originating from the settlor, and
>
> (b) income provided directly or indirectly by the settlor."

30. Specific provisions in s 575 ITTOIA deal with the relative priority of provisions within Part 5 ITTOIA and other provisions of the tax legislation. In relation to dividend income from shares in UK resident companies, s 575(3) provides that any income that falls under *both* Part 5 *and* Chapter 2 or 3 of Part 4 of ITTOIA is dealt with under the relevant Chapter of Part 4.

Transfer of assets abroad regime

31. The final issue arising on this appeal is whether Mr Dunsby is subject to income tax under the transfer of assets abroad regime in Chapter 2 of Part 13 of ITA on the basis that the income of the Trust is treated as arising to him. The rules in this regime are, again, designed to prevent avoidance of taxation.

32. The transfer of assets abroad regime can only apply if there is a "relevant transfer". The tax charges within the regime, including the charge to income tax under s 720 ITA

which is relevant in this case, then operate by reference to income of a person abroad that is connected with the transfer or another "relevant transaction" (s 714 ITA).

33. A "relevant transaction" includes both a "relevant transfer" and an "associated operation" (s 715 ITA).

34. A "relevant transfer" is defined by s 716(1) ITA in the following terms:

> "**716 Meaning of 'relevant transfer' and 'transfer'**
>
> (1) A transfer is a relevant transfer for the purposes of this Chapter if–
>
> (a) it is a transfer of assets, and
>
> (b) as a result of
>
> (i) the transfer,
>
> (ii) one or more associated operations, or
>
> (iii) the transfer and one or more associated operations,
>
> income becomes payable to a person abroad."

35. A transfer for these purposes "in relation to rights, includes the creation of the rights": s 716(2); and "assets" includes "property or rights of any kind": s 717 ITA.

36. The terms "a person abroad" and "associated operation" are defined in ss 718 and 719 respectively. At the relevant time, they provided as follows:

> "**718 Meaning of 'person abroad' etc**
>
> (1) In this Chapter 'person abroad' means a person who is resident or domiciled outside the United Kingdom.
>
> (2) For the purposes of this Chapter, the following persons are treated as resident outside the United Kingdom–
>
> (a) a UK resident body corporate that is incorporated outside the United Kingdom,
>
> (b) the person treated as neither UK resident nor ordinarily UK resident under section 475(3) (trustees of settlements), and
>
> (c) persons treated as non-UK resident under section 834(4) (personal representatives).
>
> **719 Meaning of 'associated operation'**
>
> (1) In this Chapter 'associated operation' , in relation to a transfer of assets, means an operation of any kind effected by any person in relation to–
>
> (a) any of the assets transferred,

(b) any assets directly or indirectly representing any of the assets transferred,

(c) the income arising from any assets within paragraph (a) or (b), or

(d) any assets directly or indirectly representing the accumulations of income arising from any assets within paragraph (a) or (b).

(2) It does not matter whether the operation is effected before, after or at the same time as the transfer."

37. Section 720 ITA imposes a charge to income tax for the purpose of "preventing the avoiding of income tax by individuals who are ordinarily UK resident individuals by means of relevant transfers" (s. 720(1) ITA). Section 720(2) ITA provides that the UK resident transferor is charged on income that is treated as arising to him or her under s 721 ITA.

38. At all material times, and in so far as relevant, s 721 ITA provided:

"**721 Individuals with power to enjoy income as a result of relevant transactions**

(1) Income is treated as arising to such an individual as is mentioned in section 720(1) in a tax year for income tax purposes if conditions A and B are met.

(2) Condition A is that the individual has power in the tax year to enjoy income of a person abroad as a result of–

(a) a relevant transfer,

(b) one or more associated operations, or

(c) a relevant transfer and one or more associated operations.

(3) Condition B is that the income would be chargeable to income tax if it were the individual's and received by the individual in the United Kingdom. …"

The FTT Decision

The Distribution Issue

39. Before the FTT HMRC had argued that viewing the facts realistically, it was appropriate to ignore the creation of the S share and the transfer into the Trust. Accordingly, the receipt by Mr Dunsby of the payment from the Trust was to be regarded as a distribution in respect of the ordinary shares held by Mr Dunsby, within the meaning of paragraph B of s 1000(1) CTA.

40. The FTT rejected this argument at [70] and [71]. It considered that the concept of a distribution in paragraph B of s 1000(1) CTA is "grounded in the corporate transactions that are undertaken and their effect on the capital structure of the company", and that "whether or not the receipt in Mr Dunsby's hands is a distribution on or in respect of the ordinary shares is informed by the company law procedures by which the payment is made." At [72] the FTT concluded as follows:

> "… when I apply the legislation construed purposively to the facts viewed realistically, the only "dividend or distribution" within s 383 ITTOIA that is made as part of the transactions is the dividend that was paid on the S share. The holder of the S share, the trustee, put in place arrangements to ensure that the dividend was paid directly to the beneficiaries, and so predominantly to Mr Dunsby, but that does not mean that it can be viewed as a distribution in respect of the ordinary shares held by Mr Dunsby."

The Settlements Issue

41. The FTT started with an analysis of the scope of any settlement that arose under the arrangements that implemented the Scheme. Following a review of the extensive case law, the FTT identified four broad principles at [104] as follows:

> "(1) The definition of 'settlement' in s 620 ITTOIA is very broad and can encompass any arrangements under which income on property becomes payable to others. However, it is limited to cases that involve an 'element of bounty' or, as Lord Hoffman put it in *Jones*, the arrangement must involve the provision of a benefit, which would not have been provided in a transaction at arm's length.
>
> (2) It is possible to find the element of bounty in a future uncertain event, which is not part of the arrangements that form the settlement, but was within the contemplation of the parties at the time of the settlement.
>
> (3) Steps which form an integral part of the arrangements to create a structure under which the income of property becomes payable to others may be regarded as part of the 'settlement'.
>
> (4) It is important to identify the property comprised in the settlement as this will also define the income of the settlement, which is subject to tax under the settlements legislation."

42. Applying those principles to the facts, the FTT concluded at [106] that the creation of the S share and its allotment to Mrs Gower, the creation of the Trust and the transfer of the S share to the trustee by Mrs Gower were all part of an arrangement that met the requirements to be treated as a "settlement" under s 620 ITTOIA.

43. As to the identity of the settlor, having considered the relevant case law the FTT concluded that, on any realistic view of the facts, Mr Dunsby was a person who "made" the settlement for the purposes of s 620(2) ITTOIA. Its reasoning was as follows:

> "120. Mr Dunsby made the arrangement, which I have regarded as the settlement. He (as shareholder in the Company) passed the resolutions, which created the S share. He (as shareholder in the Company and the sole director) permitted Mrs Gower to subscribe the S share at its nominal value. Mrs Gower transferred the S share to the Trust under arrangements put in place by Mr Dunsby through De Sales. But when she did so, there was no real value in the S share; whether or not any value would accrue to the Trust remained entirely under the control of Mr Dunsby.
>
> 121. Mr Dunsby was in control of all of these steps. The arrangement was as much a settlement made by Mr Dunsby as if Mr Dunsby had transferred ordinary shares to the Trust himself or had reorganized the share capital of the Company to create the S share

> and had transferred that share to the Trust himself. This was the case even though Mr Dunsby did not, at any stage, acquire the property (i.e. the S share) which came to be subject to the Trust…"

44. The FTT was also inclined to consider that Mrs Gower should be treated as a settlor, on the basis that she "made" or "entered into" the settlement. While Mrs Gower was little more than a "functionary in the process", the FTT observed that the definitions in s 620 ITTOIA of "settlement" and "settlor" are deliberately broad and are intended to bring a wide range of arrangements within the scope of the provisions: [126]–[127].

45. The FTT did not, however, need to reach a concluded view on this point given the findings that it went on to make regarding the effect of multiple settlors, if both Mr Dunsby and Mrs Gower were to be regarded as having provided property directly or indirectly to the settlement. As to that, the FTT held that the correct construction of s 645 ITTOIA was that, in circumstances where property may have been provided directly or indirectly by more than one settlor, the property should be regarded as provided partly by each such settlor and the provisions of s 645(1)(c) should apply to require a just and reasonable apportionment of the property between them: [134]. It then held at [135]:

> "In the present circumstances, that apportionment can only lead to one answer. All or substantially all of the value in the S share has been provided to the settlement by Mr Dunsby. As I mentioned above, Mrs Gower was a mere functionary in the process of the creation of the settlement. On that basis, a just and reasonable apportionment would treat all or substantially all of the property in the settlement (i.e. the S share) as originating from Mr Dunsby (s 645(1)) and accordingly all or substantially all of the income from that property (i.e. the dividend income on the S share received by the trustee) as income originating from Mr Dunsby (s 645(2)). I can see little basis for attributing any of the property to Mrs Gower."

46. As a result of these findings, the FTT concluded at [137] (repeated at [182(2)]) that the income arising under the settlement, i.e. the dividend income on the S share, should be treated as the income of Mr Dunsby under Chapter 5 Part 5 ITTOIA.

The Transfer of Assets Abroad Issue

47. Finally and for completeness if (contrary to the FTT's conclusion on the Settlements Issue) Mrs Gower was treated as the sole settlor under the settlements legislation, the FTT concluded that Mr Dunsby would nevertheless be liable to tax under s 720 ITA.

48. At [164] the FTT held that as Mr Dunsby was the sole shareholder and director of the Company and the steps concerned formed part of a preordained scheme, which was designed to ensure that part of the share capital of the Company was placed in the hands of offshore trustees in a manner in which the dividend income from those shares accrued primarily for his benefit, then the arrangements involved a "relevant transfer" (namely the issue and subsequent transfer of the S share) for the purposes of s 720 ITA.

49. At [166] the FTT held that the remaining requirements of s 720 were met: as a result of the transfer and an associated operation (the transfer of the S share to the trustee), the dividend on the S share became payable to a person abroad (the trustee).

50. At [168] and [169] the FTT concluded that the two conditions required by s 721 ITA had also been met. Condition A was satisfied because Mr Dunsby had the power to enjoy the dividend income of the trustee derived from the S share under the terms of the Trust. Condition B was satisfied because the dividend income would be chargeable to income tax in the hands of Mr Dunsby if he were to receive it in the UK. The fact that the dividend income would, if Mrs Gower was the settlor, be treated as her income under s 624 ITTOIA did not affect that conclusion, since Mr Dunsby had the power to enjoy that income under the terms of the Trust: [175].

51. The FTT thereby rejected Mr Dunsby's argument that if the deeming rule in s 624 ITTOIA applied to treat income of the settlement as the income of Mrs Gower it precluded a charge to tax on Mr Dunsby on the same income under s 720 ITA, holding at [177] that:

> "Section 624 ITTOIA simply treats income of a settlement as the income 'of' a particular person (the settlor) for income tax purposes. The charge to tax under s 720 ITA does not tax the income of the person abroad. It simply treats that income as arising to another person (the transferor) for the purposes of computing a charge to tax on that person. The income does not become income of the other person (the transferor)…"

52. The effect of a charge to tax on Mr Dunsby under s 720 was the same as the effect of finding him to be a settlor chargeable to income tax under the settlements legislation, namely that the dividend income on the S share would be treated as arising to him and therefore taxable: [181(2)] and [182(3)].

FTT Disposition

53. The effect of the FTT's conclusions was that the amount of income brought into account as taxable income was increased from £195,400 to £200,000, being the full amount of the dividend income on the S share.

Grounds of appeal and issues to be determined

54. Mr Dunsby has permission to appeal against the Decision on the following three grounds:

> Ground 1: The FTT erred in law in its identification of what comprised the "settlement" for the purposes of Chapter 5 of Part 5 of ITTOIA, and the FTT consequently erred in law in identifying Mr Dunsby as a "settlor" for the purposes of that legislation. Mr Dunsby contends that the FTT erred in failing to apply the critical distinction drawn by Lord Macmillan in the House of Lords in *Chamberlain v IRC* [1943] 2 AER 200 between "the steps taken … with a view to effecting a settlement or arrangement" and "the settlement or arrangements itself". Mr Dunsby contends that the only "settlement" was the Trust, the only settlor of which was Mrs Gower.

Ground 2: The FTT erred in law in its interpretation and application of ss 644 and 645 ITTOIA. Mr Dunsby contends that the only property provided for the settlement identified by the FTT, being the S share, was provided by Mrs Gower. It follows that, applying s 644, that all of the income arising under the settlement in the form of the dividend falls to be treated as allocated to her. Furthermore, even if Mr Dunsby could be regarded as having provided property directly or indirectly in addition to Mrs Gower, s 645 does not enable multiple settlors to be taxed on the same income, and the charge to tax therefore fails.

Ground 3: The FTT erred in law in its interpretation and application of the transfer of assets abroad regime, and in particular Condition B in s 721 ITA. Mr Dunsby contends that if Mrs Gower was the settlor (which is the basis on which the FTT approached this aspect of the case), the income would not be chargeable if it were Mr Dunsby's, since that income is treated as the income of Mrs Gower alone under s 624 ITTOIA.

55. As we mentioned above, HMRC indicated in their response to the notice of appeal that they wished to challenge the FTT's findings in respect of the Distribution Issue. HMRC contend that the FTT erred in concluding that the only "dividend distribution" within s 383 ITTOIA was the dividend paid on the S share, and that this could not be viewed as a distribution in respect of the ordinary shares held by Mr Dunsby. HMRC say that the FTT erred in focusing on the "corporate form" and company law procedures, and in so doing so failed to take a realistic view of the facts, which was that the payment received by Mr Dunsby was simply a distribution from the Company paid to him in respect of his ordinary shares.

56. In his skeleton argument, Mr Jones QC for Mr Dunsby contended that it is not open to HMRC to raise this point before the Upper Tribunal, on the basis that a respondent to an appeal cannot raise an issue which it lost before the FTT unless it obtains permission to appeal for itself. He relied in that regard on the judgment of Rose LJ in *HMRC v SSE Generation Ltd* [2021] STC 369 ("*SSE*") at [70]–[80]. Mr Jones submitted that having lost on this issue before the FTT, HMRC had to obtain permission to appeal against the FTT's decision on this point and could not simply take issue with the FTT's decision on the point in their response to Mr Dunsby's appeal.

57. Ms Poots for HMRC contended, in response on this point, that the effect of the *SSE* judgment was to draw a distinction between "issues" for which permission to appeal had to be obtained by the losing party, and "arguments", which could properly be ventilated in a response to the notice of appeal without a separate application for permission. She also noted that in [80] of *SSE* Rose LJ had noted that SSE was seeking to "do better than" the capital allowance allowed by the FTT, for which they needed permission. In the present case, she said, the decision of the FTT was to bring into account the income paid to Mr Dunsby as a result of the Scheme, as set out in the Disposition at [184] of the Decision. That, she said, was the "issue" and the FTT's alternative bases for charging Mr Dunsby were merely "arguments". She also said that since the effect of a successful appeal on the Distribution Issue would in fact lead to a lower amount of income being brought into account, namely the original £195,400 as

assessed by HMRC, HMRC were not seeking to "do better than" the FTT Decision within the meaning of [80] of *SSE*.

58. These submissions undoubtedly give rise to interesting and nuanced questions as to the scope of the requirement for permission to appeal as set out by the Court of Appeal in the *SSE* judgment. It is, however, unnecessary to resolve those questions in this case, since Ms Poots' alternative submission was that if permission was required on this point, then this Tribunal can remedy the position by waiving the requirement to apply to the FTT pursuant to rule 7 of the Tribunal Procedure (Upper Tribunal Rules) 2008. We are firmly of the view that this would be the correct course to take in the present case.

59. It was common ground that in considering whether relief should be granted under rule 7 in this case, we should apply the three-stage test set out in *Denton v TH White* [2014] EWCA Civ 906. In *Martland v HMRC* [2018] UKUT 0178 (TCC), [44] the Tribunal held that the *Denton* test can properly be applied by in the context of applications for permission to appeal to the FTT out of time, and in *Bell v HMRC* [2018] UKUT 254 (TCC) the same approach was taken to the exercise by the Tribunal of its power to permit a late appeal to the Upper Tribunal under rule 5(3)(a).

60. Applying that test, Ms Poots fairly accepted that over a year has now elapsed since HMRC's response to the notice of appeal was filed. We agree, however, with her submissions that that there are good reasons why HMRC did not seek permission to appeal during that time. When HMRC's response was filed in this case, the position was as set out in the decision of the Upper Tribunal in *SSE* [2019] UKUT 332 (TCC), [2020] STC 107. The Tribunal found there that where a respondent to an appeal wished to challenge a finding of the FTT on a point argued before the FTT but in respect of which it was unsuccessful, the point could be raised in the response to the notice of appeal, without a separate application for permission to appeal. It was only in February 2021 that the position changed with the judgment of the Court of Appeal in *SSE*.

61. Mr Jones said that HMRC should have then taken steps to seek permission to appeal out of time, not least because HMRC themselves had argued in *SSE* that permission to appeal should have been obtained by the respondent in that case. Ms Poots responded, however, that HMRC believed that their arguments on the Distribution Issue fell outside the scope of the Court of Appeal's *SSE* ruling (and therefore that they did not need to seek permission to appeal) for the reasons that she had given in her submissions on that point. In so far as Mr Dunsby considered the effect of the Court of Appeal's judgment to preclude HMRC's submissions on the Distribution Issue set out in their response to the notice of appeal, he could have raised that objection any time after the Court of Appeal judgment was handed down. He did not do so, but allowed the response to stand unchallenged. The procedural objection was therefore only raised in Mr Jones' skeleton argument filed two weeks before this hearing.

62. We consider that there is considerable force in Ms Poots' submissions in this regard. The consequence was that it was only shortly before this hearing that HMRC were on notice that a procedural obstacle might lie in the way of their submissions on

this issue. We also note that Mr Jones has in any event addressed the Distribution Issue fully in his skeleton argument. Moreover, far from prejudicing Mr Dunsby if this issue were to be allowed to proceed, the effect of success on this issue would in fact be – rather paradoxically – to *reduce* the tax charge on Mr Dunsby. We do not, therefore, consider that Mr Dunsby has in any way been prejudiced by HMRC's failure to seek permission to appeal on this point.

63. Considering matters in the round, as we are required to do for the third stage of the *Denton* test, we consider that this is plainly a case where it would be appropriate to grant relief under rule 7. Our conclusion is therefore that in so far as HMRC required permission to appeal on the Distribution Issue (as to which we express no view) we will waive that requirement under rule 7 and permit HMRC's submissions on this issue to proceed at this hearing.

64. On that basis, it is convenient to deal with the issues in the same order as they were addressed by the FTT, starting with the Distribution Issue, and addressing thereafter the grounds of appeal concerning the settlements legislation (Grounds 1 and 2) and the transfer of assets abroad regime (Ground 3).

The Distribution Issue

65. The starting point is that when considering whether the payment received by Mr Dunsby in this case was a distribution within the meaning of ss 383–385 ITTOIA it is necessary to give those statutory provisions a purposive construction. That was the conclusion of the House of Lords in *Barclays Mercantile v Mawson* [2004] UKHL 51, [2005] STC 1, in considering how the principles set out by Lord Wilberforce in *WT Ramsay v IRC* [1981] STC 174 should be applied to a complex set of transactions which had given rise to a disputed claim to capital allowances.

66. The House of Lords held at [32] that the essence of the approach set out in *Ramsay*

> "… was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description."

67. As the judgment explained at [36], that does not mean that in the application of *any* taxing statute, elements of transactions which have no commercial purpose are simply to be disregarded. Rather, two steps are necessary:

> "first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], (2004) 6 ITLR 454 at [35]:
>
> > '[T]he driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.' "

68. That approach was adopted more recently by the Supreme Court in *UBS v Revenue and Customs* [2016] UKSC 13, [2016] STC 934, [64]–[66], where the Court emphasised that

> "the facts must be analysed in the light of the statutory provision being applied. If a fact is of no relevance to the application of the statute, then it can be disregarded for that purpose. If, as in *Ramsay*, the relevant fact is the overall economic outcome of a series of commercially linked transactions, then that is the fact upon which it is necessary to focus. If, on the other hand, the legislation requires the court to focus upon a specific transaction … then other transactions, although related, are unlikely to have any bearing on its application."

69. In the present case, the purpose of ss 383–385 ITTOIA is to impose income tax on dividends and other distributions of a UK resident company, in the hands of the person receiving or entitled to the distribution. As we have set out above, the term "distribution" is defined very broadly in s. 1000(1) CTA so as to encompass *any* dividend paid by the company, and *any* other distribution out of assets of the company in respect of shares in the company.

70. The FTT placed emphasis on the fact that the dividend was not formally paid on Mr Dunsby's ordinary shares, but was formally paid on the S share and flowed to Mr Dunsby by way of the trust of that share. The question, for the purposes of the approach set out in *UBS*, is whether that fact is relevant to the application of the statutory provisions.

71. We do not disagree with the FTT's observation that the concept of a distribution under s 1000(1) CTA requires reference to the effect of the corporate transactions undertaken on the capital structure of the relevant company. But as Ms Poots submitted the company law concept of a distribution is a wide one and does not turn on formalities. In *Progress Property Company v Moorgrath Group* [2010] UKSC 55 Lord Walker approved at [1] the following quotation from Hoffman J's judgment in *Aveling Barford Ltd v Perion* [1989] BCLC 626, 631:

> "Whether or not the transaction is a distribution to shareholders does not depend exclusively on what the parties choose to call it. The court looks at the substance rather than the outward appearance."

72. In the present case there is no doubt (and indeed no dispute) that a distribution within the meaning of s. 1000(1) CTA was made by the Company, and that this was a distribution in respect of shares as defined in s 1113(3). The disputed question is whether Mr Dunsby was the person receiving or entitled to that distribution for the purposes of s 385 ITTOIA.

73. In that regard, s 385 does not require the taxable person to be the holder of the shares on which the distribution is made. All that is required is that they are the person to whom the distribution is made or treated as made (subsection (a)), or the person receiving or entitled to the distribution (subsection (b)). The overarching purpose is to ensure that a shareholder who either does receive, or is entitled to receive, a distribution from a UK resident company is subject to income tax on that distribution.

74. The effect of the Scheme was that Mr Dunsby directly received the payment of a dividend declared by the Company of which he was, prior to the Scheme, the sole shareholder. He was also entitled to the distribution, as the principal beneficiary under that Trust. Indeed the stated purpose of the Scheme, as recorded by the FTT, was "to allow the payment of dividends from UK resident companies free of income tax". On that basis, it seems to us that the transaction fell squarely within both the scope and the purpose of ss 383–385 ITTOIA.

75. Mr Jones submitted that in this branch of the law "form is substance", relying on the rulings of Moses J in *First Nationwide v HMRC* [2012] STC 1261 and the Court of Appeal in *Khan v HMRC* [2021] STC 954. We do not, however, consider that either of those cases assists his position.

76. In *First Nationwide* the question was whether a distribution of dividends was to be regarded as payments out of income or capital for the purposes of Case V of Schedule D. On that point the judge held that the form which the distribution takes determines whether it is a capital or income distribution; the fact that the payments were made as payments of dividends therefore determined their character as income payments: [8]. That is an example of the need to focus on the statutory provision being applied – in that case a provision which drew a distinction between income and capital. In the present case, however, the relevant legislation explicitly draws no distinction between capital and income distributions, and as we have just noted there is in any event no dispute that a distribution within the meaning of s 1000(1) CTA was made. The question is rather whether Mr Dunsby is to be regarded as the person receiving or entitled to the distribution.

77. The *Khan* case did concern the interpretation of s 385 ITTOIA, and we consider that the approach of the Court of Appeal in that case supports our conclusions on the facts of this case.

78. Mr Khan was the accountant of a company whose shareholders had decided that they wished to extract the available funds from the company and wind it up in an orderly manner over several years, to avoid the immediate redundancy of the company's remaining employees. This was achieved by Mr Khan purchasing the entire issued share capital of 99 shares from the shareholders for £1.95m, plus an amount equal to the net book value of £18,771; and the company then bought from Mr Khan 98 of the shares for £1.95m, leaving him with one share. The intention was that Mr Khan would then continue trading with the company while winding up its business, and would benefit from any profits made during the remaining period of operation. Unfortunately for Mr Khan, HMRC decided that the payment by the company to Mr Khan on the purchase of its own shares was a distribution chargeable to income tax under s 383 ITTOIA. A closure notice was therefore issued increasing Mr Khan's income tax for the relevant tax year by £594,814.57.

79. Mr Khan appealed on the basis that the sale and buyback of the shares should be considered as a single composite transaction, and he was in substance no more than a conduit for the selling shareholders to effect the buyback of their shares. His appeal was rejected by the FTT, the Upper Tribunal and the Court of Appeal. The Court of Appeal

held that this was a case where it did not assist to look at the connected transactions taken as a whole, since the relevant question was one of actual receipt or entitlement at the time of the distribution, requiring the focus to be on the situation at that time: [52], [72]–[73].

80. The Court expressly acknowledged at [72] that this might, depending on the circumstances, involve looking at the reality of the transaction, ignoring artificial arrangements:

> "In some cases, the identification of the person to whom the distribution truly belongs could involve having to stand back and look at the matter realistically, ignoring any technical or artificial legal arrangements that might have been put in place to obscure their identity."

81. On the facts of the *Khan* case, however, that was not necessary. It was common ground that the payment by the company to Mr Khan was a "distribution", chargeable in principle under s 383. When that distribution was made, Mr Khan both received it and was entitled to it, as the sole shareholder of the company.

82. The Court of Appeal also noted that looking at the transactions as a composite whole would in any event not change the analysis. Mr Khan genuinely acquired the company through a bona fide structure, such that by the time of the distribution the former shareholders had lost their interest and a distribution could not legally have been made to them by that point: [42], [52], [80].

83. Mr Jones sought to draw an analogy between the position of the former shareholders in *Khan* and Mr Dunsby, saying that in *Khan* the overall effect was to transfer the distributable reserves to the shareholders. That analogy is inapt. The structures and purposes of the transactions in *Khan* and the present case are entirely different and cannot be equated. The relevant common issue is the interpretation and application of s 385. On that point Mr Dunsby's position is akin to that of Mr Khan. Unlike the former shareholders, but like Mr Khan, Mr Dunsby both received the distribution and was legally entitled to receive it. That is why the distribution was properly taxable in his hands.

84. It therefore seems to us that in the circumstances of this case the question as to Mr Dunsby's receipt of a distribution falling within s 385 can be answered by looking at the face of the transactions, without needing to consider whether they are the result of a series of commercially interlinked transactions.

85. Our analysis is, however, fortified by the fact that viewed realistically there is no doubt whatsoever that Mr Dunsby was the "person to whom the distribution truly belongs": the entire purpose and effect of the Scheme was to put the distribution in the hands of Mr Dunsby. It should not matter how precisely the flow of funds was implemented so as to put the dividend in the hands of the taxpayer.

86. We therefore respectfully disagree with the FTT on the Distribution Issue. Our conclusion is that Mr Dunsby received a distribution within the meaning of ss 383–385 ITTOIA, and is chargeable to tax on that basis. We note that this is essentially the same

conclusion as that reached by the FTT in *Clipperton & Lloyd v HMRC* [2021] UKFTT 0012 (TC), especially at [129(2)], albeit that that case was decided before and therefore did not take account of the reasoning in the Court of Appeal's judgment in *Khan*.

The Settlements Issue

87. If we are right on the Distribution Issue we do not need to go further and consider the Settlements Issue. We do so, however, in case we are wrong on the Distribution Issue and because the point was fully argued before us.

88. Mr Dunsby's grounds of appeal raise two distinct objections to the FTT's analysis of this issue. The first (Ground 1) concerns the scope of the "settlement" in this case, for the purposes of the application of s 620 ITTOIA. The second (Ground 2) concerns the identity of the settlor and the consequences if, properly interpreted, both Mr Dunsby and Mrs Gower are treated as having provided property to the settlement. We address these in turn.

Scope of the settlement

89. The thrust of Mr Jones' argument on the scope of the "settlement" within the meaning of s 620 was, as summarised above, that the FTT erred in failing to apply the distinction drawn by Lord Macmillan in *Chamberlain* between "the steps taken … with a view to effecting a settlement or arrangement" and "the settlement or arrangements itself". The only settlement in this case, he said, was the establishment of the Trust by Mrs Gower and the settlement of the S share on the Trust; the settlement therefore did not include the earlier steps under the Scheme taken by Mr Dunsby and the Company to put Mrs Gower in possession of the S share.

90. Ms Poots' starting point in response was that this issue was somewhat academic, because whatever the scope of the settlement the settlor was clearly Mr Dunsby, which is sufficient for the purposes of the charge to tax under the settlements legislation. In our judgment, however, the two questions are closely linked. If the settlement is defined as including the earlier steps in the Scheme, that inevitably has a bearing on the identity of the settlor. The scope of the settlement is therefore the logical first stage in addressing the question of the identity of the settlor. It is therefore, in our view, appropriate to address Mr Jones' submissions on *Chamberlain*.

91. *Chamberlain* was a case in which the appellant had established an investment company, Staffa, into which he transferred shares in his trading company, in consideration for preference shares in Staffa (which he retained). Some months later he executed a deed of settlement in favour of his wife and children, giving the trustees cash which was used to purchase ordinary shares in Staffa. Later that year, following a change in the relevant legislation, the capital structure of Staffa was reorganised such that the shares settled under the first settlement became "A" ordinary shares, and the remaining ordinary shares were divided into "B", "C", "D" and "E" ordinary shares. Four further deeds of settlement were then executed in favour of the appellant's children, with the appellant again settling cash on the trustees for each settlement, directing the trustees to invest in the purchase of, respectively, Staffa's "B", "C", "D"

and "E" shares. No dividends were ever paid on the "A" shares; dividends were, however, paid on the other ordinary shares.

92. For the purposes of the disputed assessment to tax, it was common ground that the appellant was the settlor. The issue was whether the property comprised in the settlement consisted of the whole assets of Staffa, or whether the settled property was instead the property comprised in each of the five separate deeds of settlement. The House of Lords found the latter to be the case. As Lord Macmillan explained, the creation of Staffa was an essential step towards fulfilling the appellant's object, but it was nevertheless merely a preparatory step in relation to the actual settlements, which settled money and not shares on the various trusts (p. 205).

93. Mr Jones placed considerable reliance on the observation by Lord Macmillan at page 205D–E that it is "fallacious to confuse the steps taken by the appellant with a view to effecting a settlement or arrangement with the settlement or arrangement itself". On that basis, he said, the settlement in this case was confined to the settlement by Mrs Gower of the S share on the Trust, and did not extend to consideration of the entire Scheme (and thus the prior steps by which Mrs Gower acquired the S share).

94. We do not accept that submission. It is clear from *Chamberlain* that the creation of a settlement as part of a series of steps that pursue an overall plan does not in itself mean that the earlier steps are to be regarded as part of the settlement itself. But *Chamberlain* does not set out a general proposition that the steps leading to the creation of a settlement are always to be ignored when determining the scope of the settlement. Indeed Mr Jones did not himself take issue, as a matter of principle, with the FTT's conclusion at [104(3)] that steps which form an integral part of the arrangements to create a structure under which the income of property becomes payable to others may be regarded as part of the settlement.

95. The courts have hitherto been rather cautious of laying down any precise test for identifying the components that are to be regarded as part of a settlement, as defined in s 620 ITTOIA. In *Crossland v Hawkins* [1961] Ch 537, where Mr Hawkins, an actor, provided his services through a company whose shares were acquired by a trust established by Mr Hawkins' father-in-law for the benefit of Mr Hawkins' children, the court considered that there was "sufficient unity" about the series of transactions to make them an "arrangement" within the meaning of the settlements legislation. That does, however, rather beg the question as to what is "sufficient" for these purposes. But the difficulty with any more specific definition is, as Lord Walker commented in *Jones v Garnett (Inspector of Taxes)* [2007] 1 WLR 2030 at [50], that the word "arrangement" in the context of what was the predecessor to s 620:

> "is a wide, imprecise word. It can (like 'settlement' or 'partnership', or indeed 'marriage') refer either to actions which establish some sort of legal structure (in this case a corporate structure though which the taxpayer's income could be channelled) or those actions together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established."

96. Nevertheless, and without aspiring to set out any exhaustive test, it seems to us that at least for present purposes a relevant question to ask is whether the act of settlement, narrowly defined, has an economic logic that is freestanding and severable from the preparatory steps leading to that settlement. If it does, then (absent unusual circumstances) that is a strong indication that the preparatory steps are not to be regarded as integral to that settlement.

97. In *Chamberlain* the arrangements for the establishment of Staffa clearly were not integral to the settlements made thereafter: as Lord Macmillan said, the appellant retained a substantial interest himself in Staffa, which was never the subject of any settlement; the settlements themselves were settlements of cash rather than shares; and there was nothing to prevent the trustees under the trusts from selling the shares in Staffa and investing the proceeds in other securities. Indeed it is notable that the later settlement was made some time later than the establishment of Staffa, and was not envisaged at the time that Staffa was created.

98. In the present case, by contrast, the creation of the Trust by Mrs Gower, and the settling of the S share on that Trust, has no independent economic logic, but is inextricably bound to (and is therefore not severable from) the earlier steps by which the S share was created by the Company and acquired by Mrs Gower. Mrs Gower could not have settled the S share on the Trust without the prior steps to put that share in her hands; and those steps had no purpose but to enable the creation of the Trust and the subsequent flow of funds, via the Trust, back to Mr Dunsby.

99. The present case is therefore one in which the settlement can therefore only sensibly be defined by reference to the sequence of transactions constituting the Scheme. To describe it by reference solely to Mrs Gower's creation of the Trust is wholly artificial and unrealistic.

Identity of the settlor

100. Given our conclusion as to the scope of the settlement, there is no real doubt as to the identity of the settlor – the settlor was Mr Dunsby and not Mrs Gower. As the FTT correctly concluded at [120], Mr Dunsby put in place the entire arrangement that constituted the Scheme. He (as the sole shareholder of the Company) passed the resolutions that created the S share, following which (as shareholder and sole director) he permitted Mrs Gower to acquire the S share at its nominal value. Mrs Gower subsequently put that share in the Trust pursuant to arrangements again put in place by, and directed by, Mr Dunsby. The Company's board of directors, with Mr Dunsby as sole director, then resolved to pay the dividend of £200,000 in respect of the S share, which gave rise to the direct payment to him of £195,400 as we have described above. As with the position taken by the Court of Appeal in *Crossland v Hawkins*, p. 508, Mr Dunsby cannot avoid characterisation as the "settlor" simply because he has left to others "certain parts of the legal machinery".

101. Mrs Gower was, as the FTT held at [126], "little more than a functionary" in that process. She did not have any independent role; rather she simply carried out the steps required of her under the Scheme established by Mr Dunsby, effectively as Mr

Dunsby's agent or nominee. Nor, as the FTT noted, did she provide funds to the settlement. Her initial subscription of £100 for the S share was (in effect) refunded through the payment to her of that sum when the Company's dividend was declared; thereafter she stood to receive 1.5% of any dividend declared by way of remuneration for her role in the Scheme. The funds settled on the Trust came entirely from the decision of the Company, with Mr Dunsby as sole director, to declare a dividend on the S share. In those circumstances we do not think that, on any realistic view, Mrs Gower can be described as having either "made" or "entered into" the settlement for the purposes of s 620(2) ITTOIA. In that regard we respectfully disagree with the provisional conclusion reached by the FTT at [127].

102. We would, moreover, reach the same conclusion even if we had concluded that the settlement should be narrowly drawn by reference solely to the creation of the Trust of the S share. For the reasons set out at [100] and [101] above, we consider that the settlor of that Trust would on that hypothesis still be Mr Dunsby and not Mrs Gower.

103. It follows from those conclusions that no issue arises as to the application of s 644–645 ITTOIA, since we do not consider that there was in this case more than one settlor. If we are wrong about that, however, it is necessary to consider how those provisions would apply.

104. The FTT considered that if both Mr Dunsby and Mrs Gower were regarded as being settlors, s 645(1)(c) would require a just and reasonable apportionment of the property between them. Mr Jones disputed that analysis of s 645(1)(c). His submission was that this provision does not address the situation of property provided by multiple settlors, but rather addresses the situation of property which consists of a mixture of property directly or indirectly settled and property that represents property settled (e.g. the proceeds of sale of trust assets, or further assets purchased with those proceeds of sale).

105. We are inclined to agree with Mr Jones' submissions on this point. That is, however, not the end of the matter, because Ms Poots argued that it was in fact not necessary to look at s 645(1)(c). The only property provided for the purposes of the settlement was, in reality, provided by Mr Dunsby: it was Mr Dunsby who was responsible for the creation of the S share and its allotment to Mrs Gower, and accordingly he provided the property "indirectly for the purposes of the settlement", as referred to in s 645(1)(a). We agree with that analysis. The income arising from the S share is therefore treated as originating from Mr Dunsby pursuant to s 645(2), and is accordingly treated for income tax purposes as being the income of Mr Dunsby under s 624. The consequence is that (irrespective of whether Mrs Gower is identified as a settlor or not) all of the income in the Trust is taxable in the hands of Mr Dunsby.

106. Our conclusion on the Settlements Issue is therefore that, to the extent that this point arises, we would uphold the conclusion of the FTT that Mr Dunsby was the settlor for the purposes of the settlements legislation in Chapter 5 of Part 5 of ITTOIA, and is therefore subject to an income tax charge on the entirety of the income arising under the settlement, i.e. in this case £200,000.

The Transfer of Assets Abroad Issue

107. The final issue before us regarding the transfer of assets abroad regime (Ground 3 of Mr Dunsby's appeal) would only arise in the event that we concluded that Mr Dunsby was not chargeable under either ss 383–385 ITTOIA, and that for the purposes of the settlements legislation the only settlor was Mrs Gower. Given the conclusions we have reached above, it is not necessary for us to decide the Transfer of Assets Abroad Issue. Again, however, as with the Settlements Issue we do so here for completeness.

108. In the event, the ground of appeal as argued before us by Mr Jones came down to a very short point. He submitted that Condition B under s 721 ITA was not met, since it required that the income under the Trust would be chargeable to income tax if it were properly regarded as being Mr Dunsby's income. However, on the premise that Mrs Gower was the settlor (which is the premise upon which this issue arises), the effect of s 624 would be that the income of the settlement would be treated for income tax purposes as being the income of Mrs Gower. That being the case, his submission was that even if the distribution were putatively regarded as Mr Dunsby's income, that would be subject to the operation of s 624 and would have to be treated as Mrs Gower's income.

109. The FTT rejected this argument at [177]. We have no hesitation in rejecting it also. The point of s 721 is to enable tax to be charged where the taxpayer has succeeded in transferring relevant income, for the purposes of other provisions of the tax code, to a person abroad in order to avoid income tax. The way that is done is to impose the tax that would have been chargeable if the income had *not* been alienated but had remained in the hands of the taxpayer. To suggest that in that situation the very result that is sought to be avoided by s 721 (namely that the income is regarded for tax purposes as the income of the person abroad) in fact governs the position is completely absurd and would render nugatory the entire purpose of the provision.

110. The correct interpretation of s 721 Condition B is that it asks whether income would be chargeable to income tax if (in the counterfactual case) it had belonged to the taxpayer and had been received by them in the UK, i.e. ignoring the *prima facie* effect of the transfer to another person.

111. If it were to arise, therefore, we would uphold the conclusion of the FTT and find that, on the premise that Mrs Gower is regarded as the settlor for the purposes of the settlements legislation, Mr Dunsby is nevertheless taxable under the transfer of assets abroad provisions in Chapter 2 Part 13 ITA, and is therefore subject to an income tax charge on the entirety of the income arising under the settlement.

Disposition

112. We have found that the FTT made an error of law in its conclusions on the Distribution Issue. We regard that error as material and accordingly exercise our discretion under s 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") to set aside the Decision on that issue.

113. This is a case where we can exercise our power under s 12(2)(b)(i) TCEA to remake the Decision. We do so by determining that the sum of £195,400 is to be brought into account as taxable income of Mr Dunsby in the year 2012/2013, such sum being the amount of the distribution received by Mr Dunsby, as we concluded at [86] above, and as originally determined by HMRC in their closure notice.

114. The appeal is dismissed.

Signed on Original

MRS JUSTICE BACON DBE **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES

RELEASE DATE: 23 November 2021