[2020] UKFTT 0407 (TC)

TC07884

Appeal numbers: TC/2015/04176
TC/2015/04175
TC/2016/00122

INCOME TAX – whether the appellants are taxable on sums received under offshore partnership and trust arrangements as earnings under ITEPA – if so, whether the appellants are entitled to "credit" for the resulting income tax which third parties were liable to deduct or account for under the Pay As You Earn System and are overcharged to tax – whether the tribunal can consider the appellants' grounds of appeal relating to the "credit" issue – whether the tribunal can consider the effect of decisions issued by HMRC under s 684(7A) ITEPA which HMRC argue prevent any "credit "arising – whether, in any event, the appellants are taxable on the sums under the provisions relating to the transfer of assets abroad – appeals dismissed

FIRST-TIER TRIBUNAL

JOHN LANCASHIRE **Appellants**

TIMOTHY LEE

MARK JOHNSON

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN

Sitting in public at Taylor House, Rosebery Avenue, London on 13 to 17 and 21 and 22 May 2019

Ms Anne Redston, counsel, instructed by Crowe Clark Whitehill, for the Appellants

Mr John Tallon QC and Ms Laura Poots, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appeals relate to additional income tax HMRC are seeking to impose on the lead appellants in respect of the provision of their services to clients in the United Kingdom ("**UK**") under arrangements promoted by de Graaf Resources Limited ("**de Graaf**") or Montpelier Tax Planning (Isle of Man) Limited or a related company ("**Montpelier**") ("**the de Graaf**" and "**the Montpelier arrangements**" respectively and together "**the arrangements**")). In short, the arrangements were designed to enable individuals participating in them to receive the majority of the income generated by the provision of their services to clients in the UK without attracting UK income tax and national insurance contributions ("**NICs**"). The arrangements were notified to HMRC by Montpelier on 30 September 2004 under the rules set out in the Finance Act 2004 commonly known as "DOTAS".

2. The tribunal has designated these appeals as lead cases pursuant to its powers set out in rule 5 of the rules governing the tribunal (the First-tier Tribunal (Tax Chamber) Rules ("**the Rules**")) on the basis that:

(1) The appeal made by Mr Johnson, who implemented the de Graaf arrangements, is the lead case as regards a number of similar appeals referred to as the Group A appeals.

(2) The appeals made by Mr Lee and Mr Lancashire, who implemented the Montpelier arrangements, are the lead cases as regards a number of similar appeals referred to as the Group B appeals. There are some factual differences between the Group A and Group B appeals as set out below. I refer to the Mr Johnson, Mr Lee and Lancashire as "**the lead appellants**" and the appellants in relation to all of the Group A and Group B appeals as "**the appellants**".

Part A – Background and Overview

Structure

3. In outline, the essential elements of the Montpelier arrangements to which the Group B appeals relate are as follows:

(1) Each appellant established a settlement in the Isle of Man ("**the Trust**") of which he was the life tenant and under the terms of which he was entitled to the income of the Trust as it arose. The trustee was an Isle of Man company ("**the Trustee**").

(2) The Trustee formed a partnership in the Isle of Man ("**the Partnership**") with other parties who acted as Trustees of Trusts established by other individuals who participated in the arrangements. The managing partner of each Partnership was a Montpelier company, MTM (Consultants) Ltd ("**MTM**").

(3) The Partnership entered into a contract with the appellant ("**the Services Contract**"), under which the appellant agreed to provide services to the Partnership or, if requested, to third parties, in return for a modest fee payable by the Partnership ("**the Fee**").

(4) It appears that (a) the Partnership entered into an agreement with another Montpelier entity based in the UK regarding the provision of the appellant's services to a named end client ("**the Client**"), (b) that Montpelier entity entered into an agreement with a UK based professional recruitment agent ("**the Recruitment Agent**") for the provision of the appellant's services to the Client, (c) the Recruitment Agent entered into an agreement with the Client for the provision of the appellant's services to it, and (d) the appellant then carried out work for the Client. It appears that an agreed fee was due to the Partnership, the Montpelier entity and the Recruitment Agent under each of these agreements.

(5) The Partnership received its fee under the arrangements set out in (4) and (a) paid the Fee to the Individual and (b) allocated a proportion of the profits of the Partnership to the Trustee ("**the Profit Share**") as a partner in the Partnership. Under the terms of the Trust, the Profit Share was subject to the terms of the Trust and, accordingly, the appellant was entitled to the Profit Share as it arose to the Trust, as the life tenant of the Trust.

(6) The overall amount received by the appellant as the Fee and the Profit Share equated to the sum he expected to receive in return for the services he provided to the Client less a fee due to Montpelier of between 6% to 10% of the overall sum ("**the Arrangement Fee**"). It is unclear how the Arrangement Fee due to Montpelier was split between the Montpelier entities involved in the arrangements or at what stage of the money flows it was collected.

4. The de Graaf arrangements to which the Group A appeals relate operated in the same way as the Montpelier arrangements except that:

(1) The appellants in the Group A appeal argue that for part of the relevant tax years (in Mr Johnson's case, it appears from 8 August 2006 to 7 August 2007) ("**the first period**") they were employees of a company, Twenty Plus Payroll Limited (later renamed TPP Contractors) ("**TPP**"), which it appears was linked with de Graaf, or possibly of an entity related to that company.

(2) It appears that, as regards the provision of each appellant's services in the first period, (a) TPP entered into a Services Agreement with the Partnership under which it received a fixed Fee, (b) TPP paid a sum equal to the fixed Fee (less its commission) to the appellant after deduction of sums which were stated to be deducted in respect of income tax and NICs, and (b) TPP or a related entity entered into a tripartite agreement with the Recruitment Agent and the appellant.

(3) In the remainder of the relevant tax years ("**the second period**"), it appears that there was an agreement for the provision of the appellant's services between de Graaf acting on behalf of the Partnership and the Recruitment Agent.

Background

5. Each lead appellant accounted for tax in his tax return made for each tax year in which he provided his services under the arrangements under s 8 and s 9 of the Taxes Management Act 1970 ("**TMA**") on the basis that (a) the Fee was subject to income tax in his hands as income from self-employment or the sum received from TPP was subject to tax as income from an employment but (b) the Profit Share was exempt from tax by virtue of article 3(2) of the double tax agreement between the UK and the Isle of Man ("**article 3**"). I refer to a tax return made under ss 8 and 9 TMA as a "return". References I make in this decision to a return are to be taken as including reference to the self-assessment of tax chargeable and payable required to made in it under ss 8 and 9 TMA.

6. Under their powers given by s 9A TMA, HMRC enquired into the lead appellants' returns for the tax years (a) 2004/05 to 2007/08, as regards Mr Lancashire, (b) 2002/03 to 2007/08, as regards Mr Lee and (c) 2006/07 and 2007/08, as regards Mr Johnson. On closure of their enquiries they amended each of these returns to show income tax and Class 4 NICs due on the Profit Share under s 28A TMA ("**s 28 amendments**").

7. Shortly after HMRC became aware of the use of the arrangements, the Government introduced legislation (in s 58 of the Finance Act 2008) which was

intended to ensure that the arrangements do not achieve the intended result, by amending s 858 of the Income Tax (Trading and Other Income) Act 2005 ("**ITTOIA**") with retrospective effect to clarify that article 3 does not apply to exempt the Profit Share from tax (although HMRC did not accept that the structure works in any event). The validity and application of these amendments was challenged by Mr Huitson, who used the Montpelier arrangements, in proceedings in this tribunal and by way of judicial review. Mr Huitson was unsuccessful in both sets of proceedings (see *R (oao Huitson) v HMRC* [2010] STC 97, [2011] STC 1860, *Huitson v HMRC* [2015] UKFTT 0448 and the decision of the Upper Tribunal ("**the UT**") refusing to accept a late appeal ([2017] UKUT 75 (TCC))).

8. The appellants notified their appeals to HMRC in 2009 and 2012 on grounds of appeal similar to those pursued by Mr Huitson. However, when they notified their appeals to the tribunal in 2015, they relied on further grounds ("**the PAYE grounds**") as set out in [10] below.

9. The appeals were stayed or otherwise held behind the proceedings brought by Mr Huitson. Once those proceedings were concluded in HMRC's favour, HMRC issued "follower notices" to the appellants under the Finance Act 2014, on the basis that the tribunal's decision in *Huitson* applies to the arrangements. These notices were challenged by way of judicial review (see *R(oao Broomfield) v HMRC* [2018] EWHC 1966) but ultimately the appellants withdrew their original grounds of appeal and the lead appellants now rely only on the PAYE Grounds.

The PAYE Grounds

Overview of the lead appellants' position

10. The PAYE Grounds, on which the lead appellants wish to rely, involve the arguments set out below. I note that in this summary I refer to the provisions which were in place for the majority of the tax years in question. For the 2002/03 tax year only, earlier provisions were applicable but the lead appellants' view is that the same analysis applies under those provisions although that is to some extent disputed by HMRC:

> (1) The lead appellants are chargeable to income tax and Class 1 NICs on the Fee and the Profit Share (together "**the sums in dispute**") under the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**") on the basis that:
>
> > (a) as regards Mr Johnson's position in the first period, the sums in dispute constitute "earnings" from an employment under the general provisions in ss 10 and 62 ITEPA; and
> >
> > (b) in relation to all other relevant periods, the sums in dispute are to be treated as "earnings" from an employment under the provisions relating to persons providing services through an agency in s 44 ITEPA (and corresponding provisions relating to NICs) ("**the agency rules**").
>
> For convenience, I refer to sums taxable under any of these provisions as "**earnings**". As explained below, HMRC dispute that the lead appellants have demonstrated to the required standard of proof (on the balance of probabilities) that the sums in dispute are earnings.
>
> (2) Under the Pay As You Earn ("**PAYE**") system (in respect of the majority of relevant tax years, as provided for in ITEPA and the Income Tax (Pay as You Earn) Regulations 2003 (UK Statutory Instrument 2003 No 2682) ("**the PAYE regulations**")), the primary obligation to account for income tax on such earnings falls on the employer or payer rather than on the employee or worker.

It was not disputed that if, as the lead appellants argued, the sums in dispute are taxable as earnings under ITEPA:

(a) the relevant rules in ITEPA take priority over the relevant rules regarding the taxation of the sums in dispute as income from a Partnership;

(b) TPP or other related entity (as regards the first period) and the Clients (as regards all other periods) are to be regarded as the employer/payer for the purposes of the PAYE rules;

(c) accordingly, under those rules, those parties were liable to (but did not) (i) deduct the income tax due in respect of the earnings from sums paid by them under the arrangements and/or account to HMRC for such income tax, and (ii) account for Class 1 NICs in respect of the earnings;

(d) HMRC were entitled to but did not take action to enforce such obligations against those parties and are out of time to do so; and

(e) HMRC did not seek to apply regulation 72(5) or regulation 81(4) of the PAYE regulations, which enable them, where certain conditions are satisfied, to direct that the employer/payer is not liable to deduct or account for income tax due on the relevant earnings under the PAYE system. HMRC accept that any applicable time limits for them to take such action have expired (except that they consider there is no time limit for them to make a direction under regulation 72(5) in respect of the first period).

(3) On the basis that the analysis is as set out below, the lead appellants' view is that the result of the above position is that, for each relevant tax year:

(a) they are entitled to have a sum equal to the income tax due in respect of their earnings for that year, which the relevant employer/payer should have deducted and/or accounted for under the PAYE system, off-set against the income tax otherwise shown as chargeable and payable by them in the s 28 amendments,

(b) they have the right to appeal to the tribunal in respect of HMRC's failure to take this sum into account in the s 28 amendments, and

(c) the tribunal has the power to amend their returns (as amended by HMRC) to reflect this sum.

(4) For income tax purposes, a taxpayer who is required to submit a return for a tax year is required to include in his return a self-assessment of both the income tax *chargeable* on him and that *payable* by him in respect of that year under ss 8 and 9 TMA. In the lead appellants' view, as regards each tax year in question, these provisions entitled and required them to take the income tax chargeable on their earnings, which TPP or the Clients should have deducted or accounted for, into account in their self-assessment of the income tax *payable* by them in their return for that year. They did not realise this at the time:

(a) For the purposes of ss 8 and 9 TMA, the amount of income tax *payable* for a tax year is the difference between the amount of income tax *chargeable* as self-assessed by the taxpayer and "*the aggregate amount of any income tax deducted at source*" including "*income tax treated as deducted from any income*" and "income tax treated as paid" (emphasis added). In the lead appellants' view, the amount of "income tax treated as deducted from any income" is to be interpreted as including the income tax chargeable on their earnings, which TPP/other related entity or the

Clients were liable to deduct and/or account for, due to the operation of regulation 185 of the PAYE regulations ("**regulation 185**") and s 59B TMA.

(b) Section 59B(1) TMA provides for the computation and payment of tax payable by a taxpayer for a tax year as the difference between (a) the amount of income tax and capital gains tax contained in his self-assessment under s 9 TMA and (b) the aggregate of (i) any payments on account made by him in respect of that year, and (ii) any "*income tax which in respect of that year has been deducted at source*", as defined as "*income tax deducted or treated as deducted from any income* or treated as paid on any income" (emphasis added).

(c) Pursuant to s 59(8) TMA, regulation 185 applies to make adjustments to "the amount of tax deducted at source under PAYE regulations" for the purposes of s 59B(1) TMA. In outline, the relevant provisions of regulation 185 are as follows:

> (i) Regulation 185(1)(b) states that it applies for the purposes of determining the difference mentioned in s 59B(1).
>
> (ii) Under regulation 185(2), for those purposes the amount of income tax deducted at source under the PAYE regulations is "the total net tax deducted during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5)".
>
> (iii) Regulation 185(5) requires the addition to A of "*any tax treated as deducted*, other than any direction tax" (emphasis added).
>
> (iv) Under regulation 185(6) "*tax treated as deducted*" means:
>
> > "any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year -
> >
> > > (a) the employer was liable to deduct from payments but failed to do so, or
> > >
> > > (b) the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so…"
>
> It was not disputed that if these provisions are in point on the basis that the lead appellants' analysis as set out above is correct, TPP/the related entity and the Clients are each to be regarded as an "employer" for the purposes of this provision.
>
> (iv) Direction tax means "tax which is the subject of a direction made under regulation 72(5) or regulation 81(4) [of the PAYE regulations] in relation to the taxpayer in respect of one or more tax periods falling within the relevant tax year".

(d) The lead appellants submitted that:

> (i) The income tax chargeable on their earnings in each relevant tax year falls within regulation 185(5) as "tax treated as deducted, other than direction tax" as those terms are defined in regulation 185(6). As noted, as was common ground, that is on the basis that TPP/the related entity and the Clients were liable to deduct and/or account for that tax under the PAYE system but failed to do so and that HMRC have not made a direction under regulation 72(5) or 81(4) of the PAYE regulations. I refer to such tax as a "tax credit".

(ii) The phrase "*income tax treated as deducted*…" when used for the purposes of s 9 TMA should be interpreted consistently with regulation 185 to include tax falling within regulation 185(5) (as the relevant terms are defined in regulation 185(6)). As set out below, HMRC do not accept that is the case.

(5) The appeals were made to HMRC under s 31A TMA against "any conclusion stated or amendment made in a closure notice", namely, the s 28 amendments made by HMRC to the lead appellants' returns to show income tax and Class 4 NICs due on the Profit Share. Under ss 49A to I TMA, where the appeal is notified to the tribunal, the tribunal is to decide "the matter in question" which means "the matter to which an appeal relates". The powers conferred on the tribunal in relation to such an appeal under s 50 TMA include the power to reduce an assessment, as amended by HMRC, if the tribunal decides that the appellant "is overcharged" by it (under sub-s(6)(a)).

(6) The lead appellants said that, as the tax credits arising under the arrangements are matters which should have been taken into account in their self-assessments of income tax payable in each return to which the s 28 amendments have been made:

(a) they have the right to appeal to the tribunal against the s 28 amendments on the basis that HMRC have failed to take the tax credit into account in setting out the income tax payable by them in those amendments, and

(b) they are overcharged by the s 28 amendments within the meaning of s 50(6)(a) TMA so that the tribunal has power under that provision to amend the relevant returns (as amended by HMRC) to reflect the tax credit.

Overview of HMRC's position

11. HMRC argued in the alternative that:

(1) (a) The tribunal does not have jurisdiction to hear the PAYE Grounds because the issues raised are not within the scope of "the matter in question" as determined according to the scope of the s 28 amendments made by HMRC. The "matter in question" is limited to whether income tax is chargeable on the sums in dispute as income from a Partnership/Trust, and (b) in any event, it is in the interests of justice and fairness for the tribunal to exercise its case management powers to prevent the lead appellants raising the PAYE Grounds.

(2) The lead appellants have failed to demonstrate to the required standard of proof that the sums in dispute are taxable as earnings under ITEPA. On that basis, there is no income tax chargeable on the sums in dispute which could constitute a tax credit within the meaning of regulations 185(5) and (6).

(3) HMRC accepted that if, contrary to their view, the sums in dispute are taxable as earnings, a tax credit may arise in relation to the tax years 2003/04 to 2007/08 but not in respect of the tax year 2002/03. However, in their view, the tribunal does not have jurisdiction to deal with any failure by HMRC to take any tax credit into account in the s 28 amendments:

(a) The lead appellants were not entitled or required to take any tax credit into account in their self-assessment of income tax payable made in their returns for each relevant tax year under ss 8 and 9 TMA.

(b) Any such tax credit is taken into account only under s 59B(1) in computing the overall tax payable by the lead appellants in each relevant tax year. That provision operates independently from the self-assessment provisions to provide the mechanism for calculating and charging the tax actually payable.

(c) Regulation 185 specifically only applies to treat a tax credit as income "treated as deducted from any income" for the purposes of s 59B; there is no reference in regulation 185 to ss 8 and/or 9 TMA. Any such income tax is not, therefore, income tax "treated as deducted" for the purposes of ss 8 and 9 TMA.

(d) It is clear, as set out in caselaw (see *Walker v HMRC* [2016] UKUT 32) that a taxpayer has no right of appeal to the tribunal as regards any asserted failure by HMRC to take account of a tax credit in enforcing the payment of tax due under s 59B.

(4) Finally, in any event, the sums in dispute are taxable under the transfer of asset abroad provisions ("**the TOAA provisions**") which, in effect, take precedence over the charging provisions in ITEPA.

The lead appellants dispute all of the above points and the parties' full submissions are set out in the relevant Parts of this decision below.

Section 684 decisions

12. Shortly before the hearing, HMRC took action which, in their view, means that, whatever the tribunal's conclusion on the PAYE Grounds, no tax credit can arise in respect of any of the relevant tax years:

(1) In letters of 8, 9 and 12 March 2019 HMRC notified each lead appellant that, as provided for in s 684(7A) ITEPA, they had decided that it is not appropriate or necessary for any relevant party to be required to comply with the PAYE regulations which may otherwise have required them to deduct and/or account for income tax in respect of the sums in dispute ("**the s 684 decisions**").

(2) In outline, s 684 empowers HMRC to make PAYE regulations. Section 684(7A)(b) states: "Nothing in the PAYE regulations may be read - … (b) as requiring the payer to comply with the regulations in circumstances in which an officer of Revenue and Customs is satisfied that it is unnecessary or not appropriate for the payer to do so".

(3) In HMRC's view, under s 684(7A)(b), the effect of the s 684 decisions is that regulation 185 is not to be read as meaning that TPP/the related entity and the Clients *were liable* to deduct income tax due in respect of the sums in dispute or to account for such income tax. Hence, on the basis that those parties were not so liable, there can be no tax credit which it can be argued HMRC have failed to take into account in making the s 28 amendments.

13. The lead appellants argued in the alternative that (a) as a matter of statutory interpretation, the s 684 decisions do not have any material effect on the analysis that they consider otherwise applies, (b) the s 684 decisions are made unlawfully and are to be regarded as null and void by the tribunal, or (c) the tribunal should bar HMRC from proceedings (wholly or partially) as the issue of the s 684 decisions is an abuse of process. In HMRC's view, on the other hand, the effect of the s 684 decisions is purely a matter of public law which the lead appellants can challenge only by way of judicial review proceedings brought in the administrative court. The lead appellants have initiated such proceedings but had applied for them to be stayed pending the outcome of this hearing.

Summary of conclusions

14. I have concluded that:

(1) For all the reasons set out in Part G, the tribunal has jurisdiction to decide the PAYE Grounds and the lead appellants should not be prevented from raising them.

(2) For all the reasons set out in Parts C and D, disregarding (a) any impact on the analysis as a result of the issue of the s 684 decisions, and (b) to the extent relevant, whether the TOAA provisions apply:

(a) Mr Johnson is not "overcharged" by the s 28 amendments within the meaning of s 50(6)(a) so far as they relate to the first period. That is on the basis that the sums in dispute relating to the first period are not taxable as earnings under ITEPA. On that basis, the s 28 amendments relating to the first period stand as they are and the further points set out below are not relevant in respect of that period.

(b) Otherwise the lead appellants are "overcharged" by the s 28 amendments within the meaning of s 50(6)(a) on the basis that (i) the sums in dispute relating to each relevant tax year are taxable as though they are earnings under s 44 ITEPA, and (ii) the resulting income tax chargeable on such sums in each tax year gives rise to a tax credit which HMRC are required to take into account in making those amendments, and (iii), accordingly, the tribunal could correct HMRC's failure to take the tax credit into account in the s 28 amendments.

(3) For all the reasons set out in Part E, the tribunal does not have jurisdiction to consider the public law arguments raised by the lead appellants in relation to the s 684 decisions. However, as a matter of statutory construction, either s 684(7A)(b) does not apply or, if it does, it does not require the tribunal to read regulation 185(6) on the basis that the Clients were not liable to account for income tax on the relevant sums. On that basis, the analysis set out in Parts C and D is not affected by the issue of the s 684 decisions.

(4) However, in any event, in respect of all relevant periods other than the first period (as the conclusion set out above in relation to that period determines the appeal in respect of that period), for all the reasons set out in Part F, the TOAA provisions apply and, in effect, take precedence over s 44 ITEPA, so that the lead appellants are subject to income tax on the Profit Share under those provisions. On that basis, the lead appellants are not "overcharged" by the s 28 amendments made by HMRC to their relevant returns so far as they relate to such periods except in relation to NICs shown as due in those amendments which HMRC accept fall away where and to the extent that the TOAA provisions apply.

Part B - Facts

15. I have found the facts set out below on the basis of the evidence given by the lead appellants and the bundle of documents produced to the tribunal. On an application made by HMRC, I made a direction that those lead appellants who had not yet given evidence were to be excluded from the hearing whilst the other lead appellant was cross-examined. I considered that it was in the interests of justice and fairness to do so to ensure that the best evidence was obtained and on the basis that there was no prejudice to a lead appellant in not attending only the part of the hearing which was concerned with establishing the particular facts relating to the other lead appellants. I found the lead appellants to be honest and credible witnesses (and I note HMRC accepted them to be such) and I have accepted their evidence as set out below.

Mr Lancashire

16. At the relevant time, Mr Lancashire worked on IT projects as a "business analyst", "change project manager" and "consultant" for clients in the financial services sector on projects related to changing their business processes or systems infrastructure. From 2001 until he used the Montpelier arrangements, he worked on what he considered to be a self-employed basis by providing his services through a "personal services company", Andante Holdings Limited.

17. Mr Lancashire said that he became aware of the Montpelier arrangements in 2004 probably through a "contractor notice board". He used it in the tax years 2004/05 to 2007/08. He thought that using the scheme would avoid the risk of HMRC seeking to tax monies he would otherwise receive in his personal services company as though they were employment earnings under legislation commonly known as IR35. He continued to regard himself as acting on a self-employed basis when operating under the Montpelier arrangements. He did not take any independent advice on using the structure given the expense involved in doing so.

Overview of the arrangements

18. The arrangements Mr Lancashire entered into operated as follows:

(1) On 19 May 2004, as Settlor, Mr Lancashire entered into a trust deed with Millibird Limited ("**Millibird**"), as Trustee, establishing the John Christopher Lancashire Family Settlement, of which he was named life tenant. Mr Lancashire's signature was witnessed by Mr Lee (who was a colleague at the time). The initial settlement was £1,000. The trust deed contained the following material provisions:

(a) The "income" of the Trust Fund was defined as "all income arising or accruing to the Trustees".

(b) The Trustee was stated to be "possessed of the income of the Trust Fund upon trust to pay the income to the Settlor during his lifetime".

(c) The beneficiaries were stated to be Mr Lancashire and his wife and children.

(d) The Trustee's powers included the power "to carry on any trade or business [in any of a number of specified areas] and to employ in such trade or business any monies which may for the time being be comprised in the Trust Fund". If this power was exercised the profits of any such trade or business (of an income nature), including profits which the Trustee was entitled to under any partnership agreement, were to be regarded as falling within the provision in (b) and so to be paid to the Settlor without deduction.

(e) The Trustee was required to draw up and prepare (or cause to be drawn up and prepared) accounts of the profits of any such trade or business (including any such trade or business carried on in partnership) within 3 months of the end of each 12 month period of account during which such trade or business was carried on and to submit copies of such accounts to the Settlor.

(2) On 26 May 2004:

(a) The Coalmine Partnership was formed of which Millibird was a member and MTM was the managing partner. The partnership agreement was not produced in the document bundles. Ms Redston said it was not possible to obtain this document as Mr Lancashire was not a party to it. However, the bundles contained financial statements for the Coalmine Partnership for the periods ending on 5 April 2005, 5 April 2006 and 5

April 2007 in which Millibird was listed as being a partner in the Coalmine Partnership from 26 May 2004 to 9 April 2008.

(b) Mr Lancashire entered into a Services Agreement with the Coalmine Partnership under which he agreed to perform consultancy services as set out below.

(3) During the relevant periods, Mr Lancashire carried out assignments for the following clients as arranged through a Recruitment Agent:

(a) From 31 May 2004 to 14 January 2005, Abbey National Treasury Services ("**ANTS**"), as arranged through NBW Partners Ltd ("**NBW**").

(b) From 2 June 2005 to 29 July 2005, NFU Mutual, as arranged through Landmark Business Consulting Ltd ("**LBC**").

(c) From 1 August 2005 to 31 January 2006, RSA, as arranged through LBC.

(d) From 1 February 2006 to 30 June 2006, Xchanging Insurance Professional Services Limited ("**Xchanging**") as arranged through LBC.

(e) From 5 March 2007 to 25 April 2007, Barclays Capital as arranged through Business & Decision Limited.

(4) Mr Lancashire said in his witness statement that, as regards all of these assignments, he always reported to a client director or manager who engaged him in the first instance, agreed the terms of the contract, defined his role, specified the deliverables he should produce and then approved them once completed. As regards recruitment for the assignments he said that:

> "In all cases I was interviewed by both the recruitment agent (for example NBW Partners Ltd and Landmark Business Consulting Ltd) and the client programme sponsor (for example John Hasson at ANTS) about the role, during which I was tested on my domain knowledge and relevant experience. If that went well, along with the provision of satisfactory references, I was offered the role."

(5) Mr Lancashire entered into a separate contract in relation to each assignment he entered into (an "**Assignment Contract**"), which he said was to vary the terms of the Services Agreement to reflect the specific terms for the assignment. This was set out in the form of a letter from MTM signed by it as managing partner of the Coalmine Partnership. It appears from the terms of these contracts, that the Coalmine Partnership entered into a further contract for the provision of Mr Lancashire's services with another Montpelier entity (which, as it appears from the other evidence, in turn, contracted for the provision of his services to the Recruitment Agent). In the letter:

(a) MTM stated: "We wish to change the Terms of the [Services] Agreement in respect of the following assignment. Please note we cannot proceed with the Assignment unless we receive your approval to the Assignment and the incorporation of the Special Conditions into your [Services] Agreement. Please respond by return if possible. Can you also please sign and return to us Schedules 2 and 3 attached, by fax or post".

(b) MTM set out details of the particular Client and "The Company" as specified to be "Montpelier", the services to be provided including key deliverables as set out in a schedule, the period of the assignment, any notice period and any special conditions as set out in a schedule.

(c) MTM stated: "You agree that the Special Conditions set out in the attached schedule are hereby incorporated by reference to the [Services]

Agreement between you and the Partnership insofar as concerns this assignment only." Further details of the terms and conditions of each Assignment Contract are set out below.

(d) On the signature page Millibird was shown as a partner of the Coalmine Partnership along with three other entities as partners.

19. In relation to each Assignment Contract, Mr Lancashire signed schedules 2 and 3 referred to above which contained the following confirmations:

(1) In schedule 2 Mr Lancashire acknowledged that:

(a) the Coalmine Partnership had the right to enter into a contract with another Montpelier entity, for the provision of his services. That entity was sometimes referred to as Montpelier Contracting & Consulting, a trading division of Montpelier (Search & Selection) Limited ("**MSS**") (which was shown as having a UK address) or was referred to simply as MSS and, in either case, was defined as "the Company",

(b) he was not an employee of the Company,

(c) the Coalmine Partnership was solely responsible for compensating him for his services and otherwise he had no entitlement to any compensation or benefits from the Company and he would fully account for "any PAYE, Income Tax, National Insurance Contributions and any other taxes or levies due on any payments I receive from the Partnership", and

(d) the Conduct of Employment Agencies and Employment Business Regulations 2003 did not apply to any contract for services between the Company and the Coalmine Partnership for the provision of his services and that, accordingly, he had opted out of those regulations.

(2) In schedule 3 Mr Lancashire confirmed that the Conduct of Employment Agencies and Employment Business Regulations 2003 did not apply to the contract for services between MSS and the relevant Recruitment Agent where he was designated as the individual who would perform the services and that he and Montpelier had accordingly opted out of the regulations.

Services Agreement

20. The Services Agreement dated 26 May 2004 included the following main provisions:

(1) It was stated in the recitals that Mr Lancashire was engaged in business on his own account offering consultancy services (as set out in a schedule) and that the partnership wanted to engage him for the purpose of providing those services to or for the Coalmine Partnership.

(2) Mr Lancashire agreed to provide the relevant services to the Coalmine Partnership as consultant or to "any person or persons to whom the Partnership shall have agreed to supply such consultancy services….and to whom the Consultant is requested by the Partnership to supply such consultancy services" (under clause 2).

(3) In consideration of the consultancy services the Coalmine Partnership agreed to pay Mr Lancashire an annual fee to be paid by equal monthly instalments in arrears as set out in a schedule. It was provided that:

> "If the aggregate of fees royalties sale price or other consideration received or receivable by the Partnership as consideration for the supply of the consultancy services …from any such person or persons as are referred to in clause 2 or which are received on the licence or sale of any computer software or programme or other intellectual

> property devised by the Consultant……shall be less than the amount specified in schedule 4 in aggregate in any year (such amount being called "the annual aggregate") the fee to be paid to the Consultant…. shall be taken to be such annual aggregate and no more [being £20,000].
>
> If the aggregate of fees royalties sale price or other consideration received or receivable by the Partnership in any payment period or periods included in any one year taken together (whether of three, six or nine calendar months) shall be less than the instalments of the amount set out in Schedule 4 due up to the quarterly payment date the instalment or instalments of the said fee payable to the Consultant shall in accordance with [(1)] be reduced to such aggregate."

(4) The agreement was to continue until determined either by the death of Mr Lancashire or by him or the Coalmine Partnership giving not less than three months' notice in writing to the other party (under clause 5).

(5) Mr Lancashire was required to devote not less than 1,200 hours per annum to the performance of the consultancy services but it was stated that "subject thereto the Consultant shall himself determine in consultation with the Partnership or any such third party … the time and place or places at which he shall perform such consultancy services".

(6) If the business of the Coalmine Partnership or a third party required the attendance of Mr Lancashire at any one particular time or place he was required to attend at that time and at that place required – for the purpose of advising, consulting with or, training any such third party or its personnel or the personnel of the Partnership and for any emergency requiring immediate attendance for the purpose of providing consultancy services.

(7) If Mr Lancashire was for any reason unavailable or unable to provide the services he was entitled to procure that the services would be rendered by some other person having the same or similar qualifications or experience as he did provided that he was not entitled to procure the rendering of such services by such other person unless he gave not less than seven days' notice of his intention and the name and address of the relevant person and that the Coalmine Partnership had the right within seven days thereafter to serve notice in writing objecting to the appointment in which case he was not entitled to appoint the relevant person.

(8) Mr Lancashire was free to engage in work as a consultant in the information technology industry and for that purpose to devise initiate and develop computer software and programmes and other products. Any such software or programmes and all other intellectual property which may come into being as a consequence of the performance by Mr Lancashire of the consultancy services was to remain the property of the Coalmine Partnership which had the sole and unfettered right to sell, licence or otherwise dispose of or deal with the same in such manner as it thought fit and had the exclusive right to the proceeds of any such transaction.

(9) It was stated that: "Nothing herein contained or implied shall cause the Consultant to be treated as the agent of the Partnership for any purpose whatsoever or otherwise give authority to the Consultant to bind the Partnership".

(10) It was stated that:

> "Unless otherwise agreed the Consultant may in performing the services employ such staff and provide and use such software and intellectual property or plant machinery or equipment as are necessary to do so as the Consultant thinks fit and the Consultant shall unless otherwise agreed be solely responsible for all expenses incurred by him in rendering of consultancy services under the agreement."

(11) Neither the Coalmine Partnership nor any third person was obliged to provide Mr Lancashire with equipment, training, premises or staff to enable him to supply the services.

(12) It was stated that:

> "The Consultant shall perform the consultancy services under this Agreement as a self-employed independent contractor and not as an employee. Nothing in this Agreement shall confer any rights or impose any duties on the Consultant as an employee of the Partnership or constitute this agreement a contract of employment or service."

(13) Mr Lancashire was required to take out appropriate "Professional Indemnity Public Liability" and "Employers Liability Insurance" to cover his activities under the agreement in such sums as were required by the Partnership from time to time and to provide evidence of such insurance to the Coalmine Partnership.

(14) It was stated that: "The Partnership shall engage the Consultant under this Agreement solely as a principal, and not as an employer. Nothing in this Agreement shall confer any rights or impose any duties on the Partnership as an employer."

(15) The agreement was stated to be governed by the law of the Isle of Man and the parties submitted to the exclusive jurisdiction of the Isle of Man courts.

Individual assignments

21. The Bundles contained the following Assignment Contracts as signed by the parties:

(1) A contract dated 21 May 2004 (a) for the provision of "specialist consultancy support" to ANTS for the period from 31 May to 31 July 2004, (b) on the basis that the Coalmine Partnership had the right to terminate the engagement on giving Mr Lancashire seven days' notice.

(2) A contract dated 8 July 2005 (a) for the provision to NFU Mutual of "Specialist Programme Management support including" project management services and change management from 1 June to 29 July 2005, (b) on the basis that Mr Lancashire had the right to terminate the engagement on giving the Coalmine Partnership notice of 28 days or such shorter period as the partnership agreed and Coalmine Partnership had the right to terminate on giving Mr Lancashire notice of seven days.

(3) A contract dated 23 August 2005 (a) for the provision to RSA of "Specialist Programme Management support" including project management services, change management and programme/project planning from 1 August 2005 to 30 September 2005, (b) on the basis that each party had the right to terminate the engagement on giving notice to the other on the same basis as set out in (2). In an email of 29 September 2005 Montpelier confirmed an extension of this assignment for RSA from 1 October 2005 to 31 October 2005 on the basis that all other conditions remained unchanged.

(4) A contract dated 12 April 2006 (a) for the provision to Xchanging of "Specialist IT consultancy to provide programme management support for

Project Fossett, including" business process design, training, change management and programme/project planning and reporting from 1 February to 30 June 2006, (b) on the basis that Mr Lancashire had the right to terminate the contract on him giving notice of 28 days to the Coalmine Partnership and the Coalmine Partnership had the right to do so on it giving Mr Lancashire notice of seven days.

(5) A contract dated 14 March 2007 (a) for the provision to Barclays Capital of "Specialist IT Consultancy for Project Management Services" from 5 March 2007 to 5 April 2007, (b) on the basis that either party could terminate the agreement on giving the other notice of seven days. In this contract "The Company" was specified to be Montpelier (Search and Selection) Limited.

22. Each of the Assignment Contracts referred to in [21] contained similar special conditions as follows (as taken from the agreement for the first assignment for ANTS):

(1) Mr Lancashire confirmed he had the necessary skills, qualifications (including any work permits) and experience to perform the assignment.

(2) Mr Lancashire agreed to (i) perform the services as specified in the Services/Project summary unless agreed otherwise, (ii) use his best endeavours to ensure that the services were provided during normal business hours, (iii) carry out the services in a diligent manner and use his best endeavours to meet any time limits or targets required by the Client, (iv) provide the services with all reasonable skill and care and cooperate with any reasonable requests from the Client, (v) observe any relevant rules and regulations of the Client to the extent reasonably applicable, (vi) take all reasonable steps to safeguard the safety of any person who may be affected by his actions and comply with health and safety policies of the Client, (vii) not engage in any conduct detrimental to the interests of the Client, and (viii) comply with all legislation and codes of practice in relation to the provision of the services.

(3) Mr Lancashire warranted that any "CV" or references provided to the Coalmine Partnership were honest and accurate and contained a complete and accurate disclosure of his history and experience.

(4) Mr Lancashire was required, on the request of the Coalmine Partnership, to deliver to Montpelier (being "the Company") an undertaking that he would comply with the provisions of the assignment affecting him.

(5) Mr Lancashire acknowledged that the continuation of the assignment was subject to the continuation of the contract between the Coalmine Partnership and Montpelier. It was stated that, in the event that the Partnership's contract with Montpelier was terminated for any reason, the assignment would cease with immediate effect and without notice.

(6) The Coalmine Partnership was entitled to terminate the assignment immediately and without notice in the event of any material breach of duty, misconduct or incompetence or non-performance by Mr Lancashire and it could suspend the assignment if, for reasons outside its control, it was unable to start or continue to perform its obligations.

(7) Mr Lancashire was responsible for correcting any defective work at his own expense.

(8) Any periods of planned absence when the services were not to be provided by Mr Lancashire had to be agreed in advance with the Coalmine Partnership. The Coalmine Partnership could propose a substitute to provide

the services during the period Mr Lancashire was not available. If by reason of ill health or any other reasons, Mr Lancashire was not available to provide the services he had to inform the Coalmine Partnership immediately.

(9) Mr Lancashire acknowledged that he may be required to provide any equipment necessary to perform the services.

23. Mr Lancashire gave the evidence set out below in relation to the assignment with ANTS:

(1) He worked as a specialist IT consultant for ANTS. He thought that NBW signed a contract for the provisions of his services with Montpelier Resourcing and Consulting Ltd ("**MRC**") or another Montpelier entity which he did not see and that MRC or other Montpelier entity had an agreement for the provision of his services with MTM, as managing partner of the Coalmine Partnership which he also did not see.

(2) The engagement required expertise in making changes to large financial systems and project management for a "Basel II" migration programme. The work required him initially to produce a specific set of business analysis and project planning documents under the supervision of the Programme Manager (his boss) Neil Willis (who later handed over to Andy Curry although Neil remained involved in the project) and the Programme Sponsor, John Hasson. To produce these he worked with business users in Finance and Risk Management and drew on his expertise in large financial systems and knowledge of the Basel II requirements.

(3) At the hearing he clarified that Mr Willis was a partner in NBW who also worked at ANTS as a contractor. He said that Mr Willis knew about the involvement of Montpelier in the arrangements, as he had to be put in touch with them, but probably did not know about the Coalmine Partnership. Mr Lancashire was taken to his own page on "LinkedIn" and it was put to him that he did not refer to the Coalmine Partnership in his experience section. He said he would not refer to a contractual arrangement in listing his experience. He had listed his most recent experience and not all the projects he had worked on

(4) On his first day he had a meeting with Mr Willis who laid out the programme of work. These deliverables were regularly subsequently varied and the priorities were changed by Mr Willis as the work progressed. He could also request changes subject to Mr Willis' approval. He had a general induction to the business, together with other permanent employees, covering matter such as internal processes and policies and a briefing on the client's Basel II objectives. He received the same training in the firm's compliance, health and safety and other such requirements as the employees did and was required to follow the employees' conduct of business handbook.

(5) Mr Willis directed his work (such as in deciding on what had to be done, what the priorities were and what had to be done first), assigned resources, reviewed progress and was ultimately responsible for the delivery and success of his work. Mr Willis could also overrule him, for example, on a decision on whether to aim to deliver a software component to a certain date when Mr Lancashire did not believe there were the resources to achieve that. He had to negotiate his pay with Mr Willis and approached him on administrative matters such as approval of timesheets which were then submitted to MRC. In effect, therefore, Mr Willis had to agree the pay position with ANTS. For expense claims Mr Lancashire had to follow the normal expense guidelines used by the firm's employees and once signed off these were directly settled by the firm.

(6) He worked mostly at the firm's premises at Euston where he had his own desk. He could occasionally work from home but only with Mr Willis' prior approval. He agreed holidays with Mr Willis and then briefed other team members to cover for him whilst he was away. In practice he could not send a substitute to cover for him as that person would have to be interviewed and subjected to the normal new hiring processes. He was hired for his specialist skills; it was not easy to replace him. He said that this was the same in respect of the other assignments he undertook for other Clients.

(7) The programme team was made up of a mixture of permanent employees and contractors. Mr Willis set the tasks for the team. On occasions, Mr Lancashire would sometimes cover for other team members and vice versa and he would also occasionally be moved to different tasks by Mr Willis as the work progressed.

(8) The quality of his work was the subject of regular informal appraisals and feedback from Mr Willis and Mr Hasson and he was also asked to appraise other members of the team on an informal basis. On one occasion he had to recommend a dismissal of a member of the team whose work was not up to standard. Each of the main deliverables he produced were reviewed and approved by the managers from various departments in the firm. He also attended weekly review meetings with Mr Willis and Mr Hasson, briefed them on his progress and discussed any issues which had arisen whilst he was doing the work.

(9) As the work progressed, he was given new tasks by Mr Willis and Mr Hasson and he moved on to focus on regulatory reporting and define key improvements required to the main financial systems. However, the programme was suspended and ultimately closed down when Santander acquired ANTS.

(10) There was no contract between him and MRC or any other Montpelier entity and no contract between MRC/any other Montpelier entity and ANTS. The Coalmine Partnership, MRC and MTM did not exercise any control over his work as they had no understanding of the nature of his work.

(11) He advised the Montpelier UK entity and NBW of the hours he had worked on a weekly basis. The timesheets had to be signed off by Mr Willis or an ANTS manager before they could be processed. His understanding was that Montpelier then billed NBW at the hourly rate agreed between them and NBW billed ANTS under their contract with them. He thought that the money flows were that (a) ANTS paid NBW at the agreed rate, (b) after deduction of its commission, NBW paid the Montpelier UK entity at the agreed rate, (c) the Montpelier UK entity paid the Coalmine Partnership at the rate agreed between them, (d) the Coalmine Partnership paid Mr Lancashire "a basic wage" under the Services Contract (a proportion of the Fee) and (e) the Coalmine Partnership, therefore, made a profit which was distributed to his Trust and then to him, after deduction of Montpelier's Arrangement Fee. He did not know at what point Montpelier's Arrangement Fee was deducted. He said that the timesheet, invoicing and payment arrangements for his other assignments were very similar.

24. As regards NFU Mutual:

(1) He started working on this project in June 2005. He was engaged to complete business analysis and project planning work for "the STEP programme" to replace NFU's main insurance processing systems.

(2) He worked under the direction of the programme director, Mr Mark Allen, and produced a number of key deliverables including a detailed analysis and step plan for the migration of customer data and processes from the old systems to the new.

(3) He worked as part of a team at the firm's offices in Stratford upon Avon which was made up of a mixture of permanent employees and contractors.

(4) He thought that he worked a full working week throughout this project. He only worked from home on the odd day; it was unusual for him to do so. He noted that at that time it was not easy to work from home; he could not log in from there.

(5) In all respects Mr Allen played the same role as Mr Willis at ANTS; he directed his work in the sense of agreeing what he would do and framing the key deliverables, assigned resources, reviewed progress and was ultimately responsible for the delivery and success of his work. He had regular meetings with Mr Allen and sought advice from him on who was the right person to speak to about particular issues. He noted that there were many different user groups who he needed to input from and Mr Allen pointed him in the right direction of who to speak to.

(6) The arrangements for billing and paying for his time were the same as under the contract with ANTS. He thought that Landmark agreed a contract with MRC and then a separate contract with NFU. The invoicing and payment flows were the same as set out above. He said that he did not see the contract between NFU and Landmark.

25. He moved to the assignment with RSA in August 2005. His role was to help the IT department define their requirements for a new IT help desk system and select a suitable package; he reported to a senior IT manager throughout this process. The billing arrangements were the same as before and he believed the contract between MRC and Landmark continued in force.

26. He moved to the assignment with Xchanging at the end of January 2006 to support the Managing Director as part of his management team, on a project to improve the performance of the business. This involved enhancing the financial systems and introducing a new systems implementation methodology and quality standards for the client's projects. He reported directly to the Managing Director throughout this period. He did not work from home as it was easy to get to the office from his home. He did not know why the notice period in the Assignment Contract was different to that in the Services Agreement. It may have reflected what was in the contract between the Recruitment Agent and the Client but he did not know. The timesheet and billing arrangements continued unchanged with the Managing Director approving all his work and signing off on his timesheets each week. Again, he did not see any agreement between MTM and MRC or MRC and the Recruitment Agent.

27. In March and April 2007, he undertook a short assignment with Barclays Capital, as part of a combined team of employees and contractors, to review the accuracy of the Commodity Trading book under the direction of the Head of Trading Operations. The billing arrangements were the same as before. Mr Lancashire sent his timesheet to MTM on a weekly basis.

28. Mr Lancashire gave the following additional evidence at the hearing:

(1) He had no contact with Millibird. He did not know what had happened to the Coalmine Partnership or Millibird when he ceased to use the Montpelier arrangements. He knew that the other partners in the Coalmine Partnership

were Trustees of other Trusts which were similar to his because Montpelier had explained how this worked on a call sometime in 2004. He had not seen the partnership agreement relating to the Coalmine Partnership. He did not know why the accounts of the Coalmine Partnership were drawn up late or why it was not possible to obtain the missing accounts. He did not know how the accounts which had been produced for the purposes of these proceedings had been obtained; he had not asked Montpelier for them. He did not receive copies of the Trust's accounts although the trust deed provided for them to be provided to him. There were never any professional or other charges paid to the Trustee. He was not party to any agreement relating to the provision of his services other than the Services Agreement and the Assignment Contracts (and he did not see any agreement between the Recruitment Agent and the Client (see below)).

(2) When questioned about the basis for the profit share allocated by the Coalmine Partnership, Mr Lancashire said that Montpelier said they would send him his "earnings" (being the Fee and the Profit Share) less Montpelier's Arrangement Fee of 10%. He did not see their internal paperwork. There was nothing in writing about the Arrangement Fee paid to Montpelier but it was deducted in practice. He thought that not all participants in the arrangements paid a fee of 10%. The fee started at 6%.

(3) He said that the Fee he received was pro-rated according to the amount of work done on the basis of the timesheets he submitted to the Montpelier UK entity. He agreed that, in any event, he received the rest of his "earnings" via the Profit Share. He said that he received the relevant portion of the Fee and the Profit Share in each case on the same day once he had sent in his timesheet.

(4) He was asked if he was content that he only had a contractual entitlement to a Fee of a maximum of £20,000 with the rest of the monies going into the Coalmine Partnership. He said that he did not see it as an issue as, in practice, he obtained both the Fee and the Profit Share. It was pointed out to him that there were unallocated profits in the accounts produced by Coalmine Partnership for 2005, 2006 and 2007 respectively. He thought that this must have arisen due to timing differences in the transaction cash flows. It did not cause him any concern, as at the time he was confident he would get the total monies earned from the Client less the 10% Arrangement Fee due to Montpelier.

(5) He noted that only a small number of recruitment agents source assignments of the kind he worked on; he found his assignments from such agents. The Recruitment Agent would not want him to see the agreement between it and the Client as it would not want him to know what it was charging the Client for his services.

(6) He confirmed that in the gaps between assignments the Services Agreement simply stayed in place; he did not give notice to terminate the Services Agreement and Montpelier raised no query on the fact he was not working in those periods.

(7) He explained that a summary of the payments he had received contained in the bundles was a document he had prepared for illustrative purposes. This showed, for example, that in the tax years 2005/2006 and 2006/07 he worked for a daily rate of £800:

(a) In January and February of 2006, he submitted timesheets for 38.5 days of work for which he was due £30,800 which comprised £3,827.33

as the Fee, £24,4000 as the Profit Share and a balance of £2,572.67 as Montpelier's Arrangement Fee.

(b) In March 2006 he submitted timesheets for 23 days of work for which he was due £18,400 which comprised £1,666.67 as the Fee and £14,900 as the Profit Share and a balance of £1,833.33 as Montpelier's Arrangement Fee.

(c) For the months of April, May and June 2006 he is shown as submitting timesheets for 12, 21 and 22 days respectively.

(8) He confirmed that he did not necessarily work a full week in all weeks during an assignment. The days of work were agreed with the Client according to the demands of the project. Whilst there was a notice period in his contract, he would honour his commitment to the Client.

(9) He agreed that the provision in the Services Agreement requiring him to work for 1,200 hours per annum for the Coalmine Partnership or as it directed was inoperable. In his view he could work as a consultant otherwise than under that agreement; he took a broad view of what he could do and Montpelier never objected and would not comment if he did not work 1,200 hours per annum under the Services Agreement. He agreed that Montpelier made no attempt to enforce the notice provisions in clause 5 of the Services Agreement or those in the Assignment Contracts. He said that, in reality, the agreement was with the Client as to how much time was needed to finish the job. He said that £800 was the fee agreed with the Recruitment Agent. The Client would pay more to the agency, perhaps, £1,200 per day.

(10) He was asked what the relevant Montpelier entity based in the UK did. He said that it dealt with the servicing of the timesheets which he sent them. He did not know what bank accounts the payments he received came from. He did not know how Montpelier's Arrangement Fee was split between the different Montpelier entities involved in the arrangements. The Recruitment Agent did not ask about this. The Recruitment Agent knew about Montpelier in the UK as Mr Lancashire asked the Recruitment Agent to contact the Montpelier UK entity regarding billing and paperwork but the Recruitment Agent would not have known about the Trust.

(11) It was put to Mr Lancashire that the documentation relating to his assignments was not complete and he was questioned about what happened in the gaps between one written Assignment Contract and the next. He said that generally assignments were extended by email correspondence between the parties on the basis that the same terms continued to apply but he no longer has that correspondence. In other cases, there was a gap as he looked for another assignment. He confirmed that he did not work in the period from January 2005 when his assignment for ANTS ended and June 2005 when his assignment for Xchanging started. He said that working on an assignment is intense and it is good to have a break. At this time he had a software company but ultimately this failed. He stepped away from using the Montpelier arrangements from June 2006 to March 2007 and instead provided his services to the relevant Client through Andante Holdings Limited. As by this time HMRC had started their enquiries into his returns, he was concerned about the risks and wanted to manage the exposure. He did not recall Montpelier saying anything about the fact he was not using the Montpelier arrangements anymore. He could not remember the thinking behind him then doing a short assignment for Barclays

Capital under the Montpelier arrangements but, after that, he did not use the arrangements anymore.

(12) It was put to him that there were some significant time lapses between the date on which an assignment started and the date on which the Assignment Contract for that assignment was signed. He said that the Clients usually wanted him to start work straightaway but matters such as obtaining security clearance took a while to deal with. He started the work for the Client on trust on the assumption that the paperwork would be dealt with in due course. He said that in practice he could not send a substitute to work for a Client in his place; he was hired for his specialist skills, it was not easy to replace him and the Client would have had to carry out an interview process.

(13) It was noted that in the Assignment Contracts he was responsible for defective work at his own expense. He said that was right but that he did not do defective work. If the Client was unhappy, he would do what he could to make things better including fixing things. He said he was happy with the provision that he worked as an independent consultant. He said that he did not know of any agreements other than those set out above relating to the provision of his services to Clients. He assumed Montpelier was involved in the contracting chain but had not seen any documents. He did not think any of the Clients were aware of his consultancy arrangements with the Partnership or of his Trust but he could not be certain. He did not think Montpelier would have told the Clients about it; Montpelier were not in the habit of doing that. He did not really know about any other intermediaries he just sent his timesheets wherever he was told to send them.

Profit Share and tax returns

29. The accounts for the Coalmine Partnership show that the profit allocations were as follows:

(1) In the year ended 5 April 2005, the partnership had total profits available for distribution of £277,204 of which Millibird was allocated £95,750 and MTM was allocated £22,901 (and the majority of the remainder was allocated to three other partners with £13,823 shown as unallocated profits carried forward).

(2) In the year ended 5 April 2006, the partnership had total profits available for distribution of £327,206 of which Millibird was allocated £65,550 and MTM was allocated £24,165 (and the majority of the remainder was allocated to the three other partners with £56,444 shown as "unallocated profits carried forward").

(3) In the year ended 5 April 2007, the partnership had total profits available for distribution of £207,089 of which £73,850 was allocated to Millibird and MTM was allocated £21,381 (and the majority of the remainder was allocated to three other partners with £16,968 shown as "unallocated profits carried forward").

(4) No figures were available for the year ended 5 April 2008.

30. In his returns for the tax years 2004/05, 2005/06 and 2006/07 Mr Lancashire reported (a) a Fee of £12,436.03, £14,358.99 and £6,538.46 respectively as income from a self-employment, and (b) the Profit Share, (subject to the comment below) in amounts corresponding to those allocated to Millibird in the accounts in the foreign income pages but he claimed exemption from income tax under article 3. In his tax return for 2004/05 he showed "Profits of IOM Trust claim for exemption under Article 3 of the UK-IOM DTA" of £96,868.97 but that was later corrected to £95,759

(as shown in the correspondence). There was the same note in the 2005/06 return and 2006/07 return.

31. In his tax return for the tax year 2007/08:

(1) Mr Lancashire reported £26,250 as partnership income although he gave 9999999999 as the partnership reference and again he claimed exemption from UK income tax on this sum under article 3. In the any other information box in the partnership pages he stated "Partnership Income – Fernleigh Partnership. Tax return: Please refer to Box 19 on main Tax Return for further details". Mr Lancashire said that the reference to the Fernleigh Partnership was just a mistake; the reference should be to the Coalmine Partnership.

(2) He said that Montpelier provided the wording for the notes in the returns in which he explained he was relying on article 3 to exempt the Profit Share from tax. The wording was as follows:

> "Foreign trust income of £26,250 has been declared on this return …as personal Partnership trading income. This income represents the share of the trading profits of an Isle of Man Partnership in which the trustee of the settlement is a partner and I am the income beneficiary. Such treatment is required by Section 59 FA 2008 subsections 4 and 5. However, I am advised that the trading profits of an Isle of Man Partnership are exempt from UK tax under article 3….and that I am entitled to Double Tax Relief on my trust income notwithstanding subsection 4 and 5 FA 2008 S. 58 which are considered to be illegal provisions in breach of the UK Human Rights Act and/or that section 58 FA 2008 has no application as it is my trustee who is the person legally entitled to the profits of the Isle of Man partnership not me. I am entitled to the profits of the trust by virtue of the terms governing the trust not the terms of the partnership. A claim for double tax relief is made accordingly…." and he gave a short description of the rationale for this approach.

32. Mr Lancashire said that his tax returns were completed with assistance from Montpelier in accordance with what he understood at that time to be the correct tax position. It was only when he received advice from Crowe Clark Whitehill in February 2015 that he became aware that in fact the funds he received under the arrangements should have been taxed as employment income and that the tax chargeable should have been accounted for under the PAYE regime.

Mr Lee

33. Mr Lee is a qualified chartered accountant who at the relevant time worked as a business analyst "across the interface between finance and IT". Mr Lee first implemented the Montpelier arrangements in the 2001/02 tax year and continued to use them until the 2007/08 tax year. He said that he was introduced to the Montpelier arrangements by a personal friend who he knew from working at Nomura.

34. Mr Lee said that he had been happy to use a personal services company to provide his services until the Government started threatening to apply IR35 to tax such companies as though they were in receipt of employment earnings. It did not suit him to work as an employee and he thought that using the Montpelier arrangements would get him through the difficulty of a potential challenge under IR35 and also provided the benefit that if there were any issues with HMRC, Montpelier would deal with them. He ran the arrangements by his accountants. They were worried about IR35 - that was the big concern in particular as regards all the uncertainty as to how it would apply. Whilst he was not averse to the tax saving, he really just wanted certainty as regards his tax position.

35. Mr Lee was told at the start that the Montpelier arrangements would have to be disclosed on his tax return and that it was likely to be shut down after one year. He initially thought, therefore, that he would only use the arrangements for one year and then would reappraise the situation. He was told he would have to pay Montpelier an initial fee of 6% rising to 10% of the income he would otherwise receive from the work for his Clients. He preferred the Montpelier arrangements to other proposals because it was clear that all would be disclosed to HMRC. In other words, everything was upfront; all income would be declared but exemption claimed with an accompanying explanation in his tax return. He thought that was why he was told the use of the Montpelier arrangements was likely to be shut down. In late 2008 Montpelier moved him to a loan scheme and then to using a personal services company.

Overview of arrangements

36. Mr Lee essentially entered into the same type of arrangements as Mr Lancashire did as follows:

(1) On 5 December 2001, Mr Lee entered into a trust deed with Piero Limited ("**Piero**") under which he was the Settlor and Piero was the Trustee and he was named the life tenant. The other material terms of the trust deed were the same as those set out in the trust deed entered into by Mr Lancashire.

(2) On 13 December 2001, the Pikamu Partnership was formed of which Piero was a member and MTM was the managing partner.

(3) On 21 December 2001, Mr Lee entered into a Services Agreement with the Pikamu Partnership which in material respects contained the same provisions as those in the Services Agreement Mr Lancashire entered into.

(4) Mr Lee carried out assignments for the following clients, on entering into an Assignment Contract, as arranged through Recruitment Agents:

(a) From 2000 to Sept 2002, Credit Suisse First Boston ("**CSFB**").

(b) From Oct 2002 to April 2003, ING Wholesale Banking.

(c) From Sept 2003 to July 2004, ANTS.

(d) From July 2004 to Jan 2005 BP Integrated Supply and Trading (Gas Trading Division).

(e) From January 2005 to March 2008, ING.

(5) In his witness statement Mr Lee said the following as regards his recruitment for these assignments:

> "In all but the second ING contract I received a call from one of the City recruitment companies with whom I tried to foster good relations. These were various agencies, Robert Walters for CSFB and for the first ING engagement, NBW for Abbey National, SQ for BP, and Resource Solutions for the second ING assignment.
>
> I was then interviewed by the end clients. All my contracts followed the same basic structures and processes. I select BP as a typical example. I had two interviews with three members of BP staff. The BP staff spent a large amount of time explaining what the job would entail and how they would like me to tackle it, as well as exploring my experience and understanding of trading accounting requirements, knowledge of the IT project life cycle and my general understanding of the trading business. The later ING assignment interview was less stringent as they knew of my skills offering, but they still went through the motions."

(6) The bundles contained the following Assignment Contracts which took the same form as those described in relation to Mr Lancashire:

(a) An unsigned agreement dated 27 November 2002 (a) for the provision to ING of "Specialist support with the outsourcing of the settlements function from Barings to Bank of New York" from 1 October 2002 on an ongoing basis, (b) on the basis that Mr Lee could terminate the agreement by giving the Pikamu Partnership two weeks of notice and the Pikamu Partnership could do so by giving Mr Lee immediate notice. The Company was named as "Montpelier". There was an unsigned and undated schedule 2 but no schedule 3. Schedule 2 referred to a contract between the Pikamu Partnership and "Montpelier Search & Selection Limited" for the provision of Mr Lee's service.

(b) An unsigned agreement dated 13 October 2003 (a) for the provision of services to ANTS from 15 September 2003 to 7 November 2003, (b) on the basis that the parties had the ability to terminate the agreement on giving each other notice as set out in the Services Agreement. However, there was an addendum which set out "Client Specific Conditions" including that the assignment could be terminated immediately by the Company giving Mr Lee written notice if he committed a material breach of any term of the assignment. The Company was again named as Montpelier. There was an unsigned and undated schedule 2, in the same form as that referred to in (a) but no schedule 3.

(c) An unsigned agreement dated 9 July 2004 (a) for the provision of services to "BP DCT IST" from 12 July 2004 to 15 October 2004, (b) on the basis that either party could terminate the engagement on giving the other 30 days' notice. The signature page listed the partners in the Piero Partnership as including MTM, Piero and two others. The Company was named as Montpelier. There was a schedule 2 signed and dated by Mr Lee and a schedule 3 signed and dated by Mr Lee but not by the relevant company. Schedule 2 referred to a contract for the provision of Mr Lee's services between the Pikamu Partnership and "Montpelier Contracting & Consulting, a trading division of Montpelier (Search & Selection) Limited". Schedule 3 referred to a contract for services between "Montpelier Search & Selection Limited" and "SQ Computer Personnel Limited". There was also a schedule 4 setting out the "deliverables" Mr Lee was required to deliver during the assignment.

(d) An unsigned agreement dated 10 October 2005 (a) for the provision to ING of "Specialist IT consultancy support for outsourcing settlement operations" and "Assistance to resolve fix OLEP go live related issue impacting Finance" and "Progress the London analysis phase OLEO II" during the period from 10 October 2005 to 30 December 2005, (b) on the basis that the Pikamu Partnership could terminate the engagement on giving Mr Lee two weeks' notice. The Company was named as "Montpelier". Piero Limited was named as a partner in the Pikamu Partnership in the signature section. There was an unsigned and undated schedule 2 and schedule 3. Schedule 2 referred to a contract for services for the provision of Mr Lee's services between the Pikamu Partnership and "Montpelier Contracting & Consulting, a trading division of Montpelier (Search & Selection) Limited". Schedule 3 referred to a contract for services between "Montpelier Search & Selection Limited" and "ING Services Limited".

(7) All of the above agreements contained the same or substantially the same special conditions as those in the Assignment Contracts which Mr Lancashire entered into except the first one listed above which had a much more limited set of provisions.

(8) Mr Lee was not able to locate the contractual documents for the first of the assignments with CSFB, but he confirmed that he also entered into an Assignment Contract in relation to that assignment. He said this must have been the case because Montpelier would not pay contractors if they had not confirmed acceptance of the relevant terms and had not returned the relevant schedules. He had not kept signed copies; the signed versions were sent to Montpelier and he did not have a scanner at home at the relevant time.

(9) The bundles also contained a contract between the Pikamu Partnership, acting through MTM, and "Montpelier (Search & Selection) Limited" as regards the supply of Mr Lee's services by the Pikamu Partnership to that company from 14 January 2002 to 4 June 2002 for a fee per day of £851.17 plus VAT:

(a) In the summary, the Recruitment Agent was named as Robert Walters and the Client as CSFB.

(b) The agreement was signed by both MTM for the Pikamu Partnership and by "Montpelier (Search & Selection) Limited".

(c) It was stated that the agreement should be read in conjunction with the "Montpelier Resource & Consulting Terms & Conditions" and, that in the absence of any signed agreement, the provision of any of the services by the Pikamu Partnership "will be deemed acceptance of this schedule and associated terms and conditions".

(d) It contained provisions similar to those set out in the Services Agreement but differences include that:

(i) It was stated that if the supplier was unable to provide the services and the supplier was unable to provide an alternative substitute acceptable to the Company and the Client, then the Company was entitled to terminate the agreement immediately and without notice.

(ii) It was stated that fees were payable only when the services were provided and performed satisfactorily by the Pikamu Partnership and, if for any reason they were not provided (including where the Company notified the Pikamu Partnership that the services were not required) then any fees were not payable by the Pikamu Partnership.

37. Mr Lee said he had not seen any other contract between the Pikamu Partnership and a Montpelier entity as regards the provision of his services. He said that once the arrangements were in place, he had little contact with MTM except to fax a copy of his timesheets to them. His day to day and main contact throughout the relevant period was with his boss at the Client.

38. Mr Lee was asked why there was a delay between him starting work on an assignment and the signature of the Assignment Contract noting that, as regards the first contract listed above, the delay was almost two months. He said that he was an early participant in the Montpelier arrangements and so initially it may have taken the Recruitment Agent time to understand the arrangements. He said that he waited for the Recruitment Agent to come up with the contract, they would then email him with

what he understood was agreed and he would say “yes” or “no”. He said that the assignment for ING was called off very abruptly when he did not yet have another assignment lined up. He spent the summer of 2003 at home with his children whilst looking for another project. He then obtained the assignment for ANTS. Mr Willis had heard about him from CFSB and said he wanted him “in now” to work on that project for ANTS so he did not want to delay for the paperwork. He had to trust that the paperwork would be forthcoming.

Assignments

39. Mr Lee gave the following evidence as regards his assignments during the relevant period:

(1) *Assignment for CSFB*: Mr Lee originally expected to work at the World Trade Centre as part of a team on the New York Stock Exchange securities settlement project, but after “9/11” he was assigned to work in London on a series of smaller IT projects under the direction of the Director of Operations Systems. The director allocated the work and “directed its execution”. He said that whilst he had the skills the project was not what he intrinsically knew about so he required more direction than usual in terms of what was needed and who to talk to (whether staff in New York or other staff) – he did not know their rules of application and interfaces. As the original project was not to be re-started, his contract was not renewed.

(2) *Assignment for ING*: Mr Lee worked within the implementation team for the Bank’s settlements group. He reported to the chief financial officer (CFO) on a daily basis. The CFO “enunciated his own requirements” which Mr Lee translated into “IT-speak”. This role was described as complex as it involved liaising with the soon to be disbanded settlements group and encouraging them to assist in implementing the necessary interfaces to the accounting and risk management systems. It also involved specifying ING’s requirements to Bank of America. He reported formally each day to the CFO with progress and issues. The CFO set out his own requirements from an accounting and risk perspective although he did not have the technical knowledge to translate this into IT speak; that was Mr Lee’s role. ING provided him with a desk and computer equipment required for the work. During the project ING decided they did not want to partner with Bank of America and his contract was terminated.

(3) *Assignment for ANTS*: Mr Lee was part of a team working on implementing Basel II. The senior partner of NBW, Mr Willis, worked on site at ANTS premises with a small team of contractors to achieve implementation. Mr Willis had daily meetings with ANTS staff and directed all aspects of his work “in great detail”. He reviewed all the work Mr Lee completed before it was presented to ANTS. He monitored progress against the overall project plan and “gave much feedback as to how the work was to be executed”. Mr Lee decided to leave ANTS following the approach from SQ to work for BP. He gave his notice to leave to NBW.

(4) *Assignment for BP*:

(a) On his first day BP staff assigned him a desk and appropriate log in credentials, gave him an overview of the business and directed the work that had to be done. The tasks and their order changed frequently based on changing priorities both from within the BP IT department and business changes as deregulation of the industry took place. He received the same training in the firm’s business compliance and health and safety and other requirements as BP staff, and attended an induction day which was mostly concerned with administrative matters. He had to sign a summary of email and internet policies as BP required for all new joiners. Around two weeks after joining he was sent on an internal training programme on gas trading. All training was carried out by the internal training department within normal working hours and he was trained alongside permanent BP staff.

(b) He regarded his IT project manager, who interviewed him, as his boss. The project manager organised his access to the IT system, his training, organised the team structure, assigned resources and reviewed progress and was ultimately responsible for the delivery and success of the project. Mr Lee considered that the project manager directed his work and noted that he spoke to him several times a day regarding the project and his role within it. He was not free to operate without interference because the overall task was very complex and large so the whole team had to be co-ordinated by the manager.

(c) Matters such as planning issues and contentions were discussed in regular meetings of the more senior members of the team who formulated and evolved the team plan. Although he was a relatively senior member of the team he could be overruled as the team decision and ultimately the view of the project manager prevailed. On a day to day basis, BP staff directed his work and training and monitored his results. If he had a query he would approach the relevant team such as the BP finance staff, the BP gas trading staff or the BP gas trading management. His direct line manager approved his timesheets which he then submitted to SQ and MTM.

(d) He worked entirely at BP's premises where he had his own desk. There was much interaction between team members and hands on use of highly sensitive data which meant home working was not suitable. If he was ill, he called the project manager who reassigned urgent tasks as necessary. He also requested holidays via the project manager and, if approved, the project manager would factor the dates into the overall plan. If tasks need to be completed whilst he was away, they would normally be reassigned to other team members. He could not provide a substitute to cover for him. It was not practicable as the person would have to be vetted and would have to have similar experience and capabilities as otherwise the project could be delayed.

(e) He always worked on the same project but from time to time had additional tasks assigned to his portfolio. Having had to liaise only with finance he was asked to become overall business manager liaising with the trading arm as well. He felt that if he did not like a particular task he still had to do it (such as weekend work) but if he felt he did not have the capacity to complete a new task properly the project manager would consider re-assigning it to someone else.

(f) The project manager reported to a business steering committee charged with implementing the gas trading process which was completely new to the UK at the time following the deregulation of the industry. The project manager divided the tasks between the team who comprised permanent staff and contractors and could require any team member to cover for another member as he frequently did in relation to Mr Lee.

(g) The quality of his work was subject to regular informal appraisal and feedback from the project manager and he was asked for his views on others so the project manager could appraise them.

(5) *Assignment for ING*: This was a relaunch of the earlier ING project. This was arranged when Mr Lee bumped into the head of IT whilst working at BP. The quick chat was the only interview required. He thought that during the chat ING understood that MTM would act for him and he understood that ING would use Resource Solutions to act for them. He then contacted MTM for them to contract on his behalf and ING contacted Resource Solutions. He was at the time negotiating a renewal with BP through SQ but he informed SQ he did not want to continue with that:

(a) On arrival at ING he was assigned a desk and a computer to work at. By way of training he was provided with a number of folders of documents to review which turned out to be his work from his previous assignment with ING.

(b) Mr Lee said: "ING supervised my work very closely as they were very sensitive to the earlier terminated out-sourcing proposal". With a representative of ING he was put in charge of migration in SG's systems. He reported at least daily to the head of IT and the CFO. The CFO outlined his business requirements and the head of IT monitored the technical solutions he proposed. He visited Amsterdam several times to take direction from the Group CFO. ING's internal audit team also appraised the security and control of his work at weekly meetings. He had frequent although irregular meetings with KPMG, ING's auditors who covered roughly the same ground as the internal team.

(c) This contract was longer than he originally expected it to be; there were several renewals. First he worked on the migration to implement "Gloss (Global Securities Settlement)", the trade settlements system, reporting to the overall project manager. After that he and another accountant/ contractor were retained to rebuild this interface in the more modern Business Event Messaging style and later on the migration of the industry equity trading system, Fidessa, which was rolled out across Europe and the USA. He finished this project at the weekends whilst working in the week for another client.

40. Mr Lee gave the following additional evidence:

(1) He agreed that at the relevant time he considered he was working under the Montpelier arrangements as a consultant. He was not aware of s 44 ITEPA at the time.

(2) Once the Montpelier arrangements were in place, he had little contact with Montpelier except that he sent his timesheets to the relevant Montpelier entity. He confirmed that he had no contact with Piero, that Piero received no fee and he had no idea what happened to that entity once he stopped using the structure. Mr Gittins at Montpelier told him there were other partners in the Pikamu Partnership who were Trustees but he did not verify that personally.

(3) He confirmed that he had obtained the available set of Pikamu Partnership accounts from Montpelier. He said he had never asked for the accounts for the Partnership or the Trust until HMRC asked for them. He did not need them as, from his perspective, the Montpelier arrangements operated properly in that he got the monies he expected to get from his work for his Clients and he was not otherwise concerned.

(4) He accepted there were oddities in the figures in the accounts and they did not correspond to the sums he had received but that did not cause him particular concern. He noted they are just draft accounts, that Montpelier had hundreds of requests for accounts once HMRC enquired into these arrangements and he did not think Montpelier did a very good quality job in what they provided. He just assumed these oddities were timing differences.

(5) At the time he considered that he only had a one month risk under the Montpelier arrangements in that, if there was a problem with him receiving the full expected funds from his work for his Client in one month, he would simply stop using the arrangements for the next month. On that basis he did not at the relevant time take an interest in Montpelier's administrative arrangements. If there had been a problem, he would just have stopped using the arrangements and would have moved to another option such as using a personal services company.

(6) He thought it was a simple calculation to work out for each month how much money he should get in total from his work for a Client. At the time he was content, therefore, that his contractual entitlement to receive funds for his work was capped at £20,000 as he was confident he would get the rest of the money through the Pikamu Partnership and Trust structure and, if it did not arrive, he had a month to sort the problem out or could simply leave the scheme. In his mind, all that mattered was that overall he got his "earnings" less Montpelier's fee.

(7) He confirmed that the amounts shown in his tax returns in respect of the Montpelier arrangements are what he received under the arrangements.

(8) He was told he would have to pay Montpelier an initial fee of 6% and later an additional 4% fee and otherwise he would receive all the income from his work for the Client. He thought that whether Montpelier would get the additional 4% was conditional on HMRC not raising any enquiry into the arrangement within a specified timeframe. However, Montpelier simply took the total 10% fee from the monies notwithstanding that HMRC did open an enquiry and he did not get a refund of the 4%. Montpelier calculated the fee from his "earnings" but he did not know at what stage they took the funds.

(9) His understanding of how the Fee payments worked was gleaned from Mr Gittins. The Fee of £20,000 was computed on the basis that he would work for 1,200 hours per annum but if he did not work the full hours the fee was pro-rated down. He never discussed this adjustment with Montpelier; they just worked it out. He did not think he had to give three months' notice to terminate the Services Agreement; it just lapsed if he did not use the Montpelier arrangements. He did not give notice when he stopped using the arrangements.

(10) The fee payable in the agreement between the Partnership and MSS of £851.17 (plus VAT) was not a number he recognised. That was not what he agreed with the Client. He assumed Montpelier took their Arrangement Fee out of this and then sent the monies to the Partnership/Trust in the Isle of Man. He thought that the rate agreed between the Client and the Recruitment Agent was a larger sum such as £990 or £995. Montpelier would deduct their Arrangement Fee and work out the relevant proportion of the Fee he was to be paid and send the balance to the Isle of Man Partnership/Trust. He was not concerned with how Montpelier got their Arrangement Fee as long as he got the money he expected to get.

(11) He did not know if Mr Willis used the scheme himself or whether he got a fee for introducing participants although he thought that Montpelier paid an introduction fee.

(12) He said that he reported to Montpelier when an assignment ended but they did not look for work for him although they plainly had contact with the Recruitment Agent. When an assignment was extended it was not necessarily on the same terms – he might be able to get more money. No one dictated he had to be in the office from nine to five; that sort of term was never manifest and it would not be put in writing. If he had time off between assignments such as to be with his children he did not have to tell Montpelier what he was doing in that period. He never invoked the three months' notice period provided for in the Services Agreement.

(13) It was put to Mr Lee that it appears that under the assignment dated 27 November 2002 he worked for two months without pay. He said he thought it is correct that there was no physical payment without the paperwork in place. It was put to him that in 2002/03 he worked for a full tax year but did not receive the full Fee of £20,000. He thought that could be because he took more holidays in that year or it could be to do with the timing of the sign off of timesheets or that Montpelier's accounting was not very sophisticated.

(14) As regards obtaining assignments, he said it could happen that a Client would have heard of him and would ask their human resources personnel to sort out the details, if he was interested in the engagement and he would agree terms with them. However, lots of Clients use a Recruitment Agent and the more normal situation was that the Recruitment Agent would contact him. He did not know why the Recruitment Agent was not involved in the Assignment Contracts.

(15) Mr Lee did not think that the Recruitment Agent knew about his Partnership and Trust structure although it would have known about the involvement of a Montpelier entity in the UK.

Financial statements and tax returns

41. The bundles contained only one set of draft financial statements for the Pikamu Partnership for the year ended 31 March 2003. These showed Piero as a partner in Pikamu and MTM as managing partner. In these statements (a) the income of the partnership was stated to be £291,666 of fees receivable, (b) the net profit was stated to be £300,065, (c) Piero was shown as having income of £155,259 and drawings of £154,414, (d) MTM was shown as having income of £26,127 and drawings of £26,574 and (e) two other partners were shown as receiving sums after which the balance carried forward was £17,342.

42. In his return for each relevant tax year:

(1) Mr Lee reported the Fee he received as income from self-employment (although the amount reported does not appear to match the full Fee agreed).

(2) Mr Lee showed the following profits from the Partnership/Trust in his tax returns for the relevant years: for 2002/03, £121,840.40, for 2003/04, £54,650; for 2004/05, £130,300; for 2005/06, £149,400; for 2006/07, £144,100 and for 2007/08, £129,350. The returns included a short note that Mr Lee was exempt from income tax on these amounts under article 3.

(3) In the return for 2007/08 in the partnership pages there was a reference in the "any other information" box to "Partnership Income - Fernleigh Partnership 2 Tax Return. Please see box 19 – Main Return Multiple businesses".

43. In his witness statement Mr Lee said that his tax returns were completed with assistance from Montpelier in accordance with the understanding he had at the time of the correct tax position. It was only when advice was received from Crowe Clark Whitehill in early 2015 that he became aware that in fact the funds should have been taxed as employment income and that the tax should have been accounted for under the PAYE regime.

Mr Johnson

44. Mr Johnson only worked for one client, Matalan, during his use of the de Graaf arrangements from August 2006 to August 2009. He said in his witness statement that:

(1) He obtained this role after responding to an advert on an IT job website placed by the employment agency, Reed Personnel Services Plc ("**Reed**"), to cover an employee's maternity leave. Reed provided a job specification and after an initial telephone interview with Reed he had two interviews with Matalan.

(2) Following confirmation of the appointment, Reed referred him to an employment agency, TPP. In July 2006 he received an email from The Focused Group ("**Focused**"), inviting him to use the de Graaf arrangements which he understood would allow the monies from this work to be received in a tax efficient way. His understanding is that Focused and TPP are related entities as is apparent from the correspondence in the bundles.

(3) Mr Johnson confirmed that his contact regarding the de Graaf arrangements was with persons he understood to represent Focused/TPP and not de Graaf. He did not take any independent advice on the structure – he just spoke to Focused/TPP.

(4) He was initially engaged to work at Matalan's Skelmersdale site from Monday to Friday from 8.30am to 5.00pm each day as maternity cover for a Matalan employee (who he initially worked alongside) for 12 months but the employee did not return from maternity leave and so he was kept on for much longer.

De Graaf arrangements in the period to 7 August 2007

45. The email Mr Johnson referred to was sent to him by a Mr Jones on 25 July 2006. In the email, Mr Jones set out an explanation of the de Graaf arrangements and gave a sample pay notification (which corresponds to the notifications Mr Johnson later received). The email was headed "TwentyPlus" but Mr Jones gave his address as that of Focused and his email address ended with "@ focusedconsulting.co.uk". Having set out the need for a Trust and Partnership, Mr Jones set out the following:

> "Your limited company signs a contract for services with the Isle of Man limited partnership for which it receives an agreed income. This company must be your own limited company, or we are able to provide a limited company payroll service on your behalf.
>
> The Isle of Man limited partnership contracts with The Focused Group, and we in turn contract with your agency or client.
>
> You undertake services for the benefit of the end user clients and all amounts are invoiced by the [Partnership] to reflect the agreed charges for the services. The limited partnership will, immediately upon receipt of the monies, pay your limited company the amount due under the contract and the remainder is distributed by the [Partnership] to the trust for immediate onward payment to you.

All monies received are paid into the segregated bank account of the limited partnership under the control of the Isle of Man office of the InTrust Group and are paid out immediately upon receipt. There is no need for any offshore bank accounts to be maintained by you. All monies received by you will be advised to the Inland Revenue….

You are subject to NI and income tax on the income received by your limited company, less such expenses as are allowed under Schedule D.

The amounts received by you through the trust are not subject to UK tax under [article 3].

…our arrangements – substantially increase your net income, comply fully with current legal and tax regulations, are supported by a legal opinion from leading UK counsel and are administered by the Isle of Man office of InTrust group, a substantial international trust and fiduciary services group of high repute" (this para was in upper case).

46. Following receipt of the email, the following steps were put in place:

(1) On 5 August 2006, Mr Johnson entered into an engagement letter with Guardian Services (I.O.M.) Limited ("**Guardian**") as Trustee in relation to the establishment of the DG52 Settlement. It was stated that the Trustee was to receive a fee of £100 for the establishment of the trust. The letter appears have been sent by Focused.

(2) On 18 July 2006 the Atholl Partnership was formed of which it seems Guardian was a member and the managing partner was de Graaf.

(3) On 8 September 2006 Mr Johnson entered into a trust deed with Guardian as Trustee which established the DG52 settlement of which he was the Settlor and was named the life tenant and which was otherwise made on similar terms to the terms set out in the trust deeds entered into by Mr Lancashire and Mr Lee.

(4) On 10 April 2007, the Shenn Limited Partnership was formed of which Guardian was also a member and the managing partner was de Graaf.

(5) It appears that, at some point in 2006, either the Atholl Partnership or Shenn Partnership, acting through de Graaf as its managing partner, entered into a Services Agreement with TPP for it to provide services to the Partnership. The agreement included in the bundles was in draft and incomplete and did not include the name of the Partnership which was to be a party to it. Mr Johnson confirmed in his witness statement that he had received a copy of this agreement in 2006. It included the following provisions:

(a) In the recitals it was stated that "[TPP] is engaged in business on its own account as a consultancy company engaged in the provision and supply of business and or professional services and for this purpose has engaged the services of Mark Johnson" and that "the Managing Partner has on behalf of the Partnership agreed to engage the services of [TPP] and [TPP] has undertaken to provide such services as herein mentioned on the terms hereinafter appearing". The term "Consultant" was stated to mean "the said [TPP] and shall where the context admits also include the said Mark Johnson".

(b) "The Managing Partner on behalf of the Partnership hereby agrees to engage the Consultant to perform the Services hereinafter specified and the Consultant hereby undertakes with the Managing Partner acting on behalf of the Partnership to provide the services of the said Mark Johnson on the terms hereinafter mentioned" in consideration for a "Retainer" of £15,000 per annum to be paid "weekly in arrears by instalments upon receipt of the payment for the invoice to clients of the Partnership for the services of the consultant provided that the amount of the Retainer paid in respect of any one week shall be one fifty second of the Retainer, or the amount received by the Partnership from its clients in such week for the invoiced services of the Consultant less ten per cent (10%), whichever shall be lower".

(c) The Consultant undertook with the Partnership that it would procure that Mr Johnson would provide his services as consultant to the Partnership or such clients of the Partnership as the Managing Partner notified to him and: "So long as he may be required so to do the Consultants (including the said Mark Johnson) shall provide such services as aforesaid for a period or periods in any Accounting Period which average not less than thirty hours per week".

(d) The Consultant was required to maintain at its own expense at its place of business such hardware and software as may be necessary to enable it to perform the said services and such means of electronic communication as may enable it to communicate with the Partnership or the clients of the Partnership as it may reasonably be required by the Partnership to maintain.

(e) It was provided that all patents, knowhow software and other intellectual property which may be acquired by the Partnership or the Consultant when performing services for the clients of the Partnership was to belong to the Partnership or the relevant client as the case may be. The Consultant was required to provide the Services in the UK or in any part of the world as the Partnership may require provided that the Consultant was entitled to its agreed reasonable expenses for travel costs from its place of business to the Isle of Man or to perform services for such clients of the Partnership.

(f) The Partnership was to use its best endeavours either to provide the Consultant with the opportunity of providing services to the Partnership in accordance with the agreement or of providing services to clients of the Partnership in accordance with the agreement.

(g) The Partnership was required to reimburse or pay the Consultant for the agreed costs of the travelling expenses referred to above and to pay the Retainer.

(h) The Consultant was entitled to substitute for itself or Mr Johnson any other suitably qualified person to perform the services if it/he were unable to do so subject, in "the event of his death serious illness or injury", to the Consultant giving the Partnership prior notification no less than seven days before the intended substitution in which case the Partnership was entitled to object to the person who was proposed.

(i) "Subject to any requirement that may be laid upon him by the Partnership as to the time or times in which he shall perform such services as aforesaid the Consultant shall be free to engage in business on his own account and nothing herein shall restrict or limit the manner in which he shall carry on that business or the manner in which he shall perform any such Services as aforesaid."

(j) The agreement could be terminated by either party giving to the other not less than three months' notice in writing expiring on any one of the days on which an instalment of the Retainer fell due to be paid.

(6) It is reasonable to infer that on or around 8 August 2006 an agreement was formed between Reed, Mr Johnson and Focused ("**an Intermediary Contract**"). Whilst the version in the bundles did not contain any signature provisions, the schedule to the contract was signed by Reed and Mr Johnson (but not Focused) on 8 August 2006 and an "opt out notice" was signed by Mr Johnson also on that date (see (7)). Matalan was named as Reed's client in the schedule to the agreement. Mr Johnson was referred to as the Worker and Focused as the Intermediary. The agreement included the following main provisions:

(a) It was stated that:

> "Employees of the Intermediary including the Worker shall be bound by the terms of this Agreement.
>
> Nothing in this Agreement shall be construed to mean that the Worker is engaged by or is an employee of Reed or the Client….
>
> The commencement, estimated duration and completion of this Agreement shall be as set out in the Schedule unless terminated early in accordance with [the relevant terms of the Agreement].
>
> Either party may terminate this Agreement at any time on giving notice to the other in writing….
>
> Reed engages the Intermediary to provide the Services as set out in the Schedule.
>
> The Intermediary shall provide the Worker to perform the Services for the Client under the terms of this Agreement.
>
> Reed does not give any form of guarantee that the Services of the Intermediary will be required during the period of this Agreement.
>
> Reed is not obliged to offer work to the Intermediary and the Intermediary does not have to accept any work offered under this Agreement…..
>
> The Intermediary shall make the Worker available to Reed at such times and at such locations as Reed and the Intermediary shall agree from time to time.
>
> The Intermediary shall ensure that the Worker has the required level of skills, experience and where appropriate, qualifications to provide the Services."

(b) It was stated that the Worker and Intermediary "shall perform the Services with due skill and care" and that, if Reed or the Client was dissatisfied with the Services, the Intermediary was at its own expense to remedy that.

(c) It was stated that the Worker "shall comply" with any rules set by the Client including rules relating to security, health and safety and the environment.

(d) The Intermediary was responsible for complying with "all its legal obligations" including paying the "National Minimum Wage". The Intermediary could send a substitute to perform the services with the prior approval of Reed and the Client in which case the Intermediary was responsible for paying the substitute.

(e) There were a number of obligations stated to apply to both the Intermediary and the Worker such as that (a) they were not to represent themselves as agents of Reed or the Client, (b) they were not to solicit away from the Client specified persons such as employees and (c) they were not to disclose confidential information. It was stated that they both acknowledged that all relevant intellectual property was vested in the Client and that they assigned to the Client any right in respect of intellectual property.

(f) Reed agreed to pay a fee to the Intermediary as set out in the schedule as invoiced by the Intermediary. In the schedule to the contract the fee was stated to be £211.54 per day. Reed agreed to reimburse the Intermediary for all travelling and other expenses reasonably incurred by the Worker in providing the Services provided that the Client had agreed to pay such expenses.

(g) There were provisions enabling either party to terminate the agreement in specified circumstances, seemingly meaning Reed or the Intermediary.

(h) Focused agreed to be responsible for all income tax liabilities and NICs (and indemnified Reed in respect of any claim by the authorities in respect of such sums) and confirmed that it had notified HMRC of its and the Worker's status and would account for all appropriate taxes including income tax and NICs in respect of the fees due under the agreement.

(i) The document was stated to be the "entire agreement and understanding" between the parties in relation to the services.

(j) In the schedule to the contract:

(i) As noted, the fee per day payable by Reed to Focused was stated to be £211.54 to be invoiced on a weekly basis and to be paid within 14 days of receipt of the invoice.

(ii) The estimated duration of the contract was stated to be 14 months to commence no later than 17 August 2006 and to be completed no later than 31 October 2007.

(iii) Under a heading "Special Conditions", the following wording was included:

> "Duration of contract is approximately 14 months, start date (tbc) until end October 2007.
>
> Salary is £47,500
>
> Car allowance is £7,500
>
> Holiday entitlement for the full year is 25 days ….
>
> Holiday entitlement is prorated during the holiday year."

(iv) Under the Special Conditions heading it was also stated that the normal notice period (from Mr Johnson to Matalan and from Matalan to Mr Johnson) was three months, Mr Johnson was subject to a probationary period of three months during which time Matalan was required to give Mr Johnson only four weeks' notice of termination but he was still required to give three months' notice, Mr Johnson's main place of work was stated to be Skelmersdale although there may be some limited travel required to fulfil the role and his hours of work were stated to be 8.30 am to 5.30pm on weekdays with 45 minutes for lunch.

(7) In the "opt out notice" which appears to be attached to the agreement, "Focused Consulting" and Mr Johnson gave Reed notice that they agreed that certain provisions in the Conduct of Employment Agencies and Employment

Businesses Regulation 2003 did not apply to any assignments for any of Reed's clients.

(8) On 7 November 2006 Mr Johnson disclosed the arrangements to HMRC under s 309 of the Finance Act 2004 (a "DOTAS" disclosure). In the form in which the disclosure was made Mr Johnson was named as the scheme user making the disclosure and de Graaf was named as the promoter. The form included brief details of the scheme and it was stated that:

> "the arrangements are designed to enable a person taxable under schedule D to reduce his/her liability to income tax in the UK by establishing an interest-in-possession trust in the Isle of Man, of which he/she is the sole beneficiary and the trustee of which is a limited partnership of which the general partner is De Graaf Resources Limited.
>
> [There were details of the Trust and the Partnership including a statement that] The business of the Partnership is the provision of consultancy services to clients.
>
> It is intended that my trust should receive a share of the partnership profits derived from that business.
>
> That share of the partnership profits will not attract UK tax….
>
> I have been asked to add that these arrangements are only available to Schedule D taxpayers. Great care is taken to ensure that employees are not included in the arrangements, since this would contravene the IR35 regime. I can confirm that I am not an employee and am indeed a Schedule D taxpayer."

47. It appears that for each week of work during the period from 7 August 2006 to 7 August 2007 (a) Mr Johnson submitted timesheets to Reed, (b) Matalan paid an agreed fee to Reed, (d) Reed paid the fee due under the Intermediary Contract to Focused or TPP, (e) Focused or TPP passed the money to the relevant de Graaf Partnership (the precise identity of which is unknown) who paid a pro-rata share of the £15,000 Retainer to TPP and the balance to the Trust, and (f) TPP paid the pro-rata share of £15,000 to Mr Johnson having deducted their own commission of 5% and on accounting for what was described as employer's NICs and income tax and employees' NICs.

48. The fact that the arrangements worked as set out above is supported by documents in the bundles such as receipts/payment slips seemingly prepared by de Graaf and payslips produced by TPP. For example, the bundles contained:

(1) Pay/receipt slips headed "de Graaf Resources Limited" each of which was stated to apply to Mr Johnson as contractor and showed a total "weekly fee" which, after deduction of "Commission" of 10 % was shown as split into (a) a proportionate amount of the "Annual Contracted Payment" of £15,000 as the "Net Weekly Contracted Payment" and (b) "Weekly Trust Income". In each case, the sum in (a) was shown as payable to TPP and the sum in (b) was shown as Trust Income payable to Mr Johnson. The pay/receipts slips referred to the Atholl Partnership and the DG 52 Trust and related to a number of weeks in the period from August 2006 to September 2006.

(2) A number of payslips headed TPP relating to Mr Johnson's pay for a number of weeks in the period from August 2006 to May 2007. For example, the payslip for the period ending on 18 August 2006 showed (a) a figure for his "Gross Pay, calculated after deduction from his "Contracted Income" of "Admin Costs" and "Additional NI" and (b) a sum for "Net Pay" being the figure in (a) less deductions for "PAYE Tax" and "National Insurance", and (c)

figures for "Taxable Pay YTD", Tax Paid YTD and NI Paid YTD" and also for "Admin Costs" and "Additional NI".

(3) A letter from the payroll administrator at TPP to Mr Johnson dated 27 March 2007 in which TPP set out a "summary of your payroll payments from your start date on 7 August 2006 until 2 March 2007" showing gross pay of £7,350.22 less "PAYE" and "EE NI" with a resulting net figure of £6,770.76.

49. It also appears that when the arrangements commenced Mr Johnson gave TPP his P45 dated 23 August 2006 as the figures on the first TPP payslip incorporate those on the P45. The bundles also contained a P60 issued to Mr Johnson by TPP for the tax year 2006/07.

50. The bundles also contained:

(1) Two "PAYE Coding Notices" issued by HMRC to Mr Johnson on 29 December 2006 and 14 January 2007 setting out his tax code for the tax years 2006/07 and 2007/08 respectively. Each notice begins "you need a tax code so Twenty Plus Payroll Limited can work out how much tax to take off the payments they make to you" in the relevant year.

(2) A letter from de Graaf Resources Ltd to Mr Johnson dated 7 June 2007 showing the distributions from his Trust for the year ended 5 April 2007 and advising him how to enter the income on his tax return to claim exemption from tax under article 3. The schedule was stated to relate to the Atholl Partnership.

(3) A reminder sent by de Graaf Resources Ltd to Mr Johnson about his tax in an email of 14 September 2007 and a letter dated 2 August 2007 entitled "Twentyplus Contractor Update" from a person with a TPP email address.

(4) A P45 issued to Mr Johnson which showed the date he left employment as 10 August 2007.

51. Mr Johnson gave evidence that the arrangements operated as above but there were gaps in his knowledge:

(1) In his witness statement, Mr Johnson confirmed that around the time he had discussions with Focused on using the de Graaf arrangements, de Graaf established an Isle of Man Partnership with his Trust as one of the partners and de Graaf as the managing partner. He was sent "a pro forma agreement" between an unnamed partnership and TPP, namely, the draft Services Agreement details of which are set out above. He said that "Focus….then contracted with [Reed] for me to provide my services to Matalan" under a contract dated 8 August 2006 (as again set out above).

(2) At the hearing Mr Johnson said that he could not recall if there was a signed version of the Services Agreement between TPP and a Partnership. He said that he took it that a Partnership was established from the documents he saw but he could not recall seeing the partnership deed. He could not recall seeing a copy of any accounts for the Partnership.

(3) He confirmed he had not seen a contract between Reed and Matalan regarding the provision of his services. He could not remember if he signed any written agreement between him and TPP for his services to be provided to Matalan.

(4) He said that he submitted timesheets to Reed who he understood then invoiced Matalan and that, ultimately, he was paid the retainer by TPP subject to PAYE and NICs. Other than that, he had minimal contact with Reed, TPP, Focused or the Partnership. Pay increases were negotiated with Matalan and, once the position was agreed, he simply informed Reed.

(5) Mr Johnson said that in the first period he considered that he was an employee of TPP (which he thought encompassed Focused) given the commitments which TPP made under the Services Agreement, that ultimately he received forms P60 and P45 from TPP and that this was reflected in the contract schedule and he received sick pay. When asked at the hearing who Focused were, Mr Johnson said that, so far as he was aware, they were who he was working for. He assumed Focused, TPP and de Graaf were all related as they were referred to in the same correspondence and documents.

(6) It was put to him that in the Intermediary Contract it was stated that Focused would account for tax in respect of fees payable under that agreement. Mr Johnson did not know if Focused had complied with this and did not recall doing so himself.

(7) Mr Johnson could not recall precisely what entity paid him during the first period but said there was no-one else, other than TPP/Focused, that he was aware of who would have dealt with the payments.

De graaf arrangements from 7 August 2007

52. From August 2007 onwards, Mr Johnson entered into essentially the same type of arrangements as Mr Lancashire and Mr Lee:

(1) On 2 August 2007, Mr Johnson received an email from TPP which began: "Twentyplus has recently reviewed its model and decided that the use of TPP Contractors as our preferred payroll company is not appropriate going forward. The reason for this is that in the light of recently defined legislation the use of TPP Contractors Ltd as a payroll function may suggest employment status, even though this is clearly not the case." TPP went on to recommend that its contractors register with HMRC as self-employed and said that, in that case, the "Retainer" would subsequently be paid gross as self-employment income (or said that contractors could be paid through a company). TPP attached a new contract between Mr Johnson and de Graaf.

(2) As noted on 10 August 2007 Mr Johnson received a P45 which it seems was issued by TPP. Mr Johnson said in his witness statement that he paid little attention to this as his day to day role did not change. He also said that from this time onwards the Partnership contracted directly with de Graaf.

(3) On 20 August 2007, Mr Johnson entered into a Services Agreement with the Atholl Partnership (as signed by both parties) which contained substantially the same terms as the draft Services Agreement described above. This referred to the Atholl Partnership as having been established on 18 July 2006 with de Graaf as its managing partner. Under this agreement, Mr Johnson agreed to perform consultancy services for not less 30 hours per week for a Fee of £15,000 per annum which was to be paid weekly in arrears provided that the Client had paid for his services.

(4) On 1 August 2008, Mr Johnson entered into a Services Agreement with the Shenn Partnership (as signed by both parties) on similar terms to the previous agreement with the Atholl Partnership under which he agreed to perform consultancy services of not less than 30 hours per week for a Fee of £12,000 per annum. This agreement referred to the Shenn Partnership as having been formed on 10 April 2007 with de Graaf as general partner and Guardian as limited partner.

(5) It is reasonable to infer from the following documents that Reed and de Graaf or a related entity entered into an Intermediary Contract sometime in February 2008:

(a) A document headed "Intermediary Agreement" stated to be made between Reed and "the Intermediary" which contained similar provisions to those in the earlier Intermediary Contract although Mr Johnson was not named as a party and there was no reference to the name of the Intermediary.

(b) A "Contract Schedule" which appeared to relate to this agreement which specified Mr Johnson as the Worker and Matalan as the Client. It was stated that the contract was for an estimated duration of one month to commence no later than 1 February 2008 and to be completed no later than 29 February 2008, that the fee was £220 to be invoiced weekly and that Mr Johnson and Matalan were able to terminate on giving each other notice of four weeks (subject to a provision regarding a probationary period). The "Special Conditions" otherwise contained similar terms to those set out above (see [46(6)] and also the wording: "Duration of contract is approximately 14 months, start date (tbc) until end October 2007". The schedule was signed by Reed and Matalan but was undated.

(c) A notice from "de Graaf Resources" and Mr Johnson to Reed signed only by de Graaf and dated 7 February 2008 in which they confirmed that certain regulations were not to apply in respect of "any assignments with Hirers" and "our dealings with Reed…"

(6) The bundles also contained a "Contract Schedule" dated 24 March 2009 in which "de Graaf Resources" was named as the Intermediary, Mr Johnson was named as the Worker and Matalan was named as the Client. This was signed by Reed and the Intermediary. This provided for Mr Johnson's engagement for a fee of £390 per day to be invoiced weekly for a two month period to commence no later than 29 March 2009 and to be completed no later than 29 May 2009. It was stated that the Intermediary and Reed were able to terminate on giving each other four weeks' notice. Under "Special Conditions" it was stated that the main place of work was Skelmersdale although some limited travel may be required and that the standard hours were 8.30am to 5.00pm on weekdays with 45 minutes for lunch.

53. Ms Redston also noted that the bundles contained pay/receipt slips from de Graaf dated 4 December 2007 and 4 April 2008 in the same form as those described above but which showed the payee in respect of both the "Contracted Payment" and the "Trust Income" receipts to be Mr Johnson. There was no reference to TPP as there was in the earlier pay/receipt slips. I have commented further on the effect of the above agreements in Part C.

54. At the hearing, Mr Johnson said that when changes were made to the structure, he just took it that de Graaf were changing their model and he was guided by them. He did not recall any explanation being provided when the Shenn Partnership became involved. He did not take notice of the precise model/structure used. To him it was irrelevant; all that mattered was that his timesheets were signed and he was paid. He had no idea what entities were involved. He did recall that in the first period he received two separate payments; one from TPP and one from the Trust. He thought that the car allowance payment of £7,500 would have come through the de Graaf/TPP structure because that is how he got paid. He did not think that Matalan were aware of the de Graaf arrangements. So far as Matalan knew his services were provided to

them by Reed. He did not recall any agreements other than those details of which are set out above.

Work for Matalan

55. The bundles contained a job specification produced by Matalan when they interviewed Mr Johnson. This describes his position as a "technical architecture manager for maternity leave recruitment based in Skelmersdale from early August to October 2007". The specification included the following:

(1) The recruit would report to the business account manager who reported to the IT Director.

(2) It was explained by way of background that:

> "the IT department has outsourced the operations Service Delivery elements to Cap Gemini, who operate onsite…and also offsite at CapGemini locations. There is a retained IT team within the organisation to which the technical architecture team belong. The retained team also incorporates the business account team, the IT project management team who manage major projects and the service delivery team who manage the outsource relationship. The Architecture team has a strategic focus with some tactical and audit elements but is not responsible for the day to day operation of the IT service".

(3) It was stated that the architecture team would cover a range of different activities during the next 12 months including: (a) improving the architecture and reducing identified risks and issues; (b) the governance of architectural design on major projects including involvement in high level design and on-going review and governance of the design and technical testing; (c) technical design and management of mini projects including technology selection, architectural design and review and technical management of tasks being completed by third parties; (d) the development of the architectural road map including developing the plan for removal of obsolete infrastructure and custom applications and end-user built applications and the documentation of business data flows; (e) enhancing the architecture governance including developing KPIs for the infrastructure, spreading the word on architecture strategy and improving architecture design review process; (f) developing next year's financial budget for must-do architectural projects including the development of business cases with short pay-back timescales; and (g) managing the infrastructure budget.

(4) The objective was stated to be to define the IT processes and platforms that constitute the IT strategy and ensure new IT projects are aligned to the strategy. It was stated that:

> "the IT architecture spans all locations: head office, distribution centres nearly 200 stores and Rotherham data centre. It covers all telephones, networks, servers (120 plus), desktops (1400 plus), tills (2500) and all applications (200 plus). The role is primarily focused on developing the strategic architecture and road map but us also responsible for the standardisation and quality assurance of IT systems to ensure a robust, stable and supportable IT infrastructure."
>
> "Typical size of infrastructure projects £50,000 up to £3 million. There can be 20 plus projects running at any one time that require Tech Arch manager input or management. The personal attributes required included to work as a team player".

(5) It was stated that the role was for a 15 month fixed term.

56. Mr Johnson gave the following evidence as regards his role with Matalan:

(1) Between August 2006 to August 2009 he worked as an IT architect at Matalan reporting directly to the director of IT initially and later (for around the last year) to the newly appointed head of IT. His role was as a "Technical Design Authority" which meant that he was required to consider the technical details of how the system was being implemented, how that may interact with other existing systems and any challenges or benefits a particular approach may offer. He put forward his suggestions for review and consideration by the head of IT and the Business Systems Manager responsible for that area. They would then either come to a decision or require him to carry out further testing and analysis before deciding on the right way to proceed. Mr Johnson said that he also "owned" the technology roadmap for the company. He described this as involving considering all the systems that support the company, how long they would be supported by the various vendors and when they would need to be replaced. He produced the roadmap which was then reviewed and discussed with the head of IT on matters such as when the company would be able to budget for various upgrades before agreeing a final version.

(2) He considered that his role was the same as that of the employee whose maternity leave he covered; he did the same job as she had done. He had a series of meetings with her to discuss the role and she prepared a handover pack for him which detailed his duties and key responsibilities. He also had a general company induction covering matters such as internal processes and policies such as restrictions on internet usage within the office.

(3) He considered the IT director and later the head of IT as his boss as they were ultimately responsible for the delivery and success of his work; he reported to them for direction, concerns and progress. Within the Matalan organisational structure he was considered to be working for them in the same way as the employee for whom he provided maternity leave cover. In addition to being in charge of his professional work they could overrule him and prioritise his work. He also had to approach them on administrative matters such as requests for pay increases, leave and approval of timesheets. Around two years into the assignment he negotiated directly with his line manager for an increase in his pay.

(4) He worked mostly on site where he had his own desk. He could occasionally work from home but only with the prior approval of his line manager. He notified the manager if he was sick in accordance with the firm's internal procedures. He also requested holidays via the line manager and would then brief other team members who covered for him whilst he was away.

(5) The core IT team was made up of a mixture of permanent employees and contractors. The head of IT divided up the tasks for the team and agreed with him the tasks allocated to him. Depending on the tasks and the progress made he sometimes covered for other team members (both employees and contractors). During work on a project the initial plans and designs may change if the requirements changed or in line with suggestions from project members. He was able to put forward proposals but they needed to be agreed by his superiors and could be overruled. He approached the on-site head of IT if he had any queries in relation to his work.

(6) If he noticed any risks or issues on the project he informed both the project manager and his line manager. This happened on a few occasions and the work was then re-done in the client's time. For example, he was asked to

review a technology road map laid out by the employee he was providing cover for. After a regular review he realised that some of the end support dates were missed or inaccurate which put the key systems at risk. He then had to rewrite the road map from the ground up but was not required to do so in his own time.

(7) All those in the core IT team were subject to regular peer review in the department which was discussed at regular team meetings. His work was informally appraised by the on-site head of IT during regular one to one sessions and he was also asked to appraise other members of the team on an informal basis. After three years Matalan decided they wanted a permanent employee for this role and he was let go. He set up a company in March 2007 which was dormant until 2009 when he used it as a personal services company.

Tax returns

57. Mr Johnson included the income he received from TPP in his 2006/07 and 2007/08 tax returns as income from an employment with TPP which he stated in the 2006/07 return commenced on 7 August 2006. In 2006/07 he showed £8,111 as income received from TPP as his employer and UK tax taken off that sum of £311.82 and £20,654.22 received from his Trust (presumably via the Atholl Partnership) in respect of which he claimed exemption from income tax under article 3 as set out in the additional information box in the foreign income pages as follows:

> "Income that would normally be declared in Box 6.4 [income received by an overseas trust, company or other entity…] comes from an interest-in possession trust created by me as settlor on 8 September 2006 of which the sole trustee is Guardian Services (IoM) Ltd….and of which I am the sole beneficiary. This income is exempt from UK tax by virtue of [article 3]. The total amount of the income received is £20,654.22, and has been omitted from box 6.4 on the basis that exemption from UK tax is due."

58. In his tax return for 2007/08, Mr Johnson showed income received from an employment with TPP of £4,816, he showed the remainder of his Fee (less expenses) as income from self-employment, and his share of partnership profits of £37,664 (under a partnership reference which was given as 111111111) in respect of which he claimed exemption from tax under article 3. As regards the partnership income, he included the same disclosure as he had made previously but added that the relevant income was exempt from tax under article 3 "notwithstanding the provision in the Finance Bill 2008 designed to remove such exemption. I am advised that these provisions are not valid because they contravene Article 1 of the Human Rights Protocol".

59. Mr Johnson said that he prepared his returns with help from his accountant and some input from de Graaf. He confirmed that he only became aware in 2015 that all of his receipts under the arrangements were taxable under ITEPA following advice from Crowe Clark Whitehill.

Part C – Are the disputed sums taxable as "earnings"?

Operation of the agency and PAYE rules

60. The lead appellants argued that the sums in dispute are to be treated as earnings under s 44 ITEPA or, in relation to Mr Johnson only as regards sums in dispute relating to the first period, are earnings under the general rules in s 10 and s 62 ITEPA. In this part all reference to parts and sections of legislation are to parts and sections of ITEPA unless it is expressly stated to the contrary. For convenience I refer to the relevant legislation which was in place in the period in question in the present tense.

Employment income – general rules

61. The relevant general rules in part 2 of ITEPA in place at the relevant time are as follows:

(1) Under s 9 the amount of employment income which is charged to tax for a particular tax year is "in the case of general earnings…..the net taxable earnings from an employment in the year" as calculated under s 11 as "taxable employment earnings in the tax year", being "taxable earnings from the employment in the year" (under s 10(2)) less the total amount of deductions allowed under specified provisions.

(2) Under s 13 the person liable for any tax on general earnings is the person to whose employment the earnings relate.

(3) Under s 18 general earnings consisting of money are to be treated as received at the earliest of (a) the time when payment is made of or on account of the earnings, and (b) the time when a person becomes entitled to payment of or on account of the earnings (subject to special provision for directors).

(4) Under s 62(2) "earnings from an employment in a tax year" means:

> "(a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment."

62. In outline:

(1) The PAYE system applies in respect of "PAYE income" for a tax year which includes "PAYE employment income for the year" (s 683(1)) as defined to include "any taxable earnings from an employment in the year determined in accordance with section 10(2)" (s 683(2)(a)).

(2) Section 684(1) provides that HMRC must make regulations "with respect to the assessment, charge, collection and recovery of income tax payable in respect of all PAYE income". The regulations applicable to the relevant tax years are the PAYE regulations.

(3) Under regulation 21 of the PAYE regulations an employer is required to deduct income tax from PAYE income on making a "relevant payment" to an employee.

(4) As set out below, in certain circumstances HMRC can direct, in effect, that the employer is not liable to deduct or account for income tax in respect of PAYE income with the consequence that the employee is liable to account for such income tax.

63. It was common ground that if the sums in dispute in respect of the employment period are taxable as earnings, TPP (or any other entity which was Mr Johnson's employer) would have been liable to deduct and/or account for the resulting income tax due.

Agency rules

64. Under s 44(1) the agency rules apply where:

> "(a) an individual ("the worker") personally provides, or is under an obligation personally to provide, services (which are not excluded services) to another person ("the client"),
>
> (b) the services are supplied by or through a third person ("the agency") under the terms of an agency contract,

(c) the worker is subject to (or to the right of) supervision, direction or control as to the manner in which the services are provided, and

(d) remuneration receivable under or in consequence of the agency contract does not constitute employment income of the worker apart from this Chapter."

65. For the purposes of s 44:

(1) "agency contract" means "a contract made between the worker and the agency under the terms of which the worker is obliged to personally provide services to the client" (under s 47(1)), and

(2) "remuneration" (a) does "not include anything that would not have constituted employment income of the worker if it had been receivable in connection with an employment apart from this Chapter, but (b) subject to paragraph (a), includes every form of payment, gratuity, profit and benefit" (under s 47(3)).

66. Where the conditions set out in s 44(1) are met:

(1) "the services which the worker provides, or is obliged to provide, to the client under the agency contract are to be treated for income tax purposes as duties of an employment held by the worker with the agency", and

(2) "all remuneration receivable under or in consequence of the agency contract (including remuneration which the client pays or provides in relation to the services) is to be treated for income tax purposes as earnings from that employment" (under s 44(2)).

67. For the tax year 2002/03 the agency rules were set out in s 134 of the Income and Corporation Taxes Act 1988 but the parties did not suggest that those rules are materially different to the rules in s 44.

68. Where s 44 is engaged, the PAYE rules apply essentially as though the agency were the employer and the worker were an employee:

(1) Income which is deemed to be taxable as earnings under s 44 is taxed as "general earnings" under s 10(2) and therefore falls within the definition of "PAYE income" under s 683.

(2) Section 688 provides that, where s 44 applies, the relevant provisions in ITEPA (including s 710) have effect as if the relevant individual held an employment with or under the relevant agency.

(3) The PAYE regulations provide that for the purposes of the regulations, "agencies are treated as employers" and "agency workers are treated as employees" (regulation 10(1)).

On that basis, all references in the relevant provisions of the PAYE regulations set out below to "employers" and "employees" are to be read as including persons treated as such under s 44.

69. If the sums in dispute are taxable under s 44, on the face of it, the effect of above rules would be that the Partnership, as the agency/deemed employer, would be required to comply with the PAYE rules in respect of the resulting income tax due on those sums. However, it was common ground that the obligation to comply with the relevant PAYE rules would fall on the Clients under s 689:

(1) Section 689 applies where:

"(a) an employee [each lead appellant] during any period works for a person ("the relevant person") who is not the employer of the employee [the Client],

(b) any payment of, or on account of, PAYE income of the employee [each lead appellant] in respect of that period is made by a person who is the employer [as employer includes a party deemed to be such under s 44, the Partnership/Trust]…

(c) PAYE regulations do not apply to the person making the payment [the Partnership/Trust]…, and

(d) income tax is not deducted, or not accounted for, in accordance with the regulations by the person making the payment [the Partnership Trust]….” (under s 689(1).

It was common ground that the Partnership would not be subject to the PAYE regulations for the purposes of (c) above; as a non-UK based partnership with no presence in the UK, it/the partners were outside the scope of the regulations.

(2) Where the above conditions are satisfied, under s 689(2) “the relevant person”, the Client, is to be treated, for the purposes of the PAYE regulations, as making a payment of PAYE income of the employee (each lead appellant) of an amount equal to the amount given by s 689(3), namely:

“(a) if the amount of the payment actually made is an amount to which the recipient is entitled after deduction of income tax, the aggregate of the amount of the payment and the amount of any income tax due, and

(b) in any other case the amount of the payment.”

(3) Therefore, as did not appear to be disputed, if these rules are in point, under s 689(3)(b), each Client would be treated as making payments of PAYE income of the relevant lead appellant equal to the amount of the earnings the lead appellant is deemed to receive under s 44.

70. The mechanism for collecting the resulting income tax due where the above provisions apply is set out in s 710. This applies to “notional payments” which include payments treated as made by virtue of s 689 (excluding payments made under s 689(3)(a)) and, for the purposes of this provision, any reference to an employer includes a reference to a person who is treated as making a payment by virtue of s 689(2):

(1) Sub-s (1) provides that if an employer makes a notional payment of PAYE income of an employee it must, subject to and in accordance with the PAYE regulations, deduct income tax at the relevant time from any payment or payments the employer actually makes of, or on account of, PAYE income of the employee.

(2) Under sub-ss (3) and (4) where the actual payments made are insufficient to enable the necessary deduction of income tax to be made, the employer must “subject to and in accordance with PAYE regulations, account to HMRC at the relevant time for an amount of income tax equal to the amount of income tax the employer is required, but is unable, to deduct”.

71. Regulation 62 states that if an employer (which again includes a relevant person under s 689) makes a relevant payment which is a notional payment:

(1) the employer “must, so far as possible deduct tax required to be deducted in respect of a notional payment….from any relevant payment or payments which the employer actually makes to the employee at the same time as the notional payment” (under regulation 62(2));

(2) if the employer cannot deduct such sums in full, it must make the deductions "so far as possible from payment or payments which the employer makes later in the same tax period" (under regulation 62(4)); and

(3) if "the relevant payments actually made are insufficient to enable the employer to deduct the full amount of tax due in respect of a notional payment, the employer must account to [HMRC] for any amount which the employer is unable to deduct" (under regulation 62(5)).

72. HMRC submitted that, if these rules are in point the Clients would have been liable *to account* to HMRC for income tax due in respect of the relevant notional payments (of sums equal to the earnings which the lead appellants would be deemed to receive under s 44). The Clients would not have been liable to deduct income tax as they did not make any actual payments of "PAYE income" from which they could deduct the relevant sums.

Directions under regulations 72 and 81

73. Regulations 72 and 81 allow HMRC, where certain conditions are satisfied, to absolve the employer/payer from the liability under the PAYE system to deduct and/or account for income tax chargeable on earnings with the consequence that the employee/worker is instead liable to account for that tax. Assuming these regulations are in point, due the effect of the regulations set out above, the provisions set out below are be read as though TPP/the relevant related entity or relevant Client is the employer and the relevant lead appellant is the employee.

(1) HMRC can make a direction under regulation 72 as follows:

"(1) This regulation applies if -

(a) it appears to the Inland Revenue that the deductible amount exceeds the amount actually deducted, and

(b) condition A or B is met.

(2) In this regulation—

"the deductible amount" is the amount which an employer was liable to deduct from relevant payments made to an employee in a tax period;

"the amount actually deducted" is the amount actually deducted by the employer from relevant payments made to that employee during that tax period;

"the excess" means the amount by which the deductible amount exceeds the amount actually deducted.

(3) Condition A is that the employer satisfies the Inland Revenue -

(a) that the employer took reasonable care to comply with these Regulations, and

(b) that the failure to deduct the excess was due to an error made in good faith.

(4) Condition B is that the Inland Revenue are of the opinion that the employee has received relevant payments knowing that the employer wilfully failed to deduct the amount of tax which should have been deducted from those payments.

(5) The Inland Revenue may direct that the employer is not liable to pay the excess to the Inland Revenue…….

(6*) If a direction is made, the excess must not be added under regulation 185(5) or 188(3)(a) (adjustments to total net tax deducted for self-assessments and other assessments) in relation to the employee*……" (Emphasis added.)

There is a right of appeal against any such direction (under regulation 72B and 72C).

(2) Regulation 81 applies to enable HMRC to make a direction where the employer has failed to account for income which they have determined to be due under regulation 80 as follows:

> "(1) This regulation applies if -
>
> > (a) any part of the tax determined under regulation 80 is not paid within 30 days from the date on which the determination became final and conclusive, and
> >
> > (b) condition A or B is met in relation to an employee.
>
> (2) Condition A is that the Inland Revenue are of the opinion that the employee in respect of whose relevant payments the determination was made has received those payments knowing that the employer has wilfully failed to deduct the amount of tax which should have been deducted from those payments.
>
> (3) Condition B is that the unpaid tax represents an amount for which the employer was required to account under regulation 62(5) (notional payments) in relation to a notional payment to the employee.
>
> (4) The Inland Revenue may direct that the employer is not liable to pay the amount of tax which appears to them should have been but was not -
>
> > (a) deducted on making those relevant payments, or
> >
> > (b) accounted for under regulation 62(5)…..
>
> (5) *If a direction is made, the amount of tax must not be added under regulation 185(5) or 188(3)(a) (adjustments for self-assessments and other assessments) in relation to the employee*……" (Emphasis added.)

74. As explained in further detail below, regulation 185(5) provides that for, any tax year, tax which, under the PAYE system, an employer/payer was liable to deduct and/or account for in respect of an employee's earnings but failed to do so is to be added to the sums which, under s 59B, are taken into account in the computation of the tax payable by the employee for that year by deduction from the tax the employee has self-assessed to be chargeable. If HMRC make a direction under either regulation 72 or 81, the effect of the highlighted provisions, therefore, is that, under s 59B, such tax is *not* added to the sums to be deducted from the tax otherwise chargeable on the employee with the result that the employee is liable to pay that tax.

75. HMRC submitted that, if the lead appellants are correct that the relevant sums in dispute are taxable as earnings under s 44, only regulation 81 can be in point. That is on the basis that, under the PAYE regulations relating to notional payments, the Clients would have been liable to account for tax in respect of the notional payments they would be deemed to make but would not have been liable to deduct the income tax due as they did not make any payments of actual PAYE income from which deductions could be made. HMRC said that they are out of time to make any direction under regulation 81 because they have not issued determinations in respect of the Clients' obligations under the PAYE regulations within the applicable time limits. They noted, however, that if that Mr Johnson is taxable on relevant sums received in the employment period on the basis that they constitute actual earnings, regulation 72 is in point and, in their view, the issue of a direction under that provision is not subject to any time limit.

Submissions on the application of ITEPA

Lead appellants' submissions

76. Ms Redston submitted that the requirements of s 44 are plainly met:

(1) Each lead appellant personally provided services (which, as was not disputed, are not excluded services) to another person, the Client, by or through a third person, the Partnership, under an agency contract in the form of the Services Agreement under the terms of which (where relevant as varied by the Assignment Contract) the lead appellant was obliged personally to provide his services to the Client.

(2) The evidence establishes that in all their assignments for the Clients, the lead appellants were subject to supervision, direction and/or control as to the manner in which they carried out the work. Ms Redston noted that the meaning of these terms was considered by the tribunal in *Oziegbe v HMRC* [2014] UKFTT 608 (TC) at [12] and [13], and by Roth J in *Talentcore v HMRC* [2011] UKUT 423 (TC). Roth J said, at [36], that where, as Ms Redston submitted is the case here, contractors work alongside permanent staff and subject to the same control, then "manifestly that will include control as to the manner in which they do their work". Roth J also confirmed that s 44 applies if only one of the conditions as to supervision, direction or control are satisfied.

(3) In Ms Redston's view, the view that the lead appellants were subject to supervision, direction or control accords with HMRC's published guidance which states the following:

> "Supervision is someone overseeing a person doing work, to ensure that person is doing the work they are required to do and it is being done correctly to the required standard. Supervision can also involve helping the person where appropriate in order to develop their skills and knowledge.
>
> Direction is someone making a person do his/her work in a certain way by providing them with instructions, guidance or advice as to how the work must be done. Someone providing direction will often coordinate how the work is done, as it is being undertaken.
>
> Control is someone dictating what work a person does and how they go about doing that work. Control also includes someone having the power to move the person from one job to another."

(4) Under the agency contract (the Services Agreement), the lead appellants received remuneration (in the form of the Fee and the Profit Share) which does not constitute employment income of the lead appellants apart from the provisions of the Chapter in which s 44 falls.

77. Ms Redston said that it is clear that for the purposes of s 44(1)(d) and s 44(2) both the Fee and the Profit Share are captured as sums paid "under or in consequence of" the agency contract. She submitted that (a) it is explicit in s 44(2) that "all remuneration receivable" for the services is included as deemed taxable earnings, and (b) it is clear from the case law that earnings include payments for work carried out for the employer or deemed employer, which are paid at the individual's direction to a third party such as in this case the Partnership and the Trust. She drew support for this view from *RFC 2012 v HMRC* [2017] UKSC 45 ("*Rangers*") at [39] to [41]. In summary, in *Rangers* the Supreme Court held that, on a purposive construction of the general employment tax rules, the fact that a football club's employees' remuneration was routed through a trust arrangement did not prevent it being taxable as their employment "earnings" and did not prevent the club from being liable to account for the resulting income tax under the PAYE system.

78. Finally, Ms Redston submitted that HMRC were fully aware of the fact that s 44 may apply to arrangements such as these before the relevant time limits expired for them to be able to take action to recover the resulting income tax. She referred to correspondence HMRC had with the adviser to a different taxpayer (as contained in the bundles) as follows:

(1) HMRC received correspondence from a firm of accountants, Warr & Co, about Mr Swarbrick, one of that firm's clients who it appears used essentially the same arrangements as those used by the appellants: he worked in the UK providing services to a UK client, HBOS; he had a contract with an Isle of Man Partnership, the Steed Partnership, under which he was paid a monthly fee, which he accounted for as self-employment income; he also received income from a Trust, which was in exact proportion to the income paid under the contract with HBOS.

(2) On 12 February 2009 HMRC's investigating Officer, Mr MacDougall, told Warr & Co that if s 44 applied "HBOS would be the relevant person under s 689 ITEPA". On 8 April 2009, the officer said he was taking further advice and on 4 September 2009 he referred to obtaining "comprehensive legal advice…not only in respect of Mr Swarbrick but also in respect of other people where there are similar claims".

(3) On 13 May 2009, Mr Warr sent HMRC the following extract from a legal opinion obtained from Mr David Ewart QC, provided generally and not in relation to Mr Swarbrick alone. It reads:

> "Does Counsel believe that income received by the individual from the IIP Trust could fall within s 44(2)(b) as being 'in consequence of the Agency Contract'? Counsel is of the opinion that this will depend on the actual facts. However, if what is received by the contactor from the IIP Trust is the balance of the fees – less costs – emanating from the contract that the contractor was – per the agency contract – undertaking, then there is a very strong case to argue that such income was, per s 44(2)(b), 'remuneration receivable under or in consequence of the agency contract", and would be subject to PAYE.
>
> Counsel is also of the opinion that HMRC does not have the 'luxury' of choosing which 'piece' of legislation it utilises in determining a tax liability. In this specific instance, HMRC may wish 'for ease of admin' to tax trust income received by the individual under s 858 of ITTOIA 2005. However, Counsel is of the opinion that s 44 ITEPA 2003 takes precedence where it applies."

(4) On 25 March 2010, HMRC issued directions under regulation 80 to recover income tax on the relevant income from HBOS. On 28 April 2010, HMRC sent Mr Warr a letter produced "after liaising with relevant specialists and upon receipt of legal advice", which set out HMRC's decision that:

(a) Section 44 applied on the basis that Mr Swarbrick provided his services personally to HBOS, the contract between Mr Swarbrick and the Steed Partnership was an agency contract, Mr Swarbrick was subject to supervision, direction and/or control by HBOS and received "remuneration" from carrying out those services.

(b) The Steed Partnership was the agency and, as it was offshore, s 689 applied so that HBOS was required under the PAYE system to account for income tax in respect of the remuneration deemed to be received by Mr Swarbrick.

(c) Mr Swarbrick was entitled to a "PAYE credit" in relation to the income which HBOS should have accounted for under the PAYE system, unless a direction had been issued under the PAYE Regulations to recover the tax due from him.

79. Ms Redston submitted that HMRC's analysis of the legal position under s 44 and the PAYE regulations, which she noted was arrived at after obtaining "comprehensive legal advice", is identical to the lead appellants' arguments in these proceedings except that HMRC decided the analysis applied only to the monies Mr Swarbrick received as a Fee and not to the monies received as Profit Share. In HMRC's view the link between the Profit Share and the meaning of "remuneration" in s 44 was "too remote". Ms Redston considered that this was plainly wrong on the basis of the decisions in *PA Holdings v HMRC* [2012] STC 582, *Aberdeen Asset Management v HMRC* [2014] STC 248 and *Rangers*. Ms Redston said that HMRC should have been aware of the correct position before they issued their decisions in relation to these appeals.

80. Ms Redston submitted that Mr Johnson was taxable on the relevant sums as earnings in the first period on the basis that he received the sums as an employee of TPP or another de Graaf company. She noted that (a) HMRC issued Mr Johnson with coding notices for PAYE purposes, (b) he received a P60 and P45, (c) he was paid sums by TPP net of income tax deducted under the PAYE system and NICs, and (d) the intention expressed at the time was that he would either work through his own personal services company (in which case he would have been an employee of that company but that structure was not adopted) or that he would be provided with "a payroll company". She said that from these expressed intentions it is plain that TPP was either an "umbrella company", which employed a number of individuals who used the arrangements, or was operating as a payroll company for another De Graaf company as the employer.

HMRC's submissions

81. HMRC submitted that the lead appellants have not established that the provisions of s 44 apply, noting the following:

(1) It is not possible to establish the precise contractual chain leading to the provision of the lead appellants' services to the Clients or the contractual basis on which the services were provided:

(a) There are major gaps in the documentary evidence. For example, there are no contracts evidencing the asserted contractual relationship between (i) the Partnership and a Montpelier entity, (ii) a Montpelier entity and the Recruitment Agent and (iii) the Recruitment Agent and the Client.

(b) Whilst the lead appellants were honest and credible witnesses, they simply did not have the knowledge of the arrangements needed to fill in the gaps in information due to the inadequate documentary evidence. For example, (i) none of the lead appellants had any contact with the Trustee or saw the accounts for the Trust, (ii) until they were obtained for the purposes of these proceedings, Mr Lancashire and Mr Johnson did not see the accounts for the Partnership and Mr Lee only received the draft unsigned accounts for the Partnership for one of the years in question, and (iii) they were not able to explain the oddities in the amounts in the accounts for the Partnerships. Moreover, all the lead appellants confirmed they had no real interest in how the arrangements worked; they were only interested in receiving the monies they expected to get for the services they provided to the Clients.

(c) Some of the terms in the Services Agreement are wholly unrealistic such as the provisions requiring the lead appellant to work 1,200 hours and those requiring a party to give three months' notice to terminate the agreement which was usually varied in the Assignment Contracts (it appears to tie in with the requirements of the Recruitment Agent and/or the Clients) and which the parties did not adhere to (given the lead appellants simply decided not to use the arrangements at will without any challenge from the relevant Partnership).

(d) The documents contain discrepancies such as the reference to the Fernleigh Partnership. This is said to be merely an error in including the name of the wrong Partnership but, in the absence of any further evidence, it cannot be assumed that is the case.

(2) The evidence demonstrates that Montpelier had no knowledge of the market in which the lead appellants operated and none of the specialist contacts or resources required to identify assignments. The lead appellants' roles were identified by a Recruitment Agent or by the lead appellants' own networks. The Clients did not know of the existence of the Partnership or the Trust.

(3) The true nature of the arrangements was simply that the parties agreed that monies generated from the lead appellants' work would be routed through the structure to avoid tax and that Montpelier and de Graaf as applicable would receive the Arrangement Fee for providing the structure. The lead appellants acknowledged that they only looked to the Partnership for the monies and, as noted, they were only interested in getting the monies they expected to receive for their work. There may well have been some agreement giving effect to their understanding. Moreover, Ms Redston accepted that this is the true nature of the arrangements in her arguments on the application of the TOAA regime (as set out below.)

82. Mr Tallon suggested, albeit in relation to the issue in Part G, that if s 44 applies, s 44(2) does not capture the Profit Share. He said that can be no straight "read across" of the decision in *Rangers*, on which Ms Redston relied, as being applicable here. He noted that in *Rangers* the court was concerned with how to interpret and apply the general provisions regarding the taxation of earnings from an actual employment whereas in this case the tribunal is concerned with the taxation of sums which are deemed to be received as earnings under the agency rules which, in effect, form their own mini-code.

83. HMRC submitted that Mr Johnson had not established that he was engaged as an employee at the relevant time for similar reasons. Mr Tallon noted, in particular, that Mr Johnson did not provide a written contract of employment, he did not understand the Services Agreement between the Partnership and TPP, he did not provide the partnership deed and accounts for the Partnership, he said he was not an employee when he signed the disclosure made for DOTAS purposes and TPP said that the arrangement was not an employment.

Lead appellants' responses to HMRC's submissions

84. Ms Redston responded that none of HMRC's points affect the analysis for the following reasons:

(1) It was not possible to provide some of the documents HMRC refer to simply because the lead appellants were not a party to them. In any event, the reasons why the requirements of s 44 are met is not affected by the lack of documents evidencing each step in the contractual chain. Moreover, as Mr Lancashire and Mr Lee both said, it is not normal for workers to have sight of

contracts between a Recruitment Agent and the Client as they contain terms, such as those relating to the fees, which the Recruitment Agent does not wish to share with the worker.

(2) There is no requirement in s 44 that the relevant third party has to source work for there to be an agency contract.

(3) The fact that the lead appellants understood that the arrangements would have a cost in the form of the fee received by Montpelier or de Graaf does not mean there was no agency contract. This does not detract from the fact that the lead appellants agreed to provide their services under the Services Agreements and the Assignment Contracts or Intermediary Contracts, the Recruitment Agents were in contact with Montpelier/TPP/Focused and passed requirements to them for inclusion in the those contracts (such as those in relation to the assignments Mr Lancashire and Mr Lee undertook with ANTS) and the lead appellants provided services to the Clients under the terms of those contracts. Moreover, even if, as HMRC asserted, some of the terms of these contracts did not give Montpelier enforceable rights, that does not mean that there was no contract at all or that the terms of the contract which demonstrate that the requirements of s 44 were met were somehow invalid.

85. Ms Redston added that the existence of the Partnerships formed the very bedrock of HMRC's case, namely that the income of the Trust was chargeable as partnership income and was essential to HMRC's alternative argument that the TOAA regime applies.

86. She concluded that, in any event, if the tribunal does not accept the lead appellants' analysis that the agency arrangements operated as set out above, there is sufficient evidence to demonstrate that the requirements of s 44 are satisfied on the basis that the lead appellants acted under agency contracts with the Recruitment Agents:

(1) The unchallenged evidence is that each lead appellant agreed with the Recruitment Agent to provide their services to the relevant Client which included fixing the fee to be paid for the work carried out and agreeing the detailed nature of the services to be provided. There is no reason why an agency contract has to be in writing.

(2) All the requirements of s 44 would be satisfied; there was a contract between the Client and a third party under which the services were provided, consideration was paid for those services by the Client and the lead appellants received remuneration in consequence of providing those services.

87. As regards the points HMRC made in relation to Mr Johnson, Ms Redston noted that (a) there can be an employment relationship without a written contract of employment, (b) the relevant partnership documents could not be produced because Mr Johnson was not a partner in the Partnership and hence not entitled to these documents, and (c) the label the parties put on their arrangement is not determinative; whether there is an employment is a question to be determined by considering all relevant factors (see, for example, *Meechan v Secretary of State for Employment* [1997] IRLR 535).

88. She added that if the tribunal does not accept these points, in any event the only reasonable conclusion is that Mr Johnson provided his services under an agency contract with Reed as the agent. Under the relevant Intermediary Contract, Mr Johnson agreed with Reed to carry out those services at Matalan and the terms of that agreement remained essentially the same. All the other requirements of s 44 are satisfied on that analysis.

Conclusion on the application of s 44

Application of s 44(1)

89. As regards all periods other than the first period, I have concluded that s 44(2) applies to treat the lead appellants as though they were employees of the relevant Partnership on the basis that the requirements of s 44(1) are satisfied.

90. The evidence establishes, as did not appear to be disputed by HMRC, that (a) the lead appellants personally provided services (which are not excluded services) to another person, the Client, within the meaning of s 44(1)(a), and (b) the lead appellants were subject to (or to the right of) supervision, direction or control as to the manner in which the services were provided within the meaning of s 44(1)(c).

91. The dispute was centred on whether under s 44(1)(b) "the services are supplied *by or through* a third person under the terms of an agency contract" where an "agency contract" is "a contract between the worker and the third party under the terms of which the worker is obliged personally to provide services to the client". I note the following:

(1) Given that s 44(1)(b) follows on from s 44(1)(a), "*the* services" under consideration under s 44(1)(b) are those which the worker provides personally to the end-client or is obliged to provide personally within the meaning of s 44(1)(a).

(2) Splitting the requirements of the provision into its constituent elements, the meaning of the requirement that the services "*are* supplied *by….*a third party *under the terms of* an agency contract" seems clear. The following is not intended to be an exhaustive description of when this requirement is satisfied but it is plain that it will be satisfied if:

(a) there is a contract between a third party and the worker under the terms of which the worker is obliged personally to provide services to the client (so that it is an agency contract);

(b) that contract contains terms providing for the third party to supply the worker's personal services to the client; and

(c) the third party fulfils the requirement for it to provide the worker's personal services to the client or, at least to some extent, fulfils that requirement, so that the services *are* supplied under the terms of that contract.

(3) The alternative requirement that the services "are supplied… *through* a third party *under the terms* of an agency contract" introduces a much broader and what seems to be a deliberately nebulous test due to the use of the term "through". The meaning of that term, according to its normal meaning as used in this context, can be taken to be "by means of an intermediate stage or process". This broad and less prescriptive wording indicates that the "through" formulation of the test is satisfied at least where the following requirements are met (and again this is not intended to be an exhaustive description):

(a) under the agency contract between the third party and the worker, there is provision for the third party either to provide the worker's personal services to the client or, by some non-prescribed method, to facilitate, arrange or somehow provide the means for the worker's personal services to be supplied to the client; and

(b) the third party fulfils whatever the relevant provision requires or, at least to some extent, fulfils that requirement, and the worker in fact personally provides services to the client.

(4) Moreover, contrary to HMRC's stance, the wording of the "through" test does not suggest that the provision is intended to apply only if the agency contract sets out all the steps which are involved in delivering the services to the end-client and/or the precise nature of those steps can be established (whether from the agency contract or otherwise). Rather the reference to services being supplied "through" a third party "under the terms of an agency contract" places the focus on the role which the third party itself plays in facilitating or providing the means for the supply of the worker's services under the terms of *its* contractual relationship with the worker.

92. Applying s 44(1)(b) as set out above, the services which Mr Lancashire and Mr Lee personally provided to the Clients in the relevant tax years were supplied through the relevant Partnership, as a third party, under the terms of an agency contract:

(1) The relevant Partnership is a third party, namely, a person other than the Client to whom Mr Lancashire and Mr Lee each personally provided his services.

(2) Each of these lead appellants, as a "worker", entered into an agreement with the Partnership, in the form of the Services Agreement, as varied by the Assignment Contracts and:

(a) under the terms of the Services Agreement, Mr Lancashire and Mr Lee were obliged to provide services personally to clients as the Partnership directed and, under the variation to that agreement made by each Assignment Contract, to provide services to the named Client unless otherwise agreed; and

(b) As set out in schedule 2 to each Assignment Contract, it was envisaged that the relevant Partnership would enter into an agreement with another Montpelier entity for the provision of their services to the Client.

(3) In Mr Lancashire's and Mr Lee's case it is reasonable to infer that:

(a) The relevant Recruitment Agent contracted with each Client for the provision of the relevant services to it given the evidence of Mr Lancashire and Mr Lee on the role each such agent played in relation to their assignments with the relevant Client.

(b) In order to be able to enter into such a contract with the Client, the Recruitment Agent must have had a form of agreement or arrangement as regards the provision of Mr Lancashire and Mr Lee's services whether with the relevant Partnership itself or with any other Montpelier entity with which that Partnership made arrangements as envisaged under schedule 2 to the Assignment Contracts.

(c) It is more probable than not that there was some form of arrangement between the relevant Partnership and another Montpelier entity as regards the supply of the personal services of Mr Lancashire and Mr Lee given, in particular, that (a) as noted, schedule 2 to each Assignment Contract envisaged this would be the case and Mr Lancashire and Mr Lee were required to and did sign that schedule, (b) Mr Lancashire and Mr Lee gave evidence that their understanding was that this was the case.

(4) On the basis of these conclusions, Mr Lancashire's and Mr Lee's services "*are* supplied….*through*" a third party, the Partnership "under an agency contract", the Services Agreement, as varied by the Assignment Contract, on the basis that:

(a) Those agreements provide for the lead appellant to provide services personally as set out above such that they are agency contracts.

(b) It suffices to establish that those services are supplied through the Partnership, as the agency, under the terms of those agreements, that (i) the Services Agreement provided that the Partnership had the right to direct to whom the lead appellants' services were to be provided, (ii) under the variation to that agreement made by the Assignment Contracts, Mr Lancashire and Mr Lee were directed by the Partnership and, agreed with the Partnership, to provide the relevant services to the named Client, (iii) Mr Lancashire and Mr Lee in fact performed the relevant services for the named Client under arrangements which involved the Partnership facilitating the supply of their services by entering into arrangements with another Montpelier entity as Mr Lancashire and Mr Lee agreed it could under schedule 2 to the Assignment Contract.

93. I have reached the same conclusion that for the purposes of s 44(1)(b), the services which Mr Johnson personally provided to Matalan in the second period were supplied through the relevant Partnership, as a third party, under the terms of an agency contract:

(1) The relevant Partnership is a third party, namely, a person other than the Client to whom Mr Johnson personally provided his services.

(2) Mr Johnson, as a "worker", entered into an agreement with the Partnership, in the form of the Services Agreement, under the terms of which he was obliged to provide services personally to clients as the Partnership directed.

(3) There is written evidence that de Graaf/Focused and the Recruitment Agent entered into a written Intermediary Contract for the provision of his services to Matalan for only some parts of the relevant period from 7 or 8 August 2007 onwards (see [52] and [53]). However, it is reasonable to infer that some form of contractual arrangement (whether in writing or not) was in place between those parties for the provision of Mr Johnson's services for the whole of the second period on the same or similar terms to those set out in the Intermediary Contract in place for the first period in the light of the facts that:

(a) There is written evidence that there were Intermediary Contracts in place for at least some of this period.

(b) The evidence is that those Intermediary Contracts contained substantially similar terms to those in the written Intermediary Contract in place during the first period.

(c) Mr Johnson provided his services to Matalan throughout the relevant period it seems on the basis that the terms set out in the written Intermediary Contract for the first period applied.

(d) Mr Johnson's evidence on the role that Reed played.

(4) It is reasonable to infer that Reed contracted with Matalan for the provision of Mr Johnson's services to it given Mr Johnson's evidence on the role Reed played in relating to his work for Matalan.

(5) On that basis it suffices to establish that in the second period the services were supplied through the Partnership under the terms of the Services Agreement, as the agency contract, that (i) the Services Agreement provided that the Partnership had the right to direct to whom Mr Johnson's personal services were to be provided, (ii) there were arrangements between de Graaf and

Reed for the provision of Mr Johnson's services to Matalan, and (iii) Mr Johnson in fact provided his services to the Client.

94. As is evident from the conclusions set out in full above, I do not accept HMRC's argument that there is insufficient evidence to establish that s 44 applies. I note the following as regards HMRC's arguments:

(1) HMRC did not go so far as to suggest the arrangements and documents were not genuine in the sense that they were a "sham" as that term has been interpreted in case law. In an often-cited passage, Diplock LJ (as he then was) explained a "sham" in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at page 802 as follows:

> "….. it means acts done or documents executed by the parties to the "sham" which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create…… for acts or documents to be a "sham", with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating."

(2) HMRC's argument was confined to suggesting that s 44(1) does not apply unless the precise terms and nature of each contract in place between the agent and the end-client can be established. However, for all the reasons set out above, on the correct interpretation of this provision, it does not require the tribunal to establish the precise terms of the arrangements involved in the supply of the lead appellants' services between the Partnership and a Montpelier entity, that entity and the Recruitment Agent and the Recruitment Agent and the Client.

(3) HMRC described some terms of the Services Agreement, such as the provisions enabling the parties to terminate the agreement by notice as wholly unrealistic and "unenforceable". I note that:

(a) Under general principles of contractual construction, the fact that a term in a contract is not enforced does not necessarily mean that it is not part of the agreement (see *Autoclenz v Belcher* [2011] UKSC 41 at [19]).

(b) In any event, if the terms HMRC refer to are unenforceable, I cannot see that that affects the analysis of how s 44 applies. There is nothing to suggest that the other terms of the contract, on which the analysis of s 44 depends, are unenforceable. As noted, HMRC did not argue that the document is a sham in the sense set out above. Nor did they argue that the unenforceability of the relevant terms somehow undermines the validity of the whole document in the sense that it has not created any legal rights and obligations as regards the provision of the lead appellants' services.

95. As regards, HMRC's other arguments:

(1) I can see no implication in the wording of s 44 that it is intended to operate only where the relevant third party is a professional recruitment agent. The relevant requirement is simply that the relevant services are provided by or through a third party under a contract between the worker and the third party which satisfies the specified requirements.

(2) I cannot see that the fact that the parties intended to use the arrangements to avoid UK tax on the income received by the lead appellants prevents s 44 from applying. It cannot be relevant to the analysis of s 44, as HMRC seem to

suggest, that the parties' purpose when they entered into the arrangements was to avoid income tax and NICs on the sums the lead appellants expected to receive for their work for the Clients on the basis of a different analysis: namely, that the relevant sums were taxable as income from a Partnership/Trust and that article 3 applied to exempt the bulk of the sums (the Profit Share) from tax. Whether s 44 applies has to be judged on its own terms. In my view, it is entirely in line with the purpose of this broadly drafted provision that these circumstances fall within it thereby ensuring that the sums received by the lead appellants under the arrangements are taxable. The fact that, in these particular circumstances, the application of s 44 may have the consequence of creating a tax credit which, on the lead appellants' stance, negates any income tax charge on them cannot be a valid basis for construing s 44 as though it does not apply in the first place.

96. Finally:

(1) I have also concluded that on the basis that the above conditions are satisfied, the remuneration receivable under or in consequence of the agency contract (which in my view comprises the total sums in dispute - both the Fee and the Profit Share) do not constitute employment income of the lead appellants (as the workers) apart from the provisions of s 44.

(2) I cannot see that the fact that HMRC may have been alerted to the possible application of s 44 ITEPA to the arrangements by the correspondence with Mr Swarbrick's advisers is at all relevant to the analysis of whether, as a matter of law, s 44 applies in the circumstances under consideration in these appeals. For the avoidance of doubt, the points the lead appellants raised in relation to that correspondence plays no part in the analysis and decision set out in this Part.

Application of s 44(2)

97. In outline, Ms Redston submitted that, on the basis that s 44(1) applies, s 44(2) applies to capture both the Fee and the Profit Share receivable by each lead appellant in each relevant tax year. She relied on the decision in *Rangers* in support of that view. Mr Tallon seemed to suggest that was not the case on the basis that *Rangers* does not provide the answer to the particular statutory question in this case (although he raised this point in the context of a different issue).

98. In *Rangers,* the taxpayer company (RFC) was a member of group of companies which set up a trust arrangement for the remuneration of employees. When it wished to benefit an employee, it made a payment to a trust, asked the trustee to resettle the sum on to a sub-trust and requested that the sub-trust income and capital should be applied in accordance with the employee's wishes. The trustee had a discretion whether to comply with those requests, but, in practice, the trustee without exception created the requested sub-trust. The employee was appointed as protector of the sub-trust with the power to change its beneficiaries.

99. HMRC assessed RFC to tax on the basis that under the PAYE system it should have accounted for income tax and NICs on amounts paid into the main trust on the basis they comprised payments of emoluments/earnings from an employment. The Supreme Court unanimously decided in favour of HMRC. Lord Hodge gave the judgment with which the other Lords agreed.

100. Lord Hodge started with general comments on the correct approach to take to the construction of the relevant provisions:

(1) He noted, at [10], that the legislative code for the taxation of income has developed over time to reflect changing governmental policies in relation to taxation, to remove loopholes in the tax regime and to respond to the behaviour of taxpayers. He considered that as a result, "the legislative code is not a seamless garment but is in certain respects a patchwork of provisions".

(2) He said, at [11], that the courts at the highest level "have repeatedly warned of the need to focus on the words of the statute and not on judicial glosses, which may clarify or illustrate in a particular case but do not replace the statutory words".

(3) He continued, at [12] to [14] to explain that "another, more recent, judicial development in the interpretation of taxing statutes is the definitive move from a generally literalist interpretation to a more purposive approach". He said that this can be traced to the speech which Lord Nicholls of Birkenhead in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] STC 1 explained the true principle established in *W. T. Ramsay Ltd. V Inland Revenue Commissioners* [1982] A.C. 300 and the cases which followed it (citing [28], [32] and [34] of the decision in *Barclays*). He said that Lord Reed in *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005 ("*UBS*"), at [62], has helpfully summarised the significance of this approach in these terms:

> "First, it extended to tax cases the purposive approach to statutory construction which was orthodox in other areas of the law. Secondly, and equally significantly, it established that the analysis of the facts depended on that purposive construction of the statute."

(4) He summarised the position, at [15] as follows:

> "First, the tax code is not a seamless garment. As a result provisions imposing specific tax charges do not necessarily militate against the existence of a more general charge to tax which may have priority over and supersede or qualify the specific charge…Secondly, it is necessary to pay close attention to the statutory wording and not be distracted by judicial glosses which have enabled the courts properly to apply the statutory words in other factual contexts. Thirdly, the courts must now adopt a purposive approach to the interpretation of the taxing provisions and identify and analyse the relevant facts accordingly.

(5) He concluded, at [16], that accordingly the proper approach was, first, to interpret the relevant statutory provisions purposively and, secondly, to analyse the facts in the light of those statutory provisions so construed.

101. On that approach he concluded, at [41], that as a general rule, the charge to tax on employment income:

> "extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party. The legislation does not require that the employee receive the money; a third party, including a trustee, may receive it."

102. He said that whilst there are certain exceptions from this rule there is no exception as regards ss 62(2)(a) or (c) and noted, at [50], that the advice of the Privy Council in *Hadlee v Comr of Inland Revenue* [1993] AC 524 supports his conclusion. He continued, at [51], that it was also necessary to decide whether under the PAYE provisions there had been a "payment" of emoluments/earnings from which deductions were required. In that context he considered that misplaced reliance, of the type he had warned against, had been placed on judicial glosses in earlier cases on the meaning of the term "payment". Whilst the judicial gloss put upon that term gave

a sensible result in *Garforth v Newsmith Stainless Ltd* [1979] 1 WLR 409, that gloss was misapplied in *Aberdeen Asset Management plc v Revenue and Customs Comrs* 2014 SC 271 and *Sempra Metals Ltd v Revenue and Customs Comrs* [2008] STC (SCD) 1062) (see [52] to [57]).

103. He concluded at [58] and [59] that:

> "In summary, (i) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee; (ii) focusing on the statutory wording, [none of the relevant provisions]…. (except section 62(2)(b)), provide that the employee himself or herself must receive the remuneration; (iii) in this context the references to making a relevant payment "to an employee" or "other payee" in the PAYE Regulations fall to be construed as payment either to the employee or to the person to whom the payment is made with the agreement or acquiescence of the employee or as arranged by the employee, for example by assignation or assignment; (iv) the specific statutory rule governing gratuities, profits and incidental benefits in section 62(2)(b) of ITEPA applies only to such benefits; (v) the cases, to which I have referred above, other than *Hadlee*, do not address the question of the taxability of remuneration paid to a third party; (vi) *Hadlee* supports the view which I have reached; and (vii) the special commissioners in *Sempra Metals* (and in *Dextra*) were presented with arguments that misapplied the gloss in *Garforth* and erred in adopting the gloss as a principle so as to exclude the payment of emoluments to a third party.
>
> Parliament in enacting legislation for the taxation of emoluments or earnings from employment has sought to tax remuneration paid in money or money's worth. No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect….."

104. Applying the legislation to the facts Lord Hodge held, at [64], that the relevant provisions for the taxation of emoluments/earnings were and are "drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work". The scheme was designed to give each footballer access without delay to the money paid into the trust, if he so wished, and to provide that the money, if then extant, would ultimately pass to the member or members of his family whom he nominated. He concluded, therefore, that "having regard to the purpose of the relevant provisions….the sums paid to the trustee of the main trust for a footballer constituted the footballer's emoluments or earnings".

105. At [65], he said that the fact that there was a chance that the trust company as trustee of the main trust might not agree to set up a sub-trust and that as trustee of a sub-trust it might not give a loan of the funds of the sub-trust to the footballer, did not alter the nature of the payments to the main trust. That was on the basis that, in applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme it is legitimate to look to the composite effect of the scheme as it was intended to operate (citing *Inland Revenue Comrs v Scottish Provident Institution* [2004] 1 WLR 3172 at [23]). The footballers, when accepting the offer of higher net remuneration through the trust scheme which the side letters envisaged, were prepared to take the risk that the scheme might not operate as planned. The fact that the risk existed did not alter the nature of the payment to the trustee of the principal trust. Accordingly, he held, at [67], that payment to the trust should have been subject to deduction of income tax under the PAYE Regulations.

106. I am concerned here not with the general rules on the taxation of earnings from an employment but with the particular construction of s 44(2) as regards agency arrangements. However, adopting the correct approach to a purposive construction of the relevant provisions as that approach is explained in *Rangers*, s 44(2) is plainly broad enough to catch not only the Fee, as remuneration receivable under the agency contract (the Services Agreement) but also the Profit Share, as remuneration receivable in consequence of that agency contract. Read in the overall context of the agency rules, this provision is aimed at catching as "remuneration", monies receivable by the worker in return for the worker's personal services as a result of it having entered into the agency contract with the relevant third party:

(1) It is not disputed that the Profit Share is a sum which is intended as a reward for the lead appellant's services and that it was structured to arise as a Profit Share under the Partnership and Trust arrangements solely for the purposes of avoiding tax and NICs.

(2) The Profit Share would not have arisen but for the lead appellant agreeing under the Services Contract to provide his services to clients as the Partnership directed. That enabled the Partnership to receive income in respect of the provision of the lead appellant's services which was then allocated to the Trustee, as a partner in the Partnership, and paid by the Trustee to the lead appellant as the life tenant of the Trust.

Application of the PAYE rules

107. As regards the PAYE rules, as noted, it was not disputed that, (a) if s 44 applies to the arrangements, under the PAYE system the relevant Client was liable to account for income tax on the earnings which the relevant lead appellant is deemed to receive, (b) HMRC is out of time to issue a determination to the Client under regulation 80 to seek recovery of the income tax it was liable to account for, and (c) therefore, HMRC cannot make a direction under regulation 81 which would, in effect, absolve the Clients from liability to account for the tax and render the lead appellants liable to account for the tax.

Conclusion on Mr Johnson's position in the employment period

108. I have decided that Mr Johnson has not established that he was an employee of TPP or any related entity in the employment period. There are three cases of particular importance, which form the basis of the case law on when there is an employment contract:

(1) In *Ready Mixed Concrete (South East) Ltd v Minister for Pensions and National Insurance* [1968] 2 QB 497 MacKenna J set out the often quoted three stage test for there to be contract for services at page 515:

> "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

This formulation for the existence of a contract of service has been approved in a number of subsequent cases including by the Supreme Court in *Autoclenz v Belcher* at [18].

(2) In *Market Investigations Ltd v Minister for Social Security* [1969] 2 QB 173, Cooke J approached the question of whether there was an employment

contract by examining whether the individual in question was "in business on his own account".

(3) In *Hall v Lorimer* [1994] 1 WLR 209, STC 23 the court interpreted the approach in *Market Investigations Ltd* essentially as requiring a multi-factorial exercise.

109. It is clear that a contract of employment does not have to be in writing but in this case there is no evidence of the terms of any contract for the provision of Mr Johnson's services to TPP (or any other Focused entity) whether oral or in writing. Mr Johnson had no knowledge of any such contract. He assumed that he was an employee of TPP as it entered into the Services Agreement with the Partnership, it paid him a proportion of the Fee on a weekly basis after deduction of sums it showed in the relevant payslips as due in respect of income tax and Class 1 NICs, it issued him with a P60 and P45 and he received sick pay. Ms Redston submitted that these factors, together with the fact that HMRC issued Mr Johnson with coding notices applicable to an employee, suffices for the tribunal to conclude that Mr Johnson was an employee. However:

(1) I cannot see that the fact that TPP agreed to provide Mr Johnson's services to the Partnership raises a presumption that he was an employee of TPP (or of any related entity). A company which wishes to engage with an individual with a view to providing his services to another party does not necessarily have to engage that person as an employee. The fact is that nothing is known of any contractual relationship between Mr Johnson and TPP.

(2) Moreover, it is not clear whether in deducting income tax and NICs from sums paid to Mr Johnson and issuing him with a P60 and P45 TPP was acting on its own account, in the belief it was the employer of Mr Johnson, or as a payroll agent for another party which was thought to be his employer. If it was acting for another party, there is the same problem that nothing is known of any contractual relationship between Mr Johnson and that party.

(3) In any event, even if TPP did consider it was an employer (which, as noted, is not clear), whether a person is an employee is a matter of assessing the relationship between them and not what the parties consider the relationship to be. As Ms Redston pointed out the label which the parties choose to put on an arrangement is not determinative of its nature.

110. I do not accept Ms Redston's alternative argument that the requirements of s 44 were satisfied in relation to Mr Johnson in the employment period on the basis that the Intermediary Contract in place in that period constituted an "agency contract" as "a contract between the worker [Mr Johnson] and the third party [Reed] under the terms of which the worker [Mr Johnson] is obliged personally to provide services to the client [Matalan]":

(1) Whilst Mr Johnson was named in the Intermediary Contract and he signed it, the obligation was *on Focused* to provide Mr Johnson's services to Matalan in return for a fee from Reed. There was no direct obligation in this contract on Mr Johnson personally to provide his services to Matalan.

(2) In the Intermediary Contract, Mr Johnson is stated to be subject to certain obligations including that he would perform the services with due skill and care, keep matters confidential and would not solicit employees of Matalan. In my view there can be no implication that the imposition of these obligations on Mr Johnson means that this document subjected him to a contractual obligation, whether to Reed or Focused, to carry out the services in the first place. The fact that the document seeks to impose obligations on the worker who will

physically provide the services does not detract from the fact that another party is specified as the party who is contractually obliged to provide the worker's services.

NICs position

111. HMRC accepted that if the lead appellants are subject to tax on the relevant sums received under the arrangements under s 44, (a) the lead appellants were not subject to Class 4 NICs, (b) instead Class 1 NICs are due and, (c) HMRC cannot recover those sums from the lead appellants. Essentially HMRC did not challenge the lead appellants' analysis on the position in respect of Class 1 NICs as set out below.

112. The NICs earnings in respect of employment are governed by s 6 of the Social Security Contributions and Benefits Act 1992. Schedule 1 to that Act requires the employer, who pays earnings to an employed earner, to pay both the employer's and the earner's Class 1 NICs to HMRC.

113. Similar provisions to those in s 44 are contained in regulation 2(1) and 2(2) read together with para 2 of part 1 of schedule 1 of the Social Security (Categorisation of Earners) Regulations 1978 ("**the Categorisation Regs**"). These provide that a person who is not an employee, is deemed to be an employee for NICs purposes if (a) he renders, or is under an obligation to render, personal service, (b) he is subject to (or to the right of) supervision, direction and control as to the manner of rendering of such service, (c) he is supplied by some third person, and (d) the earnings are paid by or through the third person or on the basis of arrangements made with that third person. If those conditions are satisfied, the third person (the agency) has the obligation to deduct Class 1 NICs from the individual's earnings or to account for NICs.

114. HMRC has the power to assess the agencies to NICs and to transfer any under-deducted NICs to the employee/worker if: (a) "the failure was due to an act or default of the earner and not to any negligence on the part of the secondary contributor" or (b) the employee "knows that the secondary contributor has wilfully failed to pay" the employee contribution (under regulation 86 of the Social Security Contributions Regs SI 2001/1004).

115. The lead appellants submitted that, unlike under s 44, there is no requirement to identify the specific agency contract for NICs purposes. Hence if there is a UK agency involved in the arrangements between the lead appellants and the Client, that agency has the obligation to account for Class 1 NICs. On that basis, the liability to account for Class 1 NICs rested with (a) TPP as regards Mr Johnson in respect of the employment period, and (b) otherwise with the Recruitment Agents. They said that, in either case, there is no legal basis on which HMRC could collect Class 1 NICs from the lead appellants:

(1) HMRC has the power to assess the agencies to NICs and to transfer any under-deducted NICs to the employee/worker if: (a) "the failure was due to an act or default of the earner and not to any negligence on the part of the secondary contributor" or (b) the employee "knows that the secondary contributor has wilfully failed to pay" the employee contribution (under regulation 86 of the Social Security Contributions Regs SI 2001/1004).

(2) HMRC cannot apply regulation 86 as regards the Intermediaries because (a) on the facts, the failure of the UK agencies was due to their failure to understand their statutory obligations; it was not "due to" an act or default of the lead appellants, who were simply working as contractors via these UK agencies and (b) in any event, HMRC are out of time to apply this, as there is a six year time limit for assessing NICs, as confirmed by the High Court decision in *HMRC v Benchdolla*r [2009] EWHC 1310.

116. The lead appellants noted that if the Partnership/Trust is regarded as the agency, where the only agency is overseas with no place of business in the UK, the obligation to account for Class 1 NICs normally transfers to the end-client (under regulation 5(1) and para 2(c) of Column B in schedule 3 of the Categorisation Regs) and HMRC would have to issue a direction under regulation 86 before it could be payable by the employee/worker. However, where, as here, the agency is in the Isle of Man, the provisions of the Social Security (Isle of Man) Order 1977 apply, so that the Isle of Man Board of Social Security is instead responsible for collecting the relevant amounts.

Overall conclusion

117. For all the reasons set out above, therefore, I have concluded that:

(1) Mr Johnson has not established that he is taxable on the sums in dispute he received under the arrangements in respect of the first period as earnings under ss 10 and 62. On that basis, Mr Johnson is not overcharged by the s 28 amendments within the meaning of s 50(6)(a) TMA and remains liable to income tax and Class 4 NICs in respect of such sums as shown to be due in the s 28 amendments. This conclusion disposes of the appeal in respect of Mr Johnson's position in the first period.

(2) As regards the second period in Mr Johnson's case and, for all relevant tax years, in the case of Mr Lancashire and Mr Lee, disregarding the effect of the s 684 decisions and of the analysis of the TOAA provisions:

(a) All sums in dispute in those periods (both the Fees and Profit Share) are taxable as though they were earnings under s 44.

(b) There is no charge to Class 1 NICs on the lead appellants in respect of those sums.

(c) The Clients were liable to account for the income tax chargeable in respect of such sums under the PAYE regulations but failed to do so.

(d) HMRC are out of time to make a direction under s 81 in effect for the transfer of the liability to account for the income tax due to the lead appellants as they have not issued determinations to the Clients within the applicable time limits. On that basis, the terms of regulation 81 are not engaged.

Part D - Are the lead appellants overcharged by HMRC's assessments?

Overview

118. Given the conclusions set out above, the decision in this Part applies (a) in relation to Mr Johnson, only as regards the second period, and (b) in relation to Mr Lancashire and Mr Lee, as regards all relevant tax years.

119. There was no dispute that if the conclusions set out in Part C are correct, the income tax chargeable on each lead appellant's earnings in respect of each relevant tax year from 2003/04 to 2007/08, which the Clients should have but did not account for under the PAYE regulations (the tax credit), is to be taken into account in the computation under s 59B of tax payable by the lead appellant for that tax year, in effect, as a deduction from the overall tax assessed to be chargeable. HMRC considered that Mr Lee was not entitled to any such tax credit in respect of the 2002/03 tax year but I have concluded that a tax credit arose also in that period for the reasons set out below (see [135] and [136]).

120. At this stage of the analysis, the disagreement centres on whether the lead appellants have a right to appeal to the tribunal in relation to HMRC's failure to take any such tax credit into account in the s 28 amendments and, accordingly, whether the tribunal has the power to amend the s 28 amendments to take the tax credit into account.

121. All references in this Part to sections of legislation are to sections of TMA in place during the majority of the tax years in question and all references to regulations are to regulations of the 2003 regulations unless there is an express statement to the contrary. The parties seemed to be content to proceed on the basis that any variations in the legislation in place in the earlier years are not material except where I have specifically indicated to the contrary.

Relevant legislation – self assessment

122. In summary, a taxpayer is required to include in his tax return for a tax year a self-assessment of the capital tax and income tax which is *chargeable* on him and the income tax which is *payable* by him in respect of that year as provided for under s 8 and s 9.

123. Section 8 requires a taxpayer to provide a self-assessment tax return where HMRC gives him notice to do so as follows:

> "(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board -
>
> > (a) to make and deliver to the officer…a return containing such information as may reasonably be required in pursuance of the notice…
>
> (1AA) For the purposes of subsection (1) above—
>
> > (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
> >
> > (b) *the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) of ITTOIA applies…..*
>
> (5*) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income*." (Emphasis added.)

124. Under s 9(1) a taxpayer is required to include assessments in every return made under s 8 as follows:

> "(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
>
> (b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and *the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) of ITTOIA 2005 applies*……

> but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of [provisions not relevant to the present appeal].” (Emphasis added.]

Relevant legislation – enquiries, closure notices and appeals

125. The self-assessment tax regime essentially operates on a “process now - check later basis”:

(1) For each tax year a person is required to pay (a) sums on account of income tax during the tax year and (b) (i) capital gains tax and (ii) any balance of income tax payable shortly after the end of the tax year according to the figures set out in his return as set out in ss 59A and 59B TMA.

(2) Within a specified time limit, a person can amend a return made under s 8 by notice to an officer of the Board and an officer of the Board can amend such a return to correct (a) an obvious error or (b) anything else in the return that the officer has reason to believe is incorrect.

(3) Under s 9A(1), HMRC have the power to enquire into a return made under s 8 within a specified time limit. An enquiry may extend, among other matters to “anything contained in the return, or required to be contained in the return, including any claim or election included in the return” (under s 9A(4)(a)).

(4) Such an enquiry “is completed when an officer of the Board by notice (a “closure notice”) informs the taxpayer that he has completed his enquiries and states his conclusions” (under s 28A(1)). A closure notice must either “(a) state that in the officer’s opinion no amendment of the return is required, or (b) make the amendments of the return required to give effect to his conclusions” (under s 28A(2)). As noted, I refer to an amendment made to a return under s 28A as a “s 28 amendment”.

(5) Otherwise, HMRC have limited powers to issue discovery assessments where certain conditions are satisfied (under s 29) or to recover overpayments of tax (under s 30).

126. Under s 31(1)(b), a taxpayer is given a right of appeal to HMRC against “any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return)”. A notice of an appeal made under s 31 must be given in writing within 30 days after the closure notice was issued to the officer by whom the closure notice was given and must specify the grounds of appeal (under ss 31A(1), (3) and (5)). On the hearing of the appeal, the tribunal may allow the taxpayer to put forward grounds not specified in the notice, and take them into consideration, if satisfied that the omission was not wilful or unreasonable (under s 31A(6)).

127. Sections 49A to 49I set out provisions as to the process for notifying an appeal to the tribunal. Whichever of these sections applies, where the appeal is notified to the tribunal, the tribunal is to decide “the matter in question” which (under s 49I(1)(a)) means “the matter to which an appeal relates”.

128. Section 50 sets out the tribunal’s powers on an appeal to it which includes the following provisions:

> “(6) If, on an appeal notified to the tribunal, the tribunal decides -
>
> > (a) that, ... the appellant is overcharged by a self-assessment;
> >
> > (b) … ; or
> >
> > (c) that the appellant is overcharged by an assessment other than a self-assessment,

the assessment…shall be reduced accordingly, but otherwise the assessment …. shall stand good."

129. It was not disputed that the reference in s 50(6)(a) to a self-assessment at least includes a reference to a self-assessment as amended by HMRC on the issue of a closure notice under s 28A. A taxpayer cannot appeal his own self-assessment; but can appeal where a closure notice results in an amended assessment showing an increase in the assessment.

Relevant legislation – payment and interaction with the PAYE rules

130. The requirement for a taxpayer to pay tax in respect of a tax year is set out in (a) s 59A TMA as regards payments on account of income tax due for that year, and (b) s 59B as regards (i) capital gains tax for that year, (ii) any balance of income tax for that year, and (iii) further payments due in other circumstances such as following amendments made by HMRC to a self-assessment or when they issue a discovery assessment.

131. In outline, under s 59A:

(1) A taxpayer is required to make two payments on account of his liability to income tax for a tax year by 31 January in that year and the 31 July immediately following the end of that year of an amount equal to 50% of "the relevant amount" if:

(a) as regards the immediately preceding year, he was assessed to income tax under s 9 in any amount; and

(b) that amount exceeds the amount of any "income tax which was deducted at source", where the amount of the excess (the relevant amount) exceeds certain thresholds.

(2) It is stated that PAYE regulations may provide that, for the purpose of determining the amount of any such excess, any necessary adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations (under s 59A(10)).

132. The relevant parts of s 59B read as follows:

"(1) Subject to subsection (2) below, the difference between -

(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and

(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,

shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of [a number of provisions which are not in point]

(2) The following, namely –

(a) any amount which, in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and

(b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year, or is a tax credit to which section 397(1) of ITTOIA 2005

shall be respectively deducted from and added to the aggregate amount mentioned in sub-section (1)(b).

(3)….

(4) In any other case, the difference shall be payable or repayable on or before the 31st January next following the year of assessment.

(5) An amount of tax which is payable or repayable as a result of the amendment or correction of a self-assessment under -

> (a) section 9ZA, 9ZB, 9C or 28A of this Act (amendment or correction of return under section 8 or 8A of this Act)…

is payable (or repayable) on or before the day specified by the relevant provision of Schedule 3ZA to this Act

(5A)-(6)….

(7) In this section *any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income*.

(8) *PAYE regulations may provide that, for the purpose of determining the amount of the difference mentioned in subsection (1) above, any necessary adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations*." (Emphasis added.)

133. Pursuant to s 59A(10) and s 59B(8), regulation 185 applies to make adjustments to "the amount of tax deducted at source under PAYE regulations" for the purposes of ss 59A and 59B. Regulation 185 provides as follows:

"(1) This regulation applies for the purpose of determining -

> (a) the excess mentioned in section 59A(1) of TMA (payments on account of income tax: income tax assessed exceeds amount deducted at source), and
>
> (b) the difference mentioned in section 59B(1) of TMA (payments of income tax and capital gains tax: difference between tax contained in self-assessment and aggregate of payments on account or deducted at source).

(2) For those purposes, *the amount of income tax deducted at source under these Regulations is the total net tax deducted during the relevant tax year ("A") after making any additions or subtractions required by paragraphs (3) to (5*).

(3) Subtract from A any repayments of A which are made before the taxpayer's return and self-assessment is made under section 8 or 8A of TMA (personal return and trustee's return).

(4) Add to A any overpayment of tax from a previous tax year, to the extent that it was taken into account in determining the taxpayer's code for the relevant tax year.

(5*) Add to A any tax treated as deducted, other than any direction tax,* but—

> (a) only if there would be an amount payable by the taxpayer under section 59B(1) of TMA on the assumption that there are no payments on account and no addition to A under this paragraph, and then
>
> (b) only to a maximum of that amount.

(6) In this regulation -

"*direction tax" means any amount of tax which is the subject of a direction made under regulation 72(5) or regulation 81(4) in relation to the taxpayer in respect of one or more tax periods falling within the relevant tax year*;

"relevant tax year" means -

(a) in relation to section 59A(1) of TMA, the immediately preceding year referred to in that subsection;

(b) in relation to section 59B(1) of TMA, the tax year for which the self-assessment referred to in that subsection is made;

"*tax treated as deducted" means any tax which in relation to relevant payments made by an employer to the taxpayer in the relevant tax year—*

(a) the employer was liable to deduct from payments but failed to do so, or

(b) *the employer was liable to account for in accordance with regulation 62(5) (notional payments) but failed to do so*;

"the taxpayer" means the person referred to in section 59A(1) of TMA or the person whose self-assessment is referred to in section 59B(1) of TMA (as the case may be)." (Emphasis added.)

134. It was not disputed that, on the basis of the analysis set out above:

(1) regulation 185 is to be read on the basis that the relevant Client is the employer and the relevant lead appellant is the employee and as though relevant payments include notional payments of PAYE income; and

(2) the effect of regulation 185, therefore, is that in determining the tax payable by the lead appellants under ss 59B(1) and s 59B(2) for each relevant tax year "any income tax which in respect of that year has been deducted at source" specifically includes the income tax which the Clients were liable to account for in accordance with regulation 62(5) but failed to do so on the basis that it does not constitute "direction tax" (meaning income tax which is the subject of a direction made by HMRC under regulation 72(5) or 81(4)).

135. Earlier PAYE rules are in point as regards Mr Lee only in relation to the tax year 2002/03. In that tax year, the relevant rules relating to "notional payments" were in the Income Tax (Employments) (Notional Payments) Regulations 1994/1212 (the "**Notional Payment Regulations**") which linked in with the previous Income Tax (Employment) Regulations 1993/744 (the "**1993 Regulations**"):

(1) Regulation 13(1) of the Notional Payment Regulations provided that (amongst other regulations) regulation 101 of the 1993 Regulations "shall apply to amounts accounted for in respect of notional payments….. as they apply in relation to deductions from actual payments" subject to certain modifications which are not in point.

(2) Regulation 101(2) of the 1993 Regulations provided that if the tax payable under an assessment (broadly an assessment other than a self-assessment) exceeded the total net tax deducted from an employee's emoluments during the tax year (less any subsequent repayments made) the Inspector may require the person to pay the excess to HMRC (instead of taking the excess into account in determining the appropriate code for a subsequent year).

(3) Under regulation 101(3) of the 1993 Regulations for the purpose of determining the amount of the excess under regulations 101(2), "any necessary adjustment" was to be made to the total net tax deducted in respect of specified matters which included, under regulation 101(4) "any tax which the employer was liable to deduct from the employee's emoluments but failed so to deduct…."

(4) Regulation 101A of the 1993 Regulations contained similar provisions to those in regulation 185 for determining "the amount of the difference" in s 59B (and the excess in s 59A) by the making of "necessary adjustments" to the amount of tax deducted at source in accordance with the regulations. The

necessary adjustments included "the like matters as are specified in paragraph (4) of regulation 101", including, therefore, an adjustment for "any tax which the employer was liable to deduct from the employee's emoluments but failed so to deduct".

136. HMRC argued that under regulation 101A of the 1993 Regulations there is a tax credit only if the relevant employer/deemed employer was liable to deduct income tax from actual PAYE income and not, as they submit is the case here, where the employer/deemed employer was liable only *to account* for the relevant tax under the regulations relating to notional payments. However, I agree with the lead appellants that the effect of the provision in regulation 13(1) of the Notional Payment Regulations (that regulation 101 of the 1993 Regulations is to apply to notional payments as it applies to relation to deductions from actual payments) means that regulation 101(4) of the 1993 Regulations is to be read as though it includes any tax which the employer/deemed employer was liable to account for under the notional payment rules as well as tax that any such party was liable to deduct.

Submissions

137. The dispute between the parties centres on whether, in making for each relevant tax year their self-assessments of income tax payable under s 9(1)(b), the lead appellants were entitled and required to take the relevant tax credit arising in respect of that tax year into account as "income tax treated as deducted".

138. In the lead appellants' view:

(1) The reference to income tax "treated as deducted" is to be given a consistent meaning wherever it is used in the TMA, namely, as including a tax credit arising under the regulation 185(6) or regulation 101A of the 1993 Regulations. That produces a result which is entirely logical and consistent with the manner in which the self-assessment system and appeal process is intended to work. Ms Redston said that this is supported by:

(a) Regulations 72(6) and 81(5), which both state that: "If a direction is made, the amount of tax must not be added under regulation 185(5) or 188(3)(a) (*adjustments for self-assessments and other assessments*) in relation to the employee" (emphasis added). The highlighted wording encompasses the entire self-assessment machinery and not just s 59B.

(b) The current regulations 72 E (5)(6) and (7) albeit these were not in place at the relevant time.

(c) The principle of interpretation, as set out in the leading textbook Bennion on statutory interpretation, that where the same phrase is used in different places in a statute, there is a presumption that the phrase is to be given the same meaning.

(2) Accordingly, the lead appellants are entitled in effect to "credit" for the tax credit which they should have included in their self-assessment of income tax payable in their relevant returns. As HMRC have not taken the tax credit into account in the increased tax shown as chargeable on and payable by the lead appellants in the s 28 amendments, the lead appellants are "overcharged" by those amendments within the meaning of s 50(6)(a). The UT decision in *Walker v HMRC* [2016] UKUT 32 ("*Walker*") has established that a person may be "overcharged" for the purposes of that provision if, in amending a return, HMRC fail to take account of sums which the taxpayer should have taken into account in his self-assessment of income tax payable. Further details of this case are set out below.

(3) The tribunal can, therefore, amend the lead appellants' returns (as amended by HMRC under the s 28 amendments) to correct the over-charge, so that the returns properly reflect the amount of tax due and payable.

(4) Moreover, the analysis accords with HMRC's published guidance at SAM142020 which reads as follows:

> "Before completing his or her return, the taxpayer may seek your advice regarding an apparent under- deduction of tax by the employer, and the PAYE tax credit to be shown in the SA return. Regulation 185(5) entitles the taxpayer to credit for sums the employer was liable to deduct, but failed so to do, unless there is a direction that the tax shall be recovered from the employee.
>
> When advising the taxpayer of the estimated credit to enter on the return, you should also use function AMEND TAXPAYER SIGNALS to set the No Repayment signal on the SA record. This will ensure that no repayment is made automatically. In the event of the return calculation giving rise to an overpayment, the case is entered on the 'Inhibited Automatic Repayment' work list for review."

(5) It is clear from the guidance that HMRC consider that taxpayers are to include any tax credit in their self-assessment calculation. However, in the situation described in the guidance where there is no P60 or P45, HMRC staff are instructed to ensure that any repayment created as a result of the taxpayer including such a sum in his self-assessment is inhibited until they have checked that the claimed sum in fact relates to earnings in respect of which there is a tax credit. That is a practical step to reduce the risk of fraud; the principle that a tax credit is to be included as part of the return is unaffected by this common-sense check.

(6) It would be very odd if a taxpayer is not required to take a tax credit into account in his self-assessment of income tax payable set out in his return given that he is plainly required to take such tax credits into account in his computation of payments of account which are required to be included in the return.

139. In HMRC's view:

(1) Any tax credit is only to be taken into account in computing sums payable or repayable as provided for in s 59B (or under s 59A). Regulation 185 specifically applies only to make adjustments to the amount of income tax treated as deducted at source for the purposes of *those provisions*; it does not apply to s 8 and s 9.

(2) Section 59B operates as a charging provision which is separate to and independent of the self-assessment provisions in s 8 and s 9. A taxpayer has no right to appeal to the tribunal as regards HMRC's asserted failure incorrectly to take the tax credit into account under s 59B. That is clear from the UT's comment in *Walker* that s 59B "is not justiciable before the FTT, being concerned with matters of collection and enforcement".

(3) Accordingly, there can be no question that the lead appellants are "overcharged by a self-assessment" within the meaning of s 50(6)(a), as a result of HMRC not taking any tax credit into account in the s 28 amendments. Those amendments necessarily relate only to matters which are or ought to have been included in the lead appellants' relevant self-assessments of income tax chargeable or payable by them, which, for the reasons given, does not include any tax credit.

(4) This interpretation is supported by the earlier relevant regulations in the 1993 Regulations (see above).

(5) The guidance Ms Redston referred to is practical guidance which does not override the effect of the legislation. Given regulations 72 E and F only came into effect after the periods in question, they cannot shed any light on the position.

140. Ms Redston responded that HMRC did not cite any authority in support of their contention that it is possible to rely on the earlier regulations referred to. She said that the normal position is that consolidation statutes are to be read without reference to the earlier provisions and, in any event, these provisions support the lead appellants' stance in that their effect is that the employee is to include any tax credit in his self-assessment of income tax payable. She noted that the heading of regulation 101A refers to self-assessment returns.

Caselaw

141. The parties each drew very different conclusions, in support of their contentions, from the UT's decision in *Walker*. This case establishes that a taxpayer may be "overcharged" within the meaning of s 50(6)(a) by an amendment made by HMRC under s 28A to the taxpayer's self-assessment of income tax payable (as well as by an amendment to the self-assessment of income tax chargeable) (b) including where any such amendment is made to the amount of any income tax the taxpayer has self-assessed to be repayable to him. In my view, however, as explained below, the decision does not provide an answer to the particular issue in this case.

142. As set out in the tribunal's decision at [9], the facts were as follows:

(1) In his tax return for the tax year 2011/12, Mr Walker showed a repayment of tax due to him of £6,040 which included £6,627.25 of tax which he claimed had been deducted by three contractors by whom he was engaged as a sub-contractor under the construction industry scheme ("**CIS**").

(2) In outline, under CIS, a contractor must make a deduction from certain payments to sub-contractors (a "**CIS deduction**") which must be paid to HMRC. A CIS deduction is to be treated for income tax purposes (a) as not diminishing the amount of the payment and, (b) where the subcontractor is an individual, (i) as income tax paid in respect of the subcontractor's relevant profits or, (ii) as regards any excess which is required to discharge any liability for Class 4 NICs, as a Class 4 NIC in respect of those profits (under s 62(2) and s 62(3) of the Finance Act 2004).

(3) HMRC made the claimed repayment but on issuing a notice closing their enquiries into Mr Walker's return under s 28A, they amended his return (amongst other matters) to reflect their view that Mr Walker had overstated the CIS deductions which (taking into account other adjustments) meant that he was owed a repayment of £821.07 only.

143. On the appeal to the tribunal, the tribunal calculated, at [25], that in fact £3,781 was repayable to Mr Walker by HMRC, in their view under s 59B on the basis that the CIS deductions totalled £7,724. They made that finding, at [23], on the basis Mr Walker received payments from the relevant contractor after deductions made under the CIS rules. In their view, the CIS deductions qualified to be treated as income tax paid for the purposes of the CIS rules notwithstanding that it appeared that the sums had not actually been handed over to HMRC; on their interpretation of the rules it sufficed that the subcontractor understood that CIS deductions had been made (see [41] to [44]).

144. The tribunal decided, however, that it had no power to amend Mr Walker's return in order to reflect what, on its findings of fact, were the correct figures. They made the following main points:

(1) As s 9 requires an assessment of not just the amount chargeable to income tax but also the amount payable "the amounts so deducted [under CIS] can, in whole or in part depending on the circumstances, contribute to or constitute an amount repayable" (see [29] and [30]).

(2) The use of the word "charge" in s 50 seems to refer only to s 9(1)(a) as regards the self-assessment of tax chargeable but it would not be correct to limit s 50 in that way. PAYE is an obvious case where the correct amount of income tax to be deducted may be in issue such as where "the employer fails to deduct the right amount of PAYE so that paragraph (b) of the definition of "tax treated as deducted" in regulation 185(6)….applies…." (see [31]). I note that in making these comments, the tribunal seemed to assume that a taxpayer is required to take tax falling within regulation 185(6) into account in a taxpayer's self-assessment of income tax payable.

(3) A consequence of this interpretation of "charge" as covering s 9(1)(b) is, at [31], that:

> "there is no scope for saying that any amount is "charged" if the tax deducted at source exceeds the amount in which the person is chargeable to income tax. It seems to us irrelevant so far as s 50 is concerned that a self-assessment (including as amended) may show an amount repayable. Such an amount is given effect to under s 59B TMA and that section is not justiciable before this Tribunal, whether it provides for an amount to be payable or repayable."

(4) That there was no net amount of tax chargeable or payable on the original self-assessment and HMRC's amendments did not alter the position, at [33], and:

> "…the amount in which the appellant was charged by the amended self-assessment was nil. We have…decided that the amount in which the appellant ought to be charged was also nil. Accordingly in terms of s 50(6) TMA the assessment stands good (at nil)".

(5) HMRC did not agree with this (see [34]). They added to the self-assessment statement the difference between the repayment shown in the self-assessment and the amount in the calculations attached to their closure notice and stated that that amount was payable by Mr Walker. The tribunal suggested, at [36], that HMRC may be able to recover that amount under s 30 relating to recovery of overpayments of tax.

145. The UT did not agree with the tribunal's analysis. The UT set out details of the relevant legislation and their observations included that:

(1) At [13], a CIS deduction constitutes income tax "treated as paid" for the purposes of s 9(1)(b) as a result of the CIS provisions set out above.

(2) At [16], the tailpiece to s 9(1) envisages the possibility of a self-assessment showing an amount as repayable subject to the exclusion of certain items from that treatment but CIS deductions are not within that exclusion. A self-assessment return can, therefore, show as repayable an excess of CIS deductions over the income tax which would otherwise be payable.

(3) At [25], s 59B(1) "envisages the possibility not only of a payment by a taxpayer to HMRC but also of a payment to a taxpayer by HMRC, in each case based on the figures contained in the original self-assessment return" (and ss

> 59B(2) and (3) make provision for the timing of the payment or repayment). They also noted that s 59B(5) applies where there is an amendment or correction to a self-assessment return under sections 9ZA or 28A which results in an amount of tax becoming payable or repayable; it makes provision for the timing of the payment or repayment of that amount

146. They continued, at [27], that (a) Mr Walker's original self-assessment return showed an amount of income tax due and, had it not been subject to an enquiry, "there is no doubt that the sum owing to him, the amount "repayable" within s 59B(1), would have been £6,040" and (b) likewise, if he had not appealed against the closure notice, the amount repayable under that section (ignoring for the moment the £6,040 actually paid) would have been £821.07 shown in the amendments made by HMRC. However, on the appeal, the tribunal's findings of fact resulted in an entitlement to repayment of £3,781 meaning that Mr Walker had been overpaid by HMRC £2,259 (the difference between £6,040 and £3,781 calculated to be repayable by the tribunal).

147. At [28], the UT explained that HMRC have a policy of "process now, check later" and that under this policy:

> "where an individual's self-assessment return shows an amount owing to the taxpayer, HMRC give effect to that return by making a payment to the taxpayer of the amount shown. HMRC's position is that, if it subsequently transpires that the payment should not, either in whole or in part, have been made, they are entitled to recover the overpayment. This is so, in particular, in the situation where a closure notice results in an amendment to the return which shows that an overpayment has been made."

148. They continued in the same passage that any dispute on HMRC's position would need to be resolved in enforcement proceedings. However, their view:

> "(without deciding the point) is that HMRC's position is correct. *In other words, the rights of the taxpayer and HMRC in relation to payment and repayment are determined by the contents of the self-assessment return as amended from time to time*." (Emphasis added)

149. They said, at [29], that on that approach, if Mr Walker had not appealed the closure notice, the amount of tax shown as overpaid on the self-assessment return would have been £821.07. This would have formed the basis of the account between HMRC and Mr Walker with the result that HMRC would be entitled (assuming HMRC are correct in their view as set out above) (i) to take credit for the difference between that figure and the £6,040 in fact paid when striking the balance owing one way or the other and (ii) accordingly to recover anything then shown to be owing to them.

150. They said, at [30], that HMRC contended that the position is no different when the correct figures are established as the result of an appeal from a closure notice; once the tribunal has decided as a matter of fact what the correct figures are, the tribunal must give effect to those conclusions by amending the self-assessment return. Once that is done, the position is no different in principle from that which obtains in relation to any other amendment to the return.

151. At [31], the UT referred to the following comments on the provisions in s 50 made by Henderson J in *Tower MCashback LLP v HMRC* 80 TC 641 at page 735:

> "… the wording of section 50(6) and (7), which applies alike to appeals relating to self-assessments and appeals against assessments made by an officer of HMRC, reflects similar wording of very long standing which goes back long before the introduction of self-assessment. *There is a venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax, and it is one of the duties of the*

> *Commissioners in exercise of their statutory functions to have regard to that public interest*."

152. At [32] the UT noted that the highlighted sentence above was expressly approved by Lord Walker in the Supreme Court (80 TC 641, at [15]) and said, at [33], that, given that general principle, ss 50(6) and (7) "should be construed, insofar as their language sensibly allows, so as enable the FTT to amend a self-assessment return to give effect to the decision which they have made in relation to an appeal which is properly before them". They noted that the tribunal had made its findings on an appeal properly before them and that it would "be a surprising result if the FTT were then unable to give effect to its findings by amending the return".

153. They continued, at [37], to agree with the tribunal that s 50(6)(a) is not restricted to an "overcharge" in the amount of tax chargeable assessed in accordance with s 9(1)(a) but also includes an excessive assessment of tax payable in accordance with s 9(1)(b). They said this would occur, for example where:

> "(i) the original assessment shows a positive amount *as payable* by way of income tax (ii) an amendment by HMRC increases that amount, for instance by disallowing part of a claim for tax deducted at source but (iii) the FTT finds on appeal that the taxpayer was entitled to the full deduction which he claimed. In such a case, the taxpayer is "overcharged" within the meaning of section 50(6)(a) by the amended assessment; and what he is overcharged to is the amount "payable" by way of income tax within section 9(1)(b)….."

154. At [39], the UT agreed with the tribunal's view that s 59B is not justiciable in the tribunal "being concerned with matters of collection and enforcement" but said "that is beside the point". The appeal was against the conclusions of the closure notice and the issue was whether the tribunal's findings of fact could be given effect by an amendment to the self-assessment return (as amended by HMRC). In their view, the "impact of such an amendment on the parties' respective rights and obligations under section 59B as a result of such an amendment is an entirely separate, and subsequent, matter."

155. The UT continued, at [40], that an amount may be shown in a self-assessment return as income tax repayable, for instance where CIS deductions exceed the income tax which would otherwise be payable. In their view, the word "payable" in s 9(1)(b) is apt to include "repayable" and:

> "Just as "overcharge" in section 50(6)(a) includes an over-assessment under section 9(1)(b) of amounts payable…..so too "overcharge" in section 50(6)(a) includes, in our view, an under-assessment of amounts repayable by HMRC: if a taxpayer receives less by way of repayment than he is entitled to receive, he can properly be described as having been overcharged……"

156. They also disagreed, at [42], with the tribunal's view that the amount in which the appellant was assessed to tax was nil. They noted that the assessment required by s 9(1)(a) is of the amount in which Mr Walker was charged to tax and that on any view he was undercharged (as could be corrected under s 50(7)(a)). As regards the assessment of the amount of tax payable:

> "The amount of tax actually payable by Mr Walker (in contrast with repayable to him) may be nil; but the amount of the assessment required by section 9(1)(b) can result in a repayment to Mr Walker. This was the position under both his original assessment and under HMRC's amended assessment. It would also be the case if the FTT were able to amend the assessment to reflect its own figures. None of these results in a nil assessment of the amount payable including an amount repayable."

157. At [43], the UT concluded that their "interpretation does not put any, or any undue, strain on the words used in section 50(6) and (7); it produces a sensible result" whereas the tribunal's conclusion had "the startling consequence that it is unable to afford a remedy to Mr Walker".

158. At [44] the UT said that their interpretation results in a sensible application of section 59B:

> "Once an amendment is made to the self-assessment return by section 50(6) and (7), section 59B then applies to the amended return just as it does to an original return or to an amendment following a closure notice which is not appealed. Section 59B(5) expressly contemplates (in paragraph (a)) an amendment to a self-assessment under section 28A as the result of a closure notice. We prefer a construction of section 50(6) and (7) which allows all amendments under section 28A to be brought within section 59B(5). The FTT saw the provision as directed mainly at those cases where an increase of tax results from an amendment. That may be so, but that is no reason to adopt a restrictive interpretation of section 50(6) and (7)."

159. At [45] the UT also rejected the apparent reliance by the tribunal on the possible alternative route said to be open to HMRC, namely an assessment under s 30 TMA. The UT said that it may be that, in some circumstances, that section could be relied on, but in others it could no and in that case there was nothing to support a suggestion that HMRC could have relied on s 30:

> "There may be reasons why HMRC are in practice unable to recover the amounts which, according to the return in the form in which it remains after the Decision, they are entitled. Mr Walker's defence to a claim for the full amount would not be straightforward and would, in essence, depend on the enforcement of public law rights against HMRC, alleging unreasonable conduct in attempting to enforce an amount of tax which ought not properly to be due. We would strive to avoid forcing HMRC and Mr Walker along such a path. Our interpretation of the relevant provisions avoids this result."

Discussion and conclusion

160. In summary, the question is whether, s 9 and s 59B (as it applies in conjunction with regulation 185) operate on the basis that:

(1) as the lead appellants argued, the lead appellants were entitled and required under s 9(1)(b) to take the tax credit arising in each relevant tax year into account in their self-assessments of income tax payable for that year with the result that:

(a) they have the right to appeal to the tribunal against HMRC's failure to take the tax credit into account in their s 28 amendments to those self-assessments, and

(b) they are plainly "overcharged" by the s 28 amendments within the meaning of s 50(6)(a) so that the tribunal has power to correct the position under that provision; or

(2) as HMRC argued, any right the lead appellants have for the tax credit to be taken into account arises only under s 59B(1) which operates, separately and independently from s 9, as the mechanism for the charging of tax, with the result that:

(a) the s 28 amendments cannot be taken to relate to the tax credit. HMRC can only make amendments under s 28A in respect of sums which are or which ought to have been included in the lead appellants self-assessments for the relevant tax years, and

(b) the lead appellants accordingly have no right to appeal to the tribunal against any failure by HMRC to take the tax credit into account. In HMRC's view, any such argument could only be raised by the lead appellants in defence of any enforcement proceedings brought by HMRC in seeking to recover the additional income tax they have found to be due.

161. Reading s 9 in the context of the wider tax code, it is apparent that in drawing a distinction between income tax *chargeable* and that *payable*, the legislature is acknowledging that, under the income tax code, there are a number of instances where a party other than the taxpayer is required to deduct and/or account for sums in respect of income tax chargeable on a taxpayer's income (or where the taxpayer is entitled to a credit for tax chargeable or income tax is to be treated as paid). The distinction is plainly, therefore, as accords with the normal meaning of the terms used, between income tax which the tax statutes specify the taxpayer is in principle liable for and income tax which the taxpayer actually has to hand over to HMRC.

162. Section 9(1)(b) is framed in general terms to require an assessment of income tax payable as the difference between income tax self-assessed to be chargeable for the year of assessment (the tax year) and, for that year of assessment, "the aggregate amount of any income tax deducted at source" (as defined in s 8 to include income tax treated as deducted and income tax treated as paid) and any relevant tax credits. There is no guidance on the computation of "income tax deducted at source", therefore, other than that it must be *for* the tax year.

163. This works in a straightforward manner as regards tax which is actually deducted by an employer from an employee's earnings under the PAYE system only in respect of income tax chargeable on the relevant earnings which are taxable for the relevant tax year. To take a simple example, if an employee receives £100 of earnings in a tax year from which his employer has deducted £35 under the PAYE system in respect of tax chargeable on those earnings, assuming the employee is subject to tax at 40%, he should self-assess £40 of income tax chargeable but only £5 of income tax payable (£40 less £35). However, under the detailed PAYE and coding system the position will often be more complicated. That is because, for example, in a particular tax year the PAYE system may require employers to deduct or account for tax relating to earnings which are taxable in other tax years or to deal with overpayments or underpayments of income tax due in respect of other tax years.

164. The self-assessment provisions in ss 8 and 9 do not themselves impose the obligation on the taxpayer to pay tax to HMRC. Sections 59A and 59B together provide the statutory mechanism whereby capital gains tax and income tax is actually charged on individual taxpayers and thereby for HMRC to seek to enforce the sums due:

(1) Section 59A set out the methodology for the computation of sums due as payments on account of income tax payable for a tax year and the dates on which such sums must be paid.

(2) Section 59B performs a number of functions relevant to the issue in this case:

(a) (i) It sets out how the capital gains tax and income tax payable by (or repayable to) a taxpayer for a tax year is to be computed (under s 59B(1) and s 59B(2)), and (ii) imposes an obligation on the taxpayer to pay the resulting sum by a specified date (which, under s 59B(4) is usually 31 January following the tax year in question); and

(b) It specifies the dates for the payment or repayment of an amount of tax which "is payable or repayable as a result of the amendment or correction" of a self-assessment, including an amendment made under s 28A (under s 59B(5)). This plainly operates on the assumption that the tax payable or repayable in those circumstances is that stated in the correction or amendment made by HMRC.

165. As might be expected having regard to the overall scheme of the self-assessment system, the computation of tax payable or repayable for any tax year under s 59B(1) is closely linked to the taxpayer's self-assessment under s 9:

(1) Section 59B(1) provides for the computation of a single overall sum representing the aggregate of capital gains tax and income tax payable by or repayable to a taxpayer for a tax year. That single sum is computed as the difference between:

(a) the capital gains tax and income tax which the taxpayer self-assesses to be chargeable for that year (under s 59B(1)(a)), and

(b) the aggregate (i) as ties in with the income tax payable portion of a taxpayer's self-assessment under s 9(1)(b), of "income tax which in respect of that year has been deducted at source", as defined to include income tax which is "treated as deducted from any income" or "treated as paid on any income", and (ii) payments on account made in respect of that year (whether under s 59A or otherwise) (under s 59B(1)(b)).

(2) I note that:

(a) Section 59B(1)(a) simply refers to the amount of capital gains tax and income tax contained in the self-assessment under s 9 for that year; it does not specifically distinguish between an assessment under s 9(1)(a) or s 9(1)(b). However, viewed in the context of the overall provision, the only sensible interpretation is that it refers to taxes contained in the self-assessment made under s 9(1)(a).

(b) In computing the overall tax payable by the taxpayer for a tax year, payments on account plainly need to be deducted from the tax otherwise chargeable on the taxpayer because they are advance payments of income tax made, in effect, on an estimated basis of the income tax due.

(3) Unlike s 9(1)(b) which simply contains a general reference to "income tax deducted at source" *for* the year of assessment, s 59B fleshes out precisely how to compute the "income tax deducted at source" which is properly attributable to income taxable in the relevant year. Hence, it takes as the starting point "income tax which in respect of that year *has been deducted* at source" and, provides for the deduction from or addition to that sum respectively of any amount which (i) in the year of assessment, is deducted at source under PAYE regulations in respect of a previous year, and (ii) in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year (under s 59B(2)).

(4) Further adjustments are provided for, in effect, under s 59B(8) which states that PAYE regulations may provide that, for the purpose of s 59B(1), "any *necessary* adjustments in respect of matters prescribed by the regulations shall be made to the amount of tax deducted at source under PAYE regulations". Those "necessary adjustments" are made by regulation 185 which provides that the income tax deducted for a tax year is the "total net tax deducted from the relevant tax year" and requires the addition to or subtraction from that sum of specified amounts:

(a) Regulations 185(3) and 185(4), require (i) the subtraction from that sum of any repayment of net tax deducted before the return is made, and (ii) the addition to that sum of any overpayment of tax from a previous year (where it was taken into account in the tax code for that year). These adjustments are "necessary" in the sense of ensuring, therefore, that in computing the tax actually payable by the taxpayer, the taxpayer does not obtain credit for tax which has already been repaid but does receive credit for overpayments from previous years.

(b) Regulation 185(5) requires the addition to that sum of "income tax treated as deducted" other than any "direction tax" (as those terms are defined in regulation 185(6)). This adjustment ensures that liability to pay income tax which the employer/payer should have deducted and/or accounted for but failed to do so rests in the right place according to whether or not a direction has been made under regulation 172 or 181:

(i) If income tax falls within regulation 185(5) it is added to the income tax deducted for the purposes of s 59B(1) and is off-set against the tax chargeable on the taxpayer thereby reducing the tax payable by the taxpayer.

(ii) If income tax does not fall within regulation 185(5) because HMRC have made a direction under regulation 172 or 181, it is not added to the income tax deducted for the purposes of s 59B(1) and, therefore, does not reduce the tax payable by the taxpayer under that provision.

166. The difficulty, therefore, is in determining whether:

(1) the taxpayer's self-assessment of "income tax deducted" from any income for a tax year for the purposes of self-assessing income tax payable is intended to correspond to the computation of "income tax which has been deducted" for that tax year for the purposes of s 59B(1)(b) specifically, in this case, as regards any tax credit which is to be taken into account by virtue of regulation 185(5) or,

(2) there is, in effect, a two stage process whereby (i) the taxpayer is required to self-assess "income tax deducted" under s 9(1)(b) without taking account of the specific adjustments required to be taken into account in computing "income tax which has been deducted" for the purposes of s 59(1)(b), and (ii) s 59(1)(b), therefore, requires those matters to be taken into account, in effect, as a separate and subsequent calculation to the self-assessment.

167. In my view, the decision in *Walker* does not provide guidance on that critical question. In *Walker* the UT examined how the self-assessment provisions interact with s 59B where an appeal has been made to the tribunal against a s 28 amendment. I note the following:

(1) The UT appeared to assume, in general terms, that for the purposes of s 59B(1), the tax initially payable by or repayable to a taxpayer following submission of his tax return is determined by the contents of the taxpayer's self-assessment. On any view, that is correct in the sense that the computation of tax payable or repayable under s 59B depends on (a) the taxpayer's self-assessment of capital gains tax and income tax chargeable under s 59(1)(a) and (b) the calculation of "income tax which has been deducted at source" under s 59(1)(b) which corresponds or overlaps, at least to some extent, with the assessment of "income tax deducted at source" required for the purposes of s 9(1)(b).

(2) However, the UT did not have to consider the precise extent to which "income tax deducted at source" for the purposes of s 9(1)(b) is intended to correspond to "income tax which has been deducted at source" for the purposes of s 59(1)(b) specifically as regards income tax dealt with under the PAYE system:

(a) The UT specifically said that the CIS deductions constituted income tax "treated as paid" within the extended definition of income tax deductions in s 9(1)(b).

(b) Given that precisely the same definition of income tax "treated as paid" applies for the purposes of s 59B(1)(b), it is uncontroversial that the CIS deductions would also fall to be taken into account in the computation of tax payable under that provision.

(3) In that case, therefore, so far as relating to the CIS deductions, the computations required by s 9(1)(b) and by s 59B(1) wholly coincide. The UT was not faced with the argument raised in this case that the computation required by s 9(1)(b), as regards the taxpayer's assessment of income tax payable, and that required by s 59B(1), as regards the imposition of tax payable, may differ.

(4) It followed from the fact that Mr Walker was required and entitled to include the CIS deductions in his assessment of income tax payable under s 9(1)(b), that the s 28 amendments made by HMRC in relation to those deductions were matters in respect of which Mr Walker had a right of appeal to the tribunal. The focus was on whether, as a matter of the correct construction of s 50(6)(a), the tribunal could give effect to the decision it made on the correct amount of the CIS deductions, an issue which the UT did not doubt was properly before the tribunal. The UT considered that the tribunal plainly could do so.

(5) I note that in its decision in *Walker* the tribunal suggested that a tax credit is a matter which a taxpayer is to take into account in his self-assessment of income tax payable under s 9(1)(b) but the UT did not refer to that comment and cannot be taken to have approved it.

168. Nor do I consider that the UT's comments on the role of s 59B in the context of the *Walker* appeal assist with the particular issue in this case. The UT held that, under the powers given to it in s 50(6)(a), the tribunal could amend a return to reflect its findings, as made on a matter properly before it, that HMRC had incorrectly amended the return under s 28A by reducing the amount the taxpayer had self-assessed to be repayable to him (in that case in respect of CIS deductions). They said, in effect, that for the purposes of s 59B such an amendment is to be treated in the same way as an amendment made by HMRC under s 28A which is not appealed to the tribunal. In their view, in the circumstances in *Walker*, there is a two-stage process:

(1) The amount of income tax chargeable and payable or repayable to the taxpayer is that determined by the tribunal as then reflected in the self-assessment as amended by the tribunal under s 50.

(2) As a separate and subsequent matter, s 59B(5) imposes a statutory obligation on the taxpayer or HMRC to pay or repay the resulting sum by the date specified (in the same way as it applies to impose a charge where HMRC make an amendment under s 28A which is not subject to appeal).

169. It was in that context that the UT held in *Walker* that s 59B "is not justiciable in the tribunal being concerned with matters of collection and enforcement". They

explained, however, that in the circumstances of that case, that was "beside the point". The issue was whether, on an appeal to the tribunal against the conclusions of a closure notice, the tribunal's findings of fact could be given effect by the tribunal making an amendment to the self-assessment return (as amended by HMRC). In the UT's view, the "impact of such an amendment on the parties' respective rights and obligations under section 59B…. is an entirely separate, and subsequent, matter".

170. It is clear from this decision, therefore, that, if it is correct that the lead appellants were entitled/required to take the tax credit into account in their self-assessment of income tax payable for each relevant tax year, (a) the lead appellants would have the right to appeal to the tribunal against any amendment made in respect of income tax payable, (b) the tribunal would have the power to correct any such amendment under s 50(6)(a), should it decide that it is incorrect, and (c) the lead appellants would have no right of appeal to the tribunal if HMRC were to fail to make any repayment to them according to the position as amended by the tribunal as required by s 59B. The decision does not, however, provide definitive guidance on the interaction and scope of ss 9(1)(b) and s 59B(1) as regards the initial assessment and computation of "income tax payable" or "tax payable" and within that "income tax deducted at source" or "income tax which is treated as deducted at source".

171. With that context in mind it seems to me that the lead appellants' argument hinges on the correct interpretation to be given to the meaning of the term "income tax treated as deducted from any income" for any tax year as that term is used in s 9(1)(b). I note that there is no limitation on or specification of for what purpose income tax is "*treated as* deducted". On the natural meaning of this term viewed in the context in which it is used, it appears simply to refer to income tax which *any provision* in the tax legislation specifies is to be regarded as deducted (when it is not in fact deducted) from any income on which a taxpayer is otherwise chargeable to income tax (subject to any specified exceptions). On the face of it, therefore, the term is broad enough to capture income tax chargeable on a taxpayer's earnings for the tax year which falls within regulation 185(6) and, under regulation 185(5), therefore, adds to the sums which under s 59B(1) constitute "income tax which has been deducted" and are to be off-set against the tax which the taxpayer has assessed to be chargeable in computing the tax payable by the taxpayer.

172. My view is that the fact that regulation 185 is stated to apply only for the purposes of s 59B and that s 9(1)(b) does not specifically cross refer to that provision is not of itself sufficient to indicate that a more restrictive interpretation is to be given to the term "income tax treated as deducted" when used in s 9(1)(b) than that suggested by its natural and ordinary meaning:

(1) It appears that the term as used for the purposes of s 9(1)(b) is drawn deliberately widely and non-specifically. There is no cross-referral to *any* provision which applies to treat income tax as deducted (whether under the PAYE system or otherwise).

(2) I can see nothing to indicate, whether in s 9(1)(b) or s 59B, that the legislature intended to make a significant distinction as regards the taxpayer's position in relation to (a) income tax chargeable on earnings which, in effect, s 59B(1) itself, in combination with the PAYE rules, provides is to be treated as income tax which has been deducted, and (b) income tax which is treated as deducted from or treated as paid in respect of income which is otherwise chargeable to tax under other provisions:

(a) In both cases, for the purposes of s 59 the result is that the relevant sum counts as "income tax which has been deducted" which reduces the overall tax payable by the taxpayer:

(b) As set out above, s 9(1)(b) is aimed at requiring taxpayers to assess the income tax which they will actually have to pay to HMRC, in contrast to the assessment required under s 9(1)(a) of income tax (and capital gains tax) which is chargeable or for which taxpayers are liable in principle.

(c) It is in accord with that intention for taxpayers to be required to take into account in that self-assessment sums which the tax code specifically provides are to be treated as reducing the tax which they will have to pay. In effect, ss 59B(1), 59B(2) and 59B(8), provide the absolute measure of "income tax deducted at source" for a tax year which the taxpayer has to self-assess and against which that assessment is to be tested.

(d) In light of the clear purpose of s 9(1)(b), the fact that these provisions provide greater specificity as regards what constitutes "income tax deducted at source" for a tax year does not of itself suffice to indicate that the assessment to be made under s 9(1)(b) is to be made on a different, more limited basis.

(3) Moreover, it would be out of kilter with the overall scheme of the self-assessment, tax payment and appeal regime if, as is the result of HMRC's interpretation, the taxpayer is required to assess a sum which does not accord with the sum he will actually have to pay and cannot appeal to the tribunal against any conclusion by HMRC as regards the availability of a tax credit or the amount of any such tax credit. On that basis, the taxpayer would have the option only of seeking to defend enforcement action by HMRC on the basis the relevant tax is not due under s 59B or possibly to bring judicial review proceedings against HMRC. However, the self-assessment regime is plainly intended to provide a comprehensive scheme for the calculation and payment of tax including an appeals process. It would be very odd if significant matters such as the availability and amount of a tax credit are to be dealt with wholly outside that scheme.

173. I have concluded, therefore, that (a) the lead appellants have the right to appeal to the tribunal in respect of the s 28 amendments on the basis that the tax credit arising in respect of each relevant tax year is a sum which the lead appellants were entitled and required to take into account in their self-assessments of income tax payable under s 9(1)(b) for that year, (b) because HMRC did not take account of the tax credits which arise by law in making the s 28 amendments, the lead appellants were "overcharged" by the s 28 amendments within the meaning of s 50(6)(a), and (c) the tribunal can, accordingly, reduce those assessments, as amended by HMRC, to take account of the tax credits.

Part E – Section 684 decisions

Background

174. As noted, the conclusions set out above are made leaving aside consideration of the effect of the s 684 decisions (and of the TOAA provisions). In HMRC's view, the terms of s 684(7A)(b) are engaged by the issue of the s 684 decisions with the result that there is no tax credit within the meaning of regulation 185 which it can be argued HMRC failed to take account of in making their s 28 amendments.

175. Section 684 contains the following provisions of relevance:

(1) As set out above, s 684(1) confers power on HMRC to make PAYE regulations "with respect to the assessment, charge, collection and recovery of income tax" in respect of all "PAYE income".

(2) Under s 684(2) provision may be made in PAYE regulations "for requiring persons making payments of, or on account of, PAYE income to make, at the relevant time, deductions or repayments of income tax calculated by reference to tax tables prepared by the Commissioners, and for making persons who are required to make any such deductions or repayments accountable to or, as the case may be, entitled to repayment from the Board". (For this purpose, "the relevant time" is usually the time when the payment is made.)

(3) Subsection (7) states that PAYE regulations have effect despite anything in the Income Tax Acts.

(4) Sub-section (7A) reads as follows:

> "(7A) Nothing in the PAYE regulations may be read -
>
> > (a) as preventing the making of arrangements for the collection of tax or other amounts in such manner as may be agreed by, or on behalf of, the payer and **[**an officer of Revenue and Customs**]**, or
> >
> > (b) as requiring the payer to comply with the regulations in circumstances in which an officer of Revenue and Customs is satisfied that it is unnecessary or not appropriate for the payer to do so."

176. The parties referred to the explanatory notes issued when clause 684 was introduced in the Finance Bill 2003 which include the following statements:

> "This clause complements the work being undertaken by the Tax Law Rewrite Project to rewrite the PAYE Regulations. It modernises the powers for making PAYE regulations and so will enable the rewritten regulations to reflect current practices…..
>
> …..The new Item 7A makes clear that the PAYE regulations may exclude certain payments from PAYE. For example, employers are not required to operate PAYE on certain payments to employees for business expenses. The new Subsection (7A), confirms that the Inland Revenue can agree to different tax collection arrangements being set up that reflect the particular circumstances of a payer. Or alternatively that the payer does not have to follow PAYE regulations, where these would be unnecessary or inappropriate. Currently there are different arrangements covering casual employment and students, for example….."

177. The s 684 decisions were set out in letters to the lead appellants of 8, 9 and 12 March 2019, in which an officer of HMRC made the following main points:

(1) The officer set out the background to the appeals noting that (a) it was stated in the relevant returns that the relevant income was not taxable due to article 3, (b) legislation was introduced specifically in s 858 ITTOIA and s 59 of the Finance Act 2008 that made clear that that article did not apply, and (c) that that legislation was contested in the Huitson litigation but HMRC's position was upheld.

(2) The officer said that he had reviewed the circumstances of the appellant's use of the tax arrangements, the PAYE Regulations and related legislation and considered how the PAYE Regulations might apply (including considering the

arguments made in the statements of case supplied by the appellant, evidence given and what HMRC knows about the arrangements entered into) and:

> "In the course of my review, I have concluded that there may be a possibility, although not a probability, that PAYE regulations might apply and require an entity other than yourself ("a payer") to account for tax on PAYE income."

(3) The officer then drew attention to s 13 ITEPA, s 8 ITTOIA and s 684(7A) ITEPA and said:

> "In the circumstances of your use of the arrangements, after taking into account the possibility that the PAYE Regulations might apply, I have concluded that it is not appropriate in these circumstances for a party to be required to comply with the PAYE Regulations. There is no evidence before me to suggest that any entity which might possibly be required to comply with the PAYE Regulations knew of or was a party to the entirety of the arrangements, given that the individuals were represented to them as self-employed. Further it is not in dispute that tax was under declared and primary legislation clearly identifies that the liability for tax remains with the individual taxpayer even if the PAYE collection mechanism were to apply. It is also inappropriate or unnecessary for a collection mechanism to operate and frustrate the collection of tax in the context of the use of these contrived arrangements that were designed to avoid tax.
>
> The effect of this decision is that you are liable to pay any additional tax due as a result of your use of the arrangements, and that any "credit" you are entitled to in respect of the operation of PAYE will be limited to the amount of tax actually collected via PAYE on your behalf. In the interest of avoiding confusion, this decision does not change the amounts of tax that HMRC is seeking from you in respect of the assessments currently under appeal…."

178. HMRC are seeking to address two issues in these letters although they have somewhat elided them:

(1) First, they are seeking to disapply the PAYE regulations under which TPP/any relevant related entity or the Clients (as the payers for PAYE purposes) would otherwise have been liable to deduct and/or account for income tax due in respect of the lead appellants' earnings in the relevant tax years.

(2) Second, they are seeking to disapply regulations 185(5) and 185(6) under which a tax credit would otherwise have arisen in each of the relevant tax years on the basis that the income tax chargeable on the lead appellants' relevant earnings constituted, within the meaning of that regulation, tax which each payer "*was liable*" to deduct or account for but which it did not so deduct or account for. On that basis, there would be no tax credit arising in respect of any of the relevant tax years:

(a) which could reduce the income tax payable by the lead appellants in those tax years as computed under s 59B, and/or

(b) which the lead appellants were required to take into account in their self-assessments made under ss 8 and 9 in respect of those tax years and which HMRC should, therefore, have taken into account in the s 28 amendments.

179. Whilst not explicit in their letters, it seems that HMRC's view is that the s 684 decisions in effect disapply the PAYE regulations on the basis that they fall within the terms of s 684(7A)(b) with the result, so they suggest, that (a) the relevant PAYE

regulations are not to be read as requiring the payers to comply with obligations they would otherwise have had to deduct and/or account for income tax in respect of the sums in dispute, (b) regulation 185(6) is not to be read on the basis that the payers were liable to deduct and/or account for such income tax, and (c) accordingly, there is no tax credit under regulation 185(5).

180. It follows from the conclusion set out in Part C that Mr Johnson was not taxable on the sums in dispute relating to the first period as earnings, that in any event TPP/any related entity had no liability as regards those sums under the PAYE rules. In the remainder of this Part, therefore, I have proceeded as though the s 684 decisions relate only to the Clients.

Submissions

181. The lead appellants submitted that s 684 decisions were not issued by HMRC for any proper purpose but, as is apparent from the terms of the letters, in a blatant attempt by HMRC to (a) prevent the lead appellants winning their appeals, and (b) thereby to oust the jurisdiction of the tribunal. Ms Redston noted, in particular, that it appears the s 684 decisions were not sent to the Clients and that there was no need for HMRC to make the decisions as regards those parties given that HMRC are out of time to enforce the liability those parties would otherwise have had under the PAYE regulations in respect of income tax chargeable on the lead appellants' earnings. She explained that the lead appellants have brought judicial review proceedings against HMRC in respect of the s 684 decisions and applied for those proceedings to be stayed pending the outcome of this hearing.

182. However, Ms Redston considered that, in any event, the s 684 decisions do not affect the lead appellants' case for a number of reasons. First, she argued that the decisions do not affect the statutory position whereby the tax credit is available:

(1) Under regulation 185, the tax credit arises in respect of income tax which the employer/payer "*was liable* to deduct" from relevant payments made in the relevant tax year" or "*was liable*" to account for in respect of such payments. The liability to deduct or account for the tax crystallised when the relevant payments were made, over ten years before the s 684 decisions were issued.

(2) The s 684 decisions cannot affect how ss 8, 9 and 59B operate. Under s 684(7A) such a decision can only impact on the operation of the PAYE regulations.

(3) Moreover, s 59B(8) provides that, for the purposes of determining the amount of tax payable or repayable by a taxpayer "any necessary adjustments *prescribed by the [PAYE] regulations* shall be made to the amount of tax deducted at source". There is no provision in the PAYE regulations which prescribes an "adjustment" to be made by the s 684 decisions. The PAYE regulations contain specific powers for HMRC, in effect, to remove the tax credit if they make a direction but, as they did not do so within the applicable time limits, each Client "was" liable to deduct and/or account for income tax chargeable on the sums in dispute.

183. Ms Redston submitted that, alternatively, it is clear from the caselaw that the tribunal has jurisdiction to consider the legality of the s 684 decisions as regards whether, in issuing them, HMRC has acted in an "ultra vires" manner, wholly unreasonably or unfairly. Ms Redston referred to *Birkett v HMRC* [2017] UKUT 0089 (TCC) ("*Birkett*") as providing a useful summary of the law on the scope of the tribunal's jurisdiction to consider public law matters:

(1) In summary, it was held in *Birkett* that whilst the tribunal has no inherent judicial review function, (a) it can consider public law issues where that is required for it to decide (i) a matter which is within its jurisdiction, or (ii) whether it has jurisdiction in the first place, and (b) whether it is so required is a matter of interpretation of the relevant statutory provisions which define the scope of the appeal.

(2) Ms Redston submitted that it is necessary for the tribunal to form a view on whether the s 684 decisions are made lawfully to enable it to decide the statutory issue before it, namely, whether the lead appellants have been "overcharged" to income tax on the basis that they are entitled to a tax credit as a result of ss 8, 9, 50 and 59B TMA and regulation 185 which should have been taken into account in the s 28 amendments. The tribunal simply cannot decide that without deciding whether the s 684 decisions were made lawfully and, therefore, have the effect HMRC say they have.

184. In Ms Redston's view, HMRC have clearly exceeded the scope of the discretion given to them under their statutory care and management powers in making the s 684 decisions. She made the following main points:

(1) Section 684(7A) does not, as HMRC seemed to think, give HMRC a new power, in addition to the existing care and management powers they had when it was introduced. That provision was enacted to reflect changes made as part of the Tax Law Rewrite process which included the codification of some of HMRC's practices. It is clear from the statutory wording that it simply confirms that nothing in the PAYE regulations should be read as meaning that HMRC cannot exercise their pre-existing powers of care and management to dispense payers from complying with obligations in those regulations where compliance would be "unnecessary or not appropriate".

(2) There are limitations on the exercise of HMRC's care and management powers as set out by Lord Hoffman in *R (oao Wilkinson) v IRC* [2005] UKHL 30 as follows:

> "This discretion [as regards care and management] enables the commissioners to formulate policy in the interstices of the tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time."

(3) In this case:

(a) In issuing the s 684 decisions, HMRC is not seeking to address any of the circumstances set out by Lord Hoffman. HMRC's stated purpose, namely, to prevent the lead appellants from succeeding in their appeals, is self-evidently an improper purpose.

(b) HMRC have specific, targeted powers which they could have sought to use to (a) assess the Clients for the tax due when they failed properly to deduct and/or account for income tax in accordance with the PAYE regulations, and (b) by direction, in effect, to transfer the obligation to account for the income tax to the lead appellants. HMRC cannot now use its "care and management" powers to mend its own failures to exercise these statutory powers within the applicable statutory time limits.

(c) Furthermore, HMRC cannot validly exercise any power they have by writing only to the lead appellants. These decisions cannot be effective unless communicated to the payers, as those who had the relevant obligations under the PAYE regulations. No such communication has occurred.

(4) In any event, even if s 684(7A)(b) gives HMRC a power in addition to their general care and management powers, the s 684 decisions would be ultra vires and illegal for precisely the same reasons as set out above.

185. Ms Redston added that HMRC's decisions are also unreasonable under the principles set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1 because:

(1) HMRC took into account irrelevant matters, including:

(a) The possibility that the lead appellants would succeed in their appeals is self-evidently not relevant for the reasons set out above.

(b) The fact that the lead appellants were "represented to [the payers] as self-employed" cannot be relevant given that s 44 ITEPA only applies to individuals who are self-employed; that is the very reason why the agency rules should have been operated by the payers.

(c) That the payers did not know that they should have deducted and/or accounted for income tax under the PAYE regulations cannot be relevant given the long-standing nature of the legal requirement in question. All businesses should have been aware of s 44 ITEPA; they had a statutory obligation to apply it.

(2) HMRC failed to take into account relevant matters, including HMRC's failure to use their specific, targeted powers within the statutory time limits, as explained above, and the fact that all businesses should have been aware of s 44 ITEPA and had a statutory obligation to operate it.

(3) The statutory process for transferring PAYE obligations from payer to payee, under regulations 72 and 81 of the PAYE Regulations, is subject to time limits and appeal rights. It is procedurally unfair for HMRC to make decisions which (so they say) gives the same effect as such a direction (by the removal of the tax credit) by using a purported discretionary power which is not subject to statutory time limits and in respect of which the taxpayer has no right to appeal.

186. Finally, Ms Redston argued that the issue of the s 684 decisions constitutes an abuse of process which justifies barring HMRC from taking any further part in these proceedings or from taking part in the part of the proceedings relating to the tax credit. She said that it is manifestly unfair for HMRC to have acted in a manner which, in her view, completely undermines the purpose of the hearing in an attempt to prevent the lead appellants succeeding in their appeals. She submitted that the decision in *Foulser v HMRC* [2013] UKUT 038 (TCC) ("*Foulser*") provides authority that the tribunal has jurisdiction to decide "abuse of process" arguments and, if necessary, to order that the s 684 decisions are nullities. She noted that the lead appellants could also bring judicial review proceedings on this basis but, as judicial review is available only where there is no alternative remedy, it is for the tribunal to make a decision on this point.

HMRC's submissions

187. Mr Tallon made the following main points:

(1) It is not part of the statutory exercise required for the tribunal to determine this appeal to decide whether HMRC have exceeded their powers in issuing the s 684 decisions or acted improperly. The tribunal can decide the issues before it in the usual way whilst the public law issues are correctly dealt with separately by the appropriate forum, the administrative court. If the administrative court

decides that the decisions are for any reason "nullities", HMRC would be required to give effect to that decision.

(2) If, contrary to HMRC's stance, the tribunal considers that it has jurisdiction to hear the lead appellants' arguments on public law matters, in the interests of justice and fairness, the tribunal should deal with those arguments at a further hearing. The tribunal should not make a decision on these matters without allowing or requiring both parties to submit full evidence on the issues which neither party has done in preparation for this hearing. For example, any assertion that HMRC had an improper motive would require extensive evidence in order to be dealt with fully.

(3) On the lead appellants' abuse of process arguments:

(a) The lead appellants only raised this issue very shortly before the hearing.

(b) Any asserted unfairness as regards the issue of the s 684 decisions is not the type of procedural fairness which, as the UT held in *Foulser*, the tribunal has jurisdiction to hear. The tribunal can make a decision on all issues properly before the tribunal on the basis of the evidence submitted unimpeded by the s 684 decisions, in the knowledge that the issues relating to the s 684 decisions can be dealt with by the administrative court and that those decisions may not be relevant to the outcome of these proceedings at all. There is nothing unlawful or improper in HMRC asking the tribunal to determine the issues relating to whether the lead appellants have been overcharged by the closure notices. The parties further representations on *Foulser* and related caselaw are set out below.

(c) To bar HMRC from proceedings would be a wholly disproportionate response given it would affect the outcome of the issues which do not depend on the issue of the s 684 decisions.

(4) In any event, the s 684 decisions were properly made:

(a) It is acknowledged that the s 684 decisions were made at a late stage and have serious and real consequences for the lead appellants. However, the reasons for the timing of the issue of the s 684 decisions raises factual matters on which full evidence would need to be called if the public law argument were to be considered by the tribunal. It should be borne in mind that HMRC had to comply with their governance processes in issuing the s 684 decisions.

(b) It was appropriate for HMRC to make the s 684 decisions given that (i) the Clients did not themselves pay any remuneration to the lead appellants but paid sums to a Recruitment Agent as invoiced by that agent, (ii) the Partnership or Trust paid the remuneration, (c) the Clients were liable to account for income tax on the remuneration under the PAYE regulations only because the Partnership was outside the scope of the PAYE regime, (iii) the Clients were simply not in a position to know anything other than that they were dealing with a UK Recruitment Agent given the evidence that Montpelier and de Graaf were not in contact with the Clients, (iv) even if the Clients were aware of Montpelier or de Graaf, it was reasonable for them to suppose the relevant entity was based in the UK (given it used a UK address and that the lead appellants said that they would not have been aware of the Partnership and Trust), and, accordingly, that any such UK entity was the party liable under the PAYE system to account for income tax chargeable on the sums in dispute.

(c) The lead appellants argued that HMRC should have known about the application of the agency rules at an earlier stage but HMRC simply did not have the detailed information to enable them to form that view. Unlike the lead appellants, HMRC were not in a position to know the agency rules applied (and, for the reasons given, the Clients were not in a position to know they needed to apply the PAYE regulations).

(d) There is no time limit on HMRC's ability to exercise their powers under s 684 or any requirement to inform the payer of the decision. It is clear from the explanatory notes that the legislature's intention in introducing s 684 in the applicable form was to modernise it to reflect current practices. Whilst the notes give some examples of when HMRC may exercise their powers under this provision, it is plainly intended to provide a very flexible arrangement whereby HMRC may exercise their powers in a broad set of circumstances

188. Ms Redston added that the tribunal should reject HMRC's application for this matter to be dealt with separately at a further hearing for the following main reasons:

(1) It was HMRC's choice to issue the s 684 decisions so close to the hearing. They plainly could have issued them earlier and in fact they did in other cases on 25 May 2018 (as shown in examples in the bundles).

(2) It is not in the interests of justice to adjourn the hearing and delay the outcome, in particular, given that (a) the appeals relate to periods ending over ten years ago, (b) there are several hundred appeals which are stayed pending the outcome of these lead appeals, and (c) some appellants have already passed away since the appeals were notified to the tribunal.

(3) HMRC have already significantly delayed the hearing of these appeals as set out in earlier case management hearing.

(4) Whilst HMRC assert they must have the opportunity to provide evidence, when the lead appellants asked for evidence (such as HMRC's emails, meeting notes and other records of the decision making process), HMRC refused to supply it (as shown in correspondence in the bundles). There is no reason why HMRC should now be allowed an adjournment to provide evidence which they could have supplied for this hearing but refused to provide given they are fully in control of the s 684(7A) process and its timing.

Does the tribunal have jurisdiction to consider the legality of the s 684 decisions?

Conclusion

189. In summary, for all the reasons set out below, I have concluded that:

(1) The tribunal does not have jurisdiction to hear the lead appellants' challenge to the s 684 decisions on the basis that they are unlawful, ultra vires or unreasonably arrived at.

(2) However, the tribunal does have jurisdiction to consider the effect of s 684(7A)(b) in the light of the issue of the s 684 decisions.

(3) As a matter of statutory construction, that provision does not apply to affect the analysis of whether there is a tax credit set out in Part C.

190. I note that it was a matter of dispute whether in making the s 684 decisions HMRC were acting (a) under a specific power conferred by s 684(7A)(b) as HMRC seemed to suggest, or (b) under their general statutory management and care powers, as the lead appellants considered to be the case. In my view, the analysis is the same whichever of these positions is correct.

Caselaw

191. As summarised by the UT in *Birkett*, there are a number of cases in which the UT and the Court of Appeal have considered the extent of the tribunal's jurisdiction as regards public law matters, namely: *Oxfam v HMRC* [2009] EWHC 3078 (Ch) ("*Oxfam*"), *Hok Ltd v HMRC* [2012] UKUT 363 (TCC) ("*Hok*"), *HMRC v Noor* [2013] UKUT 71 (TCC) ("*Noor*") and *Trustees of the BT Pension Scheme v HMRC* [2015] EWCA Civ 713 ("*BT Trustees*").

192. In *Oxfam*, Oxfam appealed to the tribunal against HMRC's decision to disallow in part its claim for recovery of input tax for VAT purposes by amending the terms of a method for the apportionment of input tax between its business and non-business activities. The appeal was brought under s 83(1)(c) of the Value Added Tax Act 1984 ("**s 83(1)(c)**") which provides that an appeal lies to the tribunal: "with respect to ... (c) the amount of any input tax which may be credited to a person". The appeal was made on the basis that HMRC had agreed the previous apportionment method with Oxfam under a binding contract (in the form of a letter from HMRC countersigned by Oxfam) which Oxfam asserted HMRC made in the exercise of its general care and management powers.

193. Having lost on that point in the tribunal, *Oxfam* brought two sets of proceedings in the High Court which were dealt with together: (a) Oxfam appealed against the decision of the tribunal on the additional ground that HMRC gave it a clear assurance that was binding on HMRC under principles of public law; in its view, the assurance created a substantive legitimate expectation for Oxfam as to how its input tax should be apportioned, and (b) Oxfam brought judicial review proceedings against HMRC on the same basis. Sales J held that Oxfam's legitimate expectation argument could properly have been raised in its appeal to the tribunal but that, in any event, Oxfam had no legitimate expectation.

194. At [63], Sales J approached the question of the tribunal's jurisdiction under s 83(1)(c) as a matter of statutory interpretation of that provision. He said that "on the ordinary meaning of the language" of s 83, it appears that:

> "it covers all the issues between Oxfam and HMRC regarding the question whether HMRC should have allowed Oxfam credit for a higher amount of input tax…..including both the contract issue and the legitimate expectation issue. *The words, "with respect to", in section 83(1) appear clearly to be wide enough to cover any legal question capable of being determinative of the issue of the amount of input tax which should be credited to a taxpayer.* The Tribunal's jurisdiction is defined by reference to the subject matter specified in the section, not by reference to the particular legal regime or type of law to be applied in resolving issues arising in respect of that subject matter." (Emphasis added.)

195. He continued, at [65], that the tribunal was correct to consider that it had jurisdiction to deal with the contract law argument as "the question of contract was an issue potentially determinative of Oxfam's rights to be credited with input tax". At [66], he said that by the same construction of s 83(1)(c) and the same reasoning which led to that conclusion, Oxfam's legitimate expectation argument also fell within the jurisdiction of the tribunal:

> "I can see no sensible basis in the language of that provision for differentiating between Oxfam's contract claim and its legitimate expectation claim. In both cases, if Oxfam's claim had been made out, an error of law on the part of HMRC in arriving at its decision on the amount of input tax to be credited to Oxfam would have been established (either a failure to respect Oxfam's contractual rights or a failure to treat Oxfam fairly, in breach of Oxfam's legitimate expectation) which would, on the face of it, be a proper

basis for an appeal to the Tribunal against HMRC's decision within the terms of section 83(1)(c)."

196. At [67], he said that usually an appeal under s 83(1)(c) would be on the merits of the decision taken by HMRC, and questions of private law or public law (such as whether HMRC took into account irrelevant considerations or failed to take account of relevant considerations) would simply not be relevant to the tribunal's task on the appeal but it does not follow:

> "that the [tribunal] will never have jurisdiction to consider issues of general private law and general public law *where that is necessary for it to determine the outcome of an appeal against a decision of HMRC whose subject matter falls within one of the sub-paragraphs of section 83(1)*." (Emphasis added.)

197. At [68], he said he did not think that it is a valid objection to this "straightforward interpretation" of s 83 "according to its natural meaning" that it has the effect that sometimes the tribunal will have to apply public law concepts in order to determine cases before it. He noted that:

> "It happens regularly elsewhere in the legal system that courts or tribunals with jurisdiction defined in statute by general words have jurisdiction to decide issues of public law which may be relevant to determination of questions falling within their statutorily defined jurisdiction. No special language is required to achieve that effect. Where they are themselves independent and impartial courts or tribunals (as the Tribunal is) there is no presumption that public law issues are reserved to the High Court in the exercise of its judicial review jurisdiction."

198. He continued, at [68], to give a number of examples illustrating the point as follows:

> "a county court may have to consider whether possession proceedings issued by a local authority have been issued in breach of its public law obligations (*Wandsworth LBC* v *Winder* [1985] AC 461; *Doherty v Birmingham City Council* [2008] UKHL 57); magistrates courts and the Crown Court may have to decide issues of public law in so far as they arise in relation to criminal proceedings (e.g. to determine if a by-law is a valid and proper foundation for a criminal charge: *Boddington v British Transport Police [1999] 2 AC 143* or to determine the validity of a formal instrument which is in some way a necessary foundation for the criminal charge: *DPP* v *Head* [1959] AC 83); and employment tribunals may have to decide issues of public law in employment proceedings (e.g. to determine whether a contract of employment with a public authority is vitiated as having been made *ultra* vires).

199. He said, at [69], that the tribunal is competent to decide such public law matters in so far as they might be relevant to determine the outcome of any appeal and, at [70], that there is a clear public benefit in construing s 83 by reference to its ordinary and natural meaning:

> "It is desirable for the Tribunal to hear all matters relevant to determination of a question under section 83…..because (a) it is a specialist tribunal which is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and (b) it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings and ensures that all issues relevant to determine the one thing HMRC and taxpayer are interested in (in this case, the amount of input tax to be recovered) are resolved on one occasion in one place. It seems plausible to suppose that Parliament would have had these public benefits in mind when legislating in the wide terms of section 83."

200. At [72] to [78] he considered if he was constrained by authority to come to a different view and held that was not the case. He explained that have been a number of cases in the tribunal and the High Court where a narrower interpretation of s 83(1) had been adopted and it was held that that provision excludes a general supervisory jurisdiction of HMRC on public law grounds. He noted that some of the authorities are reviewed by Jacob J in *Customs and Excise Comrs v National Westminster Bank plc* [2003] EWHC 1822 (Ch); [2003] STC 1072 at [46] to [56] and that none of these authorities were directly binding on him if he was clearly of the view that their reasoning on this point should not be followed.

201. At [73] he noted that in *National Westminster Bank,* at [49], Jacob J considered that such a view of the limited jurisdiction of the tribunal is supported by a dictum of Lord Lane (with whom the majority agreed) in *Customs and Excise Comrs v J.H. Corbitt (Numismatists) Ltd* [1981] AC 22 at [60] to [61] in relation to the predecessor to s 83 (s 40 of the Finance Act 1972) where he said:

> "Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way in which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the tribunal one would have expected clear words to that effect in [the Finance Act 1972]. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction."

202. In Sales J's view, this dictum does not provide "firm support for a narrower interpretation" of s 83 as excluding reference to rules of public law in every case. He explained, at [74] and [75], that:

(1) The question in *J.H. Corbitt (Numismatists) Ltd* was whether the taxpayer could take advantage of certain VAT concessions contained in subordinate legislation which depended upon whether it had kept "*such records and accounts as the commissioners may specify in a notice published by them….or may recognise as sufficient for those purposes*" (emphasis added).

(2) The taxpayer had not complied with the requirements or conditions specified in the relevant published notice and the commissioners did not recognise the records which the taxpayer had kept as being sufficient. The commissioners made an assessment of tax under a provision which said that where a taxpayer had failed to keep any documents to verify a return or it appeared to the commissioners that the return was incomplete, they could assess tax due from the taxpayer to the best of their ability. Section 40(1)(b) of the Finance Act 1972 Act provided for a right of appeal to the tribunal with respect to an assessment of this type (57H-58G).

(3) Lord Lane treated the question of whether the taxpayer had a right of appeal under that provision "as a short point of construction". He reasoned that (a) the setting of requirements by the commissioners in a published notice did not fall within the defined jurisdiction of the tribunal, (b) there was no basis for distinguishing the position where the commissioners exercised their discretion as regards records, and (c), therefore, as a matter of construction, an appeal in relation to the commissioners' decision as regards records also did not fall within the jurisdiction of the tribunal (see 60A-G).

(4) In reaching this view, Lord Lane approved the reasoning of Neill J at first instance, who said, in relation to the commissioners setting the conditions in a notice, that the tribunal could not substitute its view of the appropriate requirements for the view of the commissioners, although the tribunal could "certainly consider whether or not those conditions have as a matter of fact been complied with": [1981] AC at 60E.

203. At [76] Sales J concluded that Lord Lane's observation "has to be read in the context of what was in issue in the case and in the context of his primary reasoning to the effect that on its proper construction section 40(1)(b) of the 1972 Act did not cover an attempt to review a discretionary judgment of the commissioners" under the relevant provision:

> "The observation was made obiter and without exploring any wider implications it might have. In approving what Neill J had said at first instance about the jurisdiction of the tribunal to decide whether the facts of any particular case came within the scope of a notice published by the commissioners, Lord Lane contemplated the tribunal having jurisdiction in a case which could today be analysed in terms of legitimate expectation (i.e. whether a particular case falls clearly within the terms of a policy published by HMRC). It is clear that section 83 – like section 40 of the 1972 Act - does not confer any general supervisory jurisdiction on the Tribunal, but it seems to me to be a *non sequitur* to say that the Tribunal has no power to apply public law principles if they are relevant to an appeal against (i.e. a decision either to uphold or overturn) a decision of HMRC which falls within the terms of one of the headings of jurisdiction set out in section 83 (here, HMRC's decision regarding the amount of any input tax which may be credited to Oxfam."

204. He continued that, in his view, Lord Lane considered that the commissioners' decision not to accept the taxpayers' records as sufficient was too remote from the immediate decision of the commissioners under s 31 (in relation to which an appeal lay to the tribunal); but in *Oxfam*, Oxfam's complaints based on breach of contract and breach of legitimate expectation sought directly to impugn HMRC's decision in relation to the input tax to be credited to Oxfam. Therefore, whereas the taxpayer's complaints in *J. H. Corbitt (Numismatists) Ltd* did not fall within the scope of the relevant section, Oxfam's complaints in this case did fall within the scope of s 83(1)(c). He thought it notable that Parliament responded to the decision in *J.H. Corbitt (Numismatists) Ltd* by expanding the jurisdiction of the tribunal to allow it to review such prior or remote decisions (by introducing what became s 84(10)VATA) which "tends to reinforce the view that no general exclusion of public law concepts was intended to apply in relation to the appeal provision in section 83".

205. He said, at [77] that if Lord Lane's dictum were taken to exclude jurisdiction for the tribunal under s 83(1)(c) in this case, it would be very difficult to reconcile with the approach in the other decisions of the House of Lords and the general approach to interpretation of statutory jurisdiction provisions referred to at [66].

206. In *Hok*, the taxpayer appealed against penalties of £500 imposed on it pursuant to s 98 TMA of £100 per month for a five-month delay in filing its employer's end of year annual returns by the required date. The taxpayer did not dispute its default, but appealed to the tribunal on the basis that it was unfair for HMRC to impose the penalties as HMRC had not told it that it was in default and, if they had done, it would have remedied the default. The appeal was brought under s 100B TMA which provided that an appeal might be brought against the determination of a penalty, and that in the case of a penalty which was required to be of a particular amount, the

tribunal might: "(i) if it appears that no penalty has been incurred, set the determination aside, (ii) if the amount determined appears to be correct, confirm the determination, or (iii) if the amount determined appears to be incorrect, increase or reduce it to the correct amount..."

207. The tribunal reduced the penalties to £100 on the grounds that HMRC had acted unfairly in delaying sending out a default notice. The UT, however, held that the tribunal had no jurisdiction to do this. There was no issue that the penalties were due as a matter of law; the issue was whether HMRC should be precluded from imposing or collecting them. That was not an issue of what was due but a quite separate issue of administration which was capable of determination only by way of judicial review and hence not by the tribunal (at [54]).

208. In *Noor,* the UT, in effect, disagreed with and departed from the decision of Sales J in *Oxfam*. In summary:

(1) HMRC refused to allow Mr Noor to claim as input tax VAT which he had paid on services which were supplied more than six months before he was registered for VAT on the basis that VAT regulations prohibited recovery of VAT in relation to such supplies.

(2) Mr Noor did not appear to dispute that these provisions were in point but appealed to the tribunal on the basis that he had been told by HMRC's telephone advice line that he could claim input tax if he registered within 3 years of the relevant supplies to which the reclaim related. The right of appeal to the tribunal was, as in *Oxfam*, given by s 83. The tribunal held that Mr Noor had an enforceable legitimate expectation that he could recover the input tax as a result of the telephone call with HMRC.

(3) The UT (comprising the same panel as in *Hok*) held that the tribunal did not have any jurisdiction to give effect to any legitimate expectation which Mr Noor might have.

209. The UT said, at [30], that it is clear that the statute under which the tribunal is formed does not confer a general supervisory jurisdiction and that s 83(1) does not confer a general supervisory jurisdiction and there is no other provision of VATA (or any other legislation) which confers such a jurisdiction in relation to the legitimate expectation on which Mr Noor sought to rely. They said that it does not follow that the tribunal can never take account of or give effect to matters of public law but the tribunal can so only if it is "necessary…in the context of deciding issues clearly falling within its jurisdiction" which turns on the extent of the jurisdiction which is conferred by s 83 and "comes down to a point of statutory construction".

210. In forming their conclusion, they said that, assuming that Sales J's conclusion on the legitimate expectation point was part of the binding decision in *Oxfam* (as they thought it was) they were not bound to follow it. They noted the following:

(1) The cases Sales J referred to in support of his view at [68] (see [199] above) "are examples of a court needing to decide a point of public law in order to be able to exercise the jurisdiction which it did have or to decide whether it in fact had jurisdiction in the first place". In contrast, the issue in *Oxfam* and *Noor* was simply "one of statutory construction, namely the extent of the jurisdiction" of the tribunal under s 83(1)(c)" (see [81]).

(2) Although Sales J recognised that a narrower view of the tribunal's jurisdiction under s 83(1)(c) had been taken in other cases he did not embark upon a detailed analysis of why that was. In those cases, in taking a narrower view, the various judges did not rely only on the absence of a general

supervisory jurisdiction but also on the focus of s 83(1) being on entitlements or obligations under the VAT legislation (see [83]).

(3) In any event, they considered that they were not bound to follow Sales J's decision on jurisdiction for the following reasons, set out at [85]:

> "a. He recognised that the matter had not been the subject of detailed argument.
>
> b. ……he relied on the position in relation to the contract issue without drawing the distinction for the purposes of the argument between a contract which HMRC had power to enter into and one which they had no power to enter into…….
>
> c. He perceived very great difficulty in reconciling the exclusion of jurisdiction from the VAT Tribunal with Lord Lane's dictum in *Corbitt*. We consider that he was wrong to perceive such difficulty. Absent reliance on that difficulty, it is not possible to say that he would have reached the conclusion that he should not follow the earlier cases (even if he was correct in saying that he was not bound to do so)."

211. They said, at [87], that the right of appeal given by s 83 is in respect of "a person's right to credit for input tax *under the VAT legislation*" (emphasis added) and:

> "Within the rubric "VAT legislation" it may be right to include any provision which, directly or indirectly, has an impact on the amount of credit due but we do not need to decide the point. Thus, if HMRC have power (whether as part of their care and management powers or some other statutory power) to enter into an agreement with a taxpayer and that agreement, according to its terms, results in an entitlement to a different amount of credit for input tax than would have resulted in the absence of the agreement, the amount ascertained in accordance with the agreement may be one arising "under the VAT legislation" as we are using that phrase. In contrast, a person may claim a right based on legitimate expectation which goes behind his entitlement ascertained in accordance with the VAT legislation (in that sense); in such a case, the legitimate expectation is a matter for remedy by judicial review in the Administrative Court…."

212. They continued in the same passage to note that the tribunal's jurisdiction is "appellate" and it has no general supervisory jurisdiction over the decisions of HMRC but that does not mean that under s 83(1)(c) the tribunal:

> "cannot examine the exercise of a discretion, given to HMRC under primary or subordinate VAT legislation relating to the entitlement to input tax credit, and adjudicate on whether the discretion had been exercised reasonably (see eg *Best Buys Supplies Ltd v HMRC* [2012] STC 885 UT at [48] – [53] – a discretion under Reg 29(2) of the VAT Regulations). Although that jurisdiction can be described as supervisory, it relates to the exercise of a discretion which the legislation clearly confers on HMRC. That is to be contrasted with the case of an ultra vires contract or a claim based on legitimate expectation where HMRC are acting altogether outside their powers."

213. They made the following points, at [88]:

(1) The subject matter of s 83:

> "is the input tax which is ascertained applying the VAT legislation. Input tax is a creature of statute under VATA reflecting the provisions of [the applicable VAT directive]. Similarly, the crediting of an amount of input tax is a matter of statute".

(2) The appellate jurisdiction of the tribunal under s 83 is formulated by reference to those statutory concepts and the tribunal:

> "is not, expressly at least, given jurisdiction under this provision to decide the amount of something which is not input tax and which is not to be credited in accordance with the statutory provisions."

(3) Assuming that the taxpayer had made a successful case in the administrative court on the basis of legitimate expectation the remedy that court could provide would be to order HMRC to treat the taxpayer as entitled to a credit of an amount equal to the VAT on the relevant invoices but:

> "that amount it not itself input tax nor is it treated as input tax. The credit which Mr Noor would receive is not a credit for input tax but is a financial adjustment to give effect to his legitimate expectation. Indeed, it is not a "credit" within the meaning of the legislation since such a credit is only given for input tax. Instead, it is, as we have described it, a financial adjustment to be reflected in the account between the taxpayer and HMRC."

214. At [92] they emphasised that "the ordinary meaning of the language used in the context of [VATA] as a whole is that it is concerned with the right to a credit arising under the terms of the VAT legislation (including, on one view, HMRC's care and management powers)" and:

> "That makes perfectly good sense in the context of a decision concerning the matters listed in the paragraphs of section 83(1), and in particular concerning a decision in respect of a person's entitlement to an input tax credit under the VAT legislation. In the absence of an appealable decision, there is nothing to appeal and section 83 does not come into play."

215. They said, at [93], that they did not agree that the words "with respect to", are wide enough "to cover any legal question capable of being determinative of the issue of the amount of input tax which should be attributed to a taxpayer" at least not in relation to the "amount of input tax" which should be attributed to a taxpayer for the reasons they had already set out. They considered that Sales J's interpretation departs from the natural meaning of s 83(1)(c) which, "reading the subsection as a whole, is focused on the large number of decisions on rights and obligations under the VAT legislation which HMRC have to make and in respect of which a specialist tribunal is provided".

216. In *BT Trustees*, the trustees of a pension appealed to the tribunal against closure notices issued by HMRC disallowing claims for tax credits on certain dividends made by the trustees essentially on the basis that the disallowance infringed their EU law rights. In the Court of Appeal one of the issues was whether the claims were out of time and (amongst other matters) whether the UT was right to dismiss on jurisdictional grounds the claim that HMRC acted unlawfully in refusing to grant a waiver of the relevant time limit under an extra-statutory concession (as most of the claims were found to be subject to a six-year time-bar under domestic legislation).

217. Patten LJ noted, at [129], that the UT held that it had no jurisdiction to decide what amounted to a challenge to the lawfulness of HMRC's refusal to extend to the trustees the benefit of the extra-statutory concession because it amounted to a public law challenge which should be brought by way of an application for judicial review in the administrative court. In so doing, the UT refused to follow the decision of Sales J in *Oxfam v HMRC* as follows:

> "401. Our reasons for saying that the Tribunal has no jurisdiction to give effect to the Extra-Statutory Concessions stems from the recent decision of the Upper Tribunal in [*Hok*]…….. Mr Vajda has relied on the decision of Sales J in *Oxfam v. HMRC* [2009] EWHC 3078 (Ch), [2010] STC 686 ("*Oxfam*"), paragraphs 61 to 79 to demonstrate that the Tribunal does have

> jurisdiction. However, that decision turned on a construction of 83(1)(c) of the Value Added Tax Act 1994 which Sales J held gave jurisdiction to the VAT Tribunal to deal with legitimate expectation in the context of an appeal as to the amount of input tax. It lends no support at all to the view that the Tribunal has a general jurisdiction to deal with public law matters, whether in the context of direct tax or indirect tax, in particular to require, in the exercise of some sort of supervisory jurisdiction, HMRC to give effect to a concession. The suggestion that there is a jurisdiction in the context of direct tax is refuted by the decision in *Hok*."

218. Patten LJ said, at [132], that if the complaint by the trustees was that they had been unfairly denied the benefit of the concession then:

> "this is a public law challenge to the application of ESC B41 which should have been brought by way of judicial review because the sole ground of complaint is that they have been denied the benefit of a concession to which, on its terms, they are entitled."

219. He continued, at [133], that:

(1) The jurisdiction of the tribunal is statutory under s 3(1) of the Tribunal, Courts and Enforcement Act 2007 ("**TCEA 2007**"). That provides: "There is to be a tribunal, known as the First-tier Tribunal, for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act."

(2) In relation to income tax, the tribunal's primary functions are to determine "appeals" made under the Taxes Act which are notified to it (see ss 49D(3), 49G(4) and 48(1) TMA).

(3) In relation to the statutory appeals in question, para 9 of schedule 1A TMA provides: "(7) If on an appeal notified to the tribunal, the tribunal decides that a claim which was the subject of a decision contained in a closure notice under paragraph 7(3) above should have been allowed or disallowed to an extent different from that specified in the notice, the claim shall be allowed or disallowed accordingly to the extent that appears appropriate, but otherwise the decision in the notice shall stand good."

220. Having set out the rules governing the UT, he said, at [136], that the effect of those rules is that if the appeal is allowed by the UT and the decision re-made, the UT has the same powers as the tribunal has under schedule 1A TMA.

221. Having considered the decision in *Oxfam* (citing [63] and [67] to [71]) he concluded on this point as follows at [141] to [143]:

> "We have heard no argument about s.83(1) VATA and therefore express no view about the correctness or otherwise of the judge's interpretation of that section. But, in agreement with the Upper Tribunal, we do not consider that the decision in *Oxfam v HMRC* should be treated as authority for any wider proposition and we reject the suggestion that the reasoning of Sales J can or should be applied to the jurisdiction of the FtT and the Upper Tribunal to determine the appeals in this case.
>
> *The statutory jurisdiction conferred upon the FtT by s. 3 TCEA 2007 is in our view to be read as exclusive and the closure notice appeals under Schedule 1A TMA do not extend to what are essentially parallel common law challenges to the fairness of the treatment afforded to the taxpayer*. The extra-statutory concession is, by definition, a statement as to how HMRC will operate in the circumstances there specified and its failure to do so denies the legitimate expectation of taxpayers who had been led to expect that they would be treated in accordance with it. We are not concerned as in these statutory appeals with the direct application of the taxing instrument modified, or otherwise, by any relevant principles of EU law. The sole issue

> in relation to ESC B41 is whether it was fairly operated in accordance with its terms.
>
> We therefore consider that the reasoning of Sales J in *Oxfam v HMRC* has no application to the statutory jurisdiction under s.3 TCEA 2007 in the sense of giving to the FtT and the Upper Tribunal jurisdiction to decide the common law question of whether HMRC has properly operated the extra-statutory concession. The appeals are concerned with whether the Trustees are entitled under s.231 to claim the benefit of the credits on FIDs and foreign dividends. Not with what is their entitlement under ESC B41. This reading of TCEA 2007 is strengthened by s.15 TCEA 2007 which gives the Upper Tribunal jurisdiction to decide applications for judicial review when transferred from the Administrative Court. It indicates that when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear. There are no similar provisions in the case of the FtT."

222. *Birkett* relates to penalties imposed for a taxpayer's failure to comply with an information notice under schedule 36 to the Finance Act 1998. The particular issue before the UT was whether the tribunal had erred in concluding that it did not have jurisdiction to consider the taxpayer's argument that he had an enforceable legitimate expectation that the penalties were not to be charged or in failing to take account of HMRC's common law duty of fairness. Having set out details of the decisions set out above, the UT summarised the principles to be derived from these cases at [30] as follows:

> "(1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal….would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) *In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that*

is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction." (Emphasis added.)

223. The UT continued at [31] to note that some cases such as *Hok* are relatively straightforward. The tribunal's jurisdiction was given by s 100B TMA and only entitled it to determine if the relevant penalties had been incurred and if the amounts were correct. The issue which the appellant sought to raise, namely, whether it was unfair of HMRC to levy the penalties because of delay, did not go to either issue. Hence, the tribunal had no jurisdiction to consider it.

224. They said, at [32], that in other cases, such as in *BT Trustees*, the court may have to construe the statutory provision conferring jurisdiction on the tribunal to decide the scope of it. They noted that the Court of Appeal held that the tribunal's jurisdiction to determine if the claims for tax credits "should have been allowed" was limited to determining whether the claims should have been allowed as a matter of tax law and did not extend to determining whether the taxpayers should have been allowed the benefit of the extra statutory concession. In the UT's view that must:

> "on analysis have been because that was the true construction of para 9(7). Similar decisions have been made in relation to other cases where taxpayers have sought to argue that they should have had the benefit of an extra statutory concession: examples to which we were referred included *Prince v HMRC* [2012] UKFTT 157, *Shanklin Conservative & Unionist Club v HMRC* [2016] UKFTT 0135 (TC)."

225. They continued, at [33], that they did not read the Court of Appeal's decision in *BT Trustees* "as having laid down any general rule as to the FTT's jurisdiction applicable in all cases" noting, in particular, that the Court of Appeal expressly said that they were giving no view on Sales J's interpretation of s 83 in *Oxfam*. In the UT's view, that confirms that the Court of Appeal viewed the question whether Sales J was correct on s 83 as a question of interpretation of that section. The UT said that they also did not need to express a view on the jurisdiction of the tribunal under s 83(1) and the contrasting decisions in *Oxfam* and *Noor* but said that "it can be seen that what is in issue is the correct interpretation of that provision".

226. As regards the appeal in *Birkett*, they noted, at [35] to [38] that under s 49D(3) TMA, the tribunal's jurisdiction is to decide "the matter in question", which they thought was confined "to asking whether the statutory requirements under para 40(1) are met". It did not include a review of HMRC's decision on the grounds that it was unfair to issue the penalties because the taxpayer had a legitimate expectation of deferring any further penalties. They did not consider that to be an issue which goes to the matter in question on an appeal under the provision.

227. Finally, they said, at [40], that they had reached "this conclusion simply as a matter of construction of the relevant statutory provisions". They noted that they were asked to resolve the "tension" between the decisions in *Oxfam* and *Noor* by preferring the reasoning in *Oxfam* and that counsel submitted that it would be unfortunate if a taxpayer who wished to argue that HMRC had acted unfairly and in breach of a legitimate expectation had to take proceedings in the administrative court rather than availing himself of the comparatively simple and low-cost jurisdiction available in the tribunal. However, the UT said it was not necessary to consider these points: "the resolution of this appeal turns in our view on what the statutory provisions say, not on some broader principle".

228. They noted, at [41], that counsel said that the legislation in this case was wide enough to confer power on the tribunal to review whether a penalty should have been imposed: para 46(1)(a) of schedule 36, which provides that "HMRC may assess the penalty", conferred a discretion on HMRC to assess a penalty, and the power of the tribunal to confirm or cancel the decision under para 48(3) should be construed as wide enough to enable the tribunal to reconsider the exercise of discretion and hence to take into account such matters as fairness and the appellants' legitimate expectations.

229. At [42] they rejected that argument. They accepted that para 46(1)(a) confers on HMRC a discretion whether to assess a penalty and, if the legislation had conferred a right of appeal against that discretionary decision, then it would have been arguable that the tribunal would have had the power to reconsider the appropriateness of the penalty being assessed and that, in doing so, it could take into account all relevant factors, including fairness and legitimate expectation. But as they read the legislation, para 47(a) does not confer a right of appeal against the discretionary decision of an HMRC officer under para 46(1)(a) to assess the penalty.

Discussion - approach set out in the caselaw

230. It is plain from the decisions set out above that, as a body formed by statute to carry out functions conferred by statute, the tribunal can only consider public law matters if and to extent that that function is conferred on it by statute. I note, in particular, that in *BT Trustees* the Court of Appeal (a) held that the statutory jurisdiction conferred upon the tribunal (by s 3 TCEA 2007), namely, to exercise the functions conferred on it by statute is "to be read as exclusive" and (b) commented that the fact that s 15 TCEA 2007 gives the UT jurisdiction to decide applications for judicial review when transferred from the administrative court indicates that when one of the tax tribunals is "intended to be able to determine public law claims Parliament made that expressly clear".

231. On that basis, clearly, the tribunal has jurisdiction to consider a public law matter if there is an express statutory provision conferring that power upon it. However, under the case law set out above it has been held that, even where there is no such express provision, the tribunal may have jurisdiction to consider a public law matter if, on the correct construction of the provisions which confer jurisdiction on it or under which it exercises its jurisdiction, it is "necessary" or "falls to" the tribunal to decide that public law matter in exercising that jurisdiction or in deciding whether it has jurisdiction.

232. The decision in *Oxfam* is the only decision cited to me in which it has been held that, notwithstanding the absence of an express provision conferring power on the tribunal to hear a public law matter, the tribunal had jurisdiction to do so. In that case Sales J put a broad interpretation on the provision giving the taxpayer the right to make an appeal to the tribunal "with respect to ... (c) the amount of any input tax which may be credited to a person" (s 83(1)(c)). In his view, on its ordinary and natural meaning that provision is wide enough to cover *any legal question* capable of being determinative of the issue identified in its terms such as the legitimate expectation argument the taxpayer wished to raise. Sales J also commented that there was a clear public benefit in construing s 83 in that way and it seemed plausible that Parliament would have had these public benefits in mind then legislating in these wide terms. In the later decision in *Noor*, however, the UT took an entirely contrary view of the scope of this provision, namely that Parliament's intention was to enable a taxpayer to appeal to the tribunal only in respect of a right to credit for input tax provided for *under the VAT legislation*. In *Hok*, *Birkett* and *BT Trustees* the UT and

the Court of Appeal all interpreted the relevant provisions conferring jurisdiction on the tribunal as confined to entitling it to consider the relevant question under applicable tax law and not common law matters of legitimate expectation.

233. In the later cases, in seeking a resolution to the conflict in the decisions in *Oxfam* and *Noor*, taxpayers have argued that the decision in *Oxfam* has laid down a broader principle that the tribunal has jurisdiction to decide a public law point. However, in *Birkett* and in *BT Trustees* the UT and the Court of Appeal have both specifically and emphatically rejected that. In their view, Sayles J made the decision in *Oxfam* on the basis of the correct interpretation of the relevant statutory provision (namely, s 83(1)(c)); he did not set out some broader principle of general application whatever the wording used. Accordingly, in *Birkett* the UT did not consider it necessary to consider which of the contrasting views set out in *Noor* and *Oxfam* is correct; that was not material to the decision given that the position depends on the statutory construction of the particular statutory rules in question. However, it is notable that whilst holding that, in principle, on the correct interpretation of the relevant statutory provisions, the tribunal may have jurisdiction to hear public law matters, in practice, in none of the cases following *Oxfam*, have the UT or court found that is what Parliament intended in the absence of any express indication in the relevant legislation to that effect. Whilst each case will depend on the statutory wording in question, there is no example available in a direct tax context of what type of wording may indicate such an intention and, in an indirect tax context, no consensus on the intention to be taken on the relevant wording considered.

Discussion – application of the approach set out in caselaw

234. Approaching the matter as set out in the relevant case law, it is necessary, therefore, to consider the scope of the tribunal's jurisdiction as a matter of statutory interpretation. To recap, the appeal process operates as follows:

(1) The lead appellants appealed to HMRC under s 31(1)(b) in respect of "any conclusion stated or amendment made by a closure notice under section 28A", namely, the s 28 amendments made by HMRC when they closed their enquiries into the lead appellants' returns for the relevant tax years.

(2) Under s 49A to I, where the appeal is notified to the tribunal, the tribunal is to decide "the matter in question" which means "the matter to which an appeal relates", namely, the s 28 amendments.

(3) The extent of the tribunal's powers on such an appeal is set out in s 50 which includes a provision that, on an appeal notified to the tribunal, if the tribunal decides that the appellant "is overcharged by a self-assessment" which, for this purpose, includes amendments to a self-assessment made under s 28, the assessment is to be reduced accordingly, but otherwise the assessment stands good.

(4) The lead appellants' case is, in essence, that, under the s 28 amendments, they were "overcharged" to income tax on the disputed sums because a tax credit arose, as defined in regulation 185, which HMRC should have taken into account in those amendments.

235. Under the above provisions, the scope of the lead appellants' appeals to the tribunal and of the tribunal's powers in respect of those appeals is framed essentially by reference to the overall scope of the self-assessment system and HMRC's powers in relation to it. I note the following:

(1) In the overall context of the operation of the self-assessment regime, the obligation (under ss 8 and 9) on a taxpayer to include in his tax return for each

tax year a self-assessment of the capital gains tax and income tax "chargeable" on him and income tax "payable" by him requires an assessment of such sums as provided for under the statutory tax regime.

(2) Under s 9A HMRC may enquire into anything included in a return or required to be included in a return such as the taxpayer's self-assessment. In this case, HMRC enquired into the lead appellants' income tax position in respect of the arrangements as self-assessed by them in the relevant tax years.

(3) When HMRC close such an enquiry they are required under s 28 to state their conclusions and make any amendments to the return necessary to give effect to their conclusions. Given the nature of the enquiry permitted under s 9A, the conclusions and amendments contemplated are those relating to the taxpayer's tax position under the statutory tax system. In this case, under the s 28 amendments, HMRC concluded that further income tax was due in respect of the relevant tax years.

(4) Section 50, in effect, confines the tribunal's power to deciding if the lead appellants are "overcharged" by the s 28 amendments which HMRC have made. The reference to an "overcharge" is broadly framed; it is not specifically confined to an excess charge to tax or to sums due under the statutory tax system. However, with the above context in mind, it is reasonable to suppose that the tribunal's powers are intended to be confined to deciding if, under the s 28 amendments, HMRC have calculated too much income tax to be chargeable and payable, as such income tax is to be computed under the statutory tax regime.

236. The relevant underlying statutory question, on which the lead appellants' case hinges, is whether, under the arrangements, a tax credit arises in respect of each relevant tax year, within the meaning of regulations 185(5) and 185(6). HMRC argued that, as a result of the issue of the s 684 decisions, s 684(7A)(b) applies, in effect, to override the analysis set out in Part C that such a tax credit arises in the relevant periods (other than the first period). In their view, s 684(7A)(b) instructs the tribunal not to read the relevant PAYE regulations as though the Clients were required to comply with them as regards accounting for income tax chargeable on the sums in dispute and, therefore, not to read regulation 185(6) as meaning that the Clients were liable to account for such income tax (so that no tax credit arises under that provision).

237. Whether and how s 684(7A)(b) applies is, therefore, plainly a matter which the tribunal must consider. The tribunal cannot determine whether a tax credit arises under regulation 185 without considering whether s 684(7A)(b) applies and, if so, what effect it has. It seems to me that this ought not to be controversial; it is plainly within the tribunal's remit to consider the application and effect of any provision within the tax legislation which may impact on an issue of statutory construction squarely before it in deciding whether an appellant has been "overcharged" within the meaning of s 50.

238. However, the lead appellants' arguments raise the further question of whether the tribunal is entitled to consider whether, even if on the face of it the s 684 decisions fall within the terms of s 684(7A)(b), the decisions are, as a matter of public law, nullities, void and of no effect so that, whatever the correct interpretation of its terms, s 684(7A)(b) can have no practical effect. I note the following:

(1) There is no provision conferring any right on a taxpayer to appeal to the tribunal against the s 684 decisions or conferring any supervisory jurisdiction on the tribunal as regards whether the decisions have been made by an officer of

HMRC acting reasonably, whether the officer is viewed as having acted under HMRC's general care and management powers or under a specific power conferred by s 684(7A)(b) itself.

(2) As set out above, the rules setting out the lead appellants' appeal rights and conferring jurisdiction on the tribunal to consider the lead appellants' appeal do not themselves indicate that the tribunal has any general power to consider public law matters in considering appeals of this type.

(3) On that basis and in light of the approach set out in the caselaw, it seems to me that the tribunal would have jurisdiction to consider the lead appellants' public law arguments only if, on the correct interpretation, that is required by the provisions the tribunal must construe to decide if there is a tax credit, namely regulation 185 and s 684(7A)(b) itself.

239. Regulation 185 is framed by reference to the employer's or payer's liability to deduct and/or account for income tax under the PAYE regime. In my view, on its plain, natural meaning, s 684(7A)(b) does not require or entitle the tribunal to consider whether the relevant officer has lawfully made or has acted unreasonably in making any decision which he purports to make under or in accordance with that provision:

(1) Section 684(7A) is perhaps somewhat oddly framed in that it does not expressly confer on HMRC's officers a power to make decisions of the type referred to or refer to HMRC's officers having the power to do so under any under statutory provision. Rather it is implicit that the officer is viewed as entitled to make a decision of the specified type from the fact that s 684(7A) operates to give effect to such a decision by providing, in effect, that the PAYE regulations are to be read in accordance with that decision, thereby preventing the relevant regulations from applying where they otherwise would.

(2) Given that the provision operates "in circumstances in which *the officer is satisfied* that it is unnecessary or inappropriate to require" the payer to comply with the PAYE regulations, there can be no implication that the tribunal is mandated to form its own judgement on whether it is unnecessary or inappropriate for the payer to comply with the PAYE regulations or to decide if the officer has acted unreasonably in forming his view. In other words, s 684(7A) works on the basis that it is for the officer himself to decide whether he is so satisfied and, for the reasons already given, it is assumed that he is entitled to make that decision.

(3) The tribunal is simply instructed (as is any other person who has to interpret the PAYE regulations) that where an officer is so satisfied, the PAYE regulations are to be read in a manner which gives effect to that decision.

240. I note that, in a broad sense, it can be said that it is "necessary" for or, that it "falls to" the tribunal to decide whether the s 684 decisions are invalid because the outcome of the public law analysis may well affect the impact of the tribunal's decision whether a tax credit arises as a matter of statutory interpretation. For example, if the tribunal were to decide that s 684(7A)(b) requires the PAYE regulations to be read as HMRC argue for such that there is no tax credit in any relevant period, a finding by the administrative court that, as a matter of public law, the s 684 decisions are nullities, in effect, would render redundant or entirely negate the tribunal's conclusion on that point. HMRC would be required to give effect to the decision of the administrative court presumably by recognising a sum equal to the tax credit that would have arisen but for their invalid s 684 decisions in computing the lead appellants' tax liability in the relevant tax years. In that sense, the outcome of

the tribunal's statutory analysis and of the public law issues are inextricably linked. That appears to be what the lead appellants meant in arguing that the tribunal cannot decide whether there is a tax credit without assessing whether the s 684 decisions are valid.

241. However, in my view, on a purposive approach to the legislation, it cannot be assumed that Parliament had an intention to empower the tribunal to decide a public law matter, in the absence of any clear indication in the wording used in the relevant provisions, simply because the outcome of that matter may have an impact on the effect of any decision which the tribunal does have jurisdiction to make. As the Court of Appeal said in *BT Trustees* it is to be expected that, if the tribunal is to have jurisdiction in such public law matters, Parliament would make that expressly clear. It is a question of assessing which forum is intended to have the power to decide such matters and there is simply nothing in the relevant statutory powers conferred on the tribunal or in the relevant provisions under consideration to indicate that it is intended to be the tribunal.

242. I note that in *Noor* the UT indicated (although they did not decide the point) that the wording which gives a taxpayer a right to appeal to the tribunal "with respect to… (c) the amount of any input tax…", may be construed as broad enough to permit an appeal in respect of *all* decisions made by HMRC under any powers conferred on it under the statutory VAT regime which impact on the amount of input tax. That may include, so the UT seemed to suggest, an appeal on the grounds that a decision made under a discretionary power conferred on HMRC under the VAT regime which affects the amount of an input tax credit was made unreasonably. The UT contrasted that with the case where a taxpayer seeks to challenge a decision made by HMRC acting wholly outside any discretionary powers conferred on HMRC under the statutory VAT regime on legitimate expectation grounds, which they considered plainly to be outside the scope of the tribunal's jurisdiction.

243. Whilst that may well be a viable argument on the broad wording in question in *Noor*, my view is that, for all the reasons already given, in this case the wording of the relevant provisions does not carry any implication that it is for the tribunal to decide anything other than whether there is a tax credit as a matter of statutory construction of the relevant provisions, where relevant as those provisions are to be interpreted under s 684(7A)(b).

Interpretation of s 684(7A)(b)

Conclusion

244. For all the reasons set out below, I have concluded that, in any event, s 684(7A)(b) has no impact on the analysis of whether there is a tax credit as set out in Part C. As a matter of statutory construction, in my view:

(1) Section 684(7A)(b) has no application in these circumstances. The s 684 decisions do not fall within its ambit or, if they do, that provision does not apply to give effect to them.

(2) If the conclusion stated in (1) is wrong and s 684(7A)(b) is in point, it does not, in any event, require the tribunal to read regulation 185(6) on the basis that the Clients were not liable to account for income tax chargeable in respect of the relevant earnings.

Discussion – does s 684(7A)(b) apply?

245. To recap:

(1) Section 684(7A)(b) starts by setting out the consequence of its application in the form of an instruction to a person interpreting the PAYE regulations that

"[n]othing in the PAYE regulations may be read as requiring the payer [a person who makes payments of, or on account of, PAYE income] *to comply*" with them.

(2) It then specifies when that consequence is to occur, namely, "*in circumstances in which*" an officer of HMRC "*is satisfied* that it is unnecessary or not appropriate for the payer *to do so* [to comply with the PAYE regulations]".

246. In my view, it is plain on the natural and ordinary meaning of s 684(7A)(b), that its overall purpose is to ensure that the payer is relieved from obligations under the PAYE regulations which an officer of HMRC decides should not apply to it on the basis that it is unnecessary or inappropriate for it to comply with them. In effect, it disapplies the PAYE regulations to the extent necessary to give effect to such a decision.

247. However, its overall tenor, in particular, in the framing of the provision in the present tense plainly indicates that it is intended to apply only where an officer makes a decision which, at the time of its making, seeks to relieve the payer from an obligation "*to* comply" with the PAYE regulations which is an extant or "live" obligation, in the sense that, at the point the decision is made, the obligation remains to be fulfilled by the payer and/or, at least, that it could be subject to enforcement by HMRC. Hence, the need for the PAYE regulations to be disapplied.

248. On that basis, the s 684 decisions do not fall within the terms of s 684(7A)(b):

(1) In all the circumstances of this case, in issuing the s 684 decisions, the relevant officer can be taken to have decided, effectively, only that he is presently satisfied that it is unnecessary or inappropriate for the relevant parties to *have been* required to comply with, or to have been subject to obligations under, the PAYE regulations as regards the relevant tax years. The officer has made the decision in circumstances in which (i) the dates for the Clients to comply with the relevant regulations by accounting for income tax chargeable on the sums in dispute have long passed, and (ii) HMRC are unable to enforce the Clients' liability in that respect due to the expiry of the applicable statutory time limits or to direct that they are not so liable under regulation 81 (and HMRC accept that regulation 72 is not in point).

(2) The s 684 decisions are not, therefore, the type of decision contemplated by s 684(7A)(b). They are not decisions seeking to relieve the Clients of an extant obligation "to comply" with the PAYE regulations, as envisaged by s 684(7A)(b), given that, at the time of their making, those parties would otherwise have no enforceable obligation to do so.

(3) Moreover, it is reasonable to suppose that, if the legislature intended to enable HMRC in effect to disapply the PAYE regulations in circumstances such as these with wholly retrospective effect, they would have used clear words to that effect.

249. Even if the s 684 decisions are considered to fall within the terms of s 684(7A)(b), the provision would not operate to give effect to decisions of this type. For the reasons already set out, I read the opening words of s 684(7A) as limited to an instruction that nothing in the PAYE regulations may be read as requiring the payer *to comply* with them to the extent that, when the relevant decision is made, the payer would have an extant or live obligation to do so in the sense set out above.

Discussion – effect of s 684(7A)(b) if it does apply

250. The decision in this section is made on the assumption that, contrary to the conclusions set out above, s 684(7A)(b) applies as a result of the issue of the s 684 decisions. The question at this stage of the analysis is whether, on the correct construction of its terms, s 684(7A)(b) requires the tribunal to read regulation 185(6) as though the Clients were not liable to account for income tax chargeable on the relevant sums in dispute. I note that the lead appellants raised other points as to why s 684(7A)(b) does not affect the statutory analysis which otherwise applies but, in my view, the prior question is precisely what effect that provision itself has.

251. In my view, in addressing this issue it is important to remember that, by issuing the s 684 decisions HMRC are seeking effectively to disapply two related but distinct sets of PAYE regulations as those provisions affect two different sets of taxpayers: (a) the regulations under which, as the employers/payers, the Clients were required to account for sums in respect of the income tax chargeable on the lead appellants' earnings, and (b) regulations 185(5) and (6) which operate to determine if there is a tax credit which, under that regulation as it operates in relation to s 59B, is to be taken into account in computing the lead appellants' tax position under s 59B(1) (and which ought to have been taken into account in the s 28 amendments).

252. HMRC seem to assume that if s 684(7A)(b) gives effect to the first aspect of their s 684 decisions, it must also give effect to the second aspect. However, for all the reasons set out below, I have concluded that even if, on HMRC's argument, s 684(7A)(b) gives effect to the s 684 decisions so far as they relate to the disapplication of the PAYE regulations in relation to the Clients (as the payers), it does not give effect to those decisions so far as they purport to disapply the provisions of regulation 185 as regards the tax position of the lead appellants.

253. As set out above, it is plain that the overall purpose of s 684(7A)(b) is to ensure that *the payer* is relieved from obligations which HMRC decide should not apply to it. The consequences set out in that provision are triggered only if and to the extent that an officer of HMRC decides that *the payer is not required to comply* with the PAYE regulations and those consequences are limited to ensuring that, "nothing in the PAYE regulations may be read" as requiring *the payer to comply* to that extent. Leaving aside my concerns as to the retrospective nature of the s 684 decisions it would accord with that purpose if s 684(7A)(b) were to apply to require the tribunal to read the relevant PAYE regulations, which would otherwise require the Clients to account for income tax due on the sums in question, as though the Clients were not required to comply with them.

254. However, in my view, it does not necessarily follow, as HMRC seemed to suggest, that the legislature must be taken to have intended that the retrospective disapplication of the payer's compliance obligation, where relevant, is to be read into regulations which determine the tax position of the relevant worker. It is one thing to disapply the PAYE regulations retrospectively to relieve the payer/employer from its own obligations under them for a tax year and another, in effect, to re-write the rules under which the employee/worker is required to calculate his tax liability for that tax year. In other words, it seems to me that an intention to give effect to a decision by an officer of HMRC to absolve the employer/payer from liability under the PAYE regulations with retrospective effect does not necessarily connote an intention that that liability is to be assumed never to have existed so far as that is relevant to determining the tax position of the employee/worker. That is particularly the case where, as is the situation here, reading that disapplication into the relevant regulation (185(6)) would shift the liability to account for tax from the employer/payer to the employee/worker.

255. I have concluded that in fact s 684(7A)(b) is not intended to extend that far:

(1) As noted, as aligns with its underlying purpose (namely, to relieve payers of obligations under the PAYE regulations where HMRC decide they should not be subject to them), the very clear focus of s 684(7A) is on the position of the payer/employer as regards *its own obligations* under the PAYE regulations. That suggests that s 684(7A) is intended to affect the meaning only of those PAYE regulations which are capable of applying directly to *the payer* in terms of subjecting *it* to an obligation (to the extent that HMRC's decisions means that the relevant obligation should not apply).

(2) It seems to me that clear words would be needed to indicate that s 684(7A)(b) is intended to apply also to affect the interpretation of regulations, such as regulation 185, which are concerned with the tax liability of the relevant employee/worker. Regulation 185(5) operates to include income falling within regulation 185(6) in the sums to be deducted from the tax assessed to be chargeable on the employee/worker in computing the overall tax payable by him for the relevant tax year under s 59B. Viewed in context and on the natural and ordinary meaning of the terms used, regulation 185(6) captures income tax which the employer/payer *was* liable to deduct or account for in respect of the relevant earnings under the law applicable in the relevant tax year in the light of all facts and circumstances applicable at that time.

(I note that the question of how much tax is payable by the lead appellants under s 59B is not as such before the tribunal for decision. The tribunal's task is to consider whether the lead appellants have been overcharged by the s 28 amendments and, hence, to assess how regulation 185 and s 59B interact with the self-assessment provisions in ss 8 and 9. However, in this context it is relevant to consider this issue given that, on HMRC's interpretation, s 684(7A)(b), in effect, disapplies regulation 185(5) for all purposes.)

(3) However, there are no such clear words:

(a) The instruction in s 684(7A)(b) that, where HMRC have made a relevant decision, "nothing in the PAYE regulations may be read *as requiring the payer to comply*" does not readily translate into an instruction that the tribunal is to read regulation 185(6) as though the Clients *were not liable* to deduct or account for income tax under the PAYE regulations.

(b) To read s 684(7A)(b) in that way would require reading words into it along the following lines: "or as *having required* the payer to comply…." and, to put the matter beyond doubt, "so that the payer is not to be regarded as being or having been liable to comply with any such PAYE regulations whether for the purposes of assessing its own liability under those regulations or the tax position of any other person under any other regulation".

(4) Adopting HMRC's interpretation could lead to results which are wholly out of kilter with the purpose of s 59B and regulation 185 and the scheme of the self-assessment and charging mechanism generally. The effect would be to generate wholly unexpected tax liabilities for taxpayers who have accounted for tax according to the applicable law in the light of the circumstances in the relevant tax years.

Abuse of process

256. For the reasons set out below, I have decided that the tribunal does not have jurisdiction to hear the appellants' "abuse of process" arguments and, accordingly,

that there is no basis for the tribunal to direct that HMRC is barred from all or any part of these proceedings.

Caselaw

257. The extent of the tribunal's jurisdiction as regards "abuse of process" has been considered in detail by the UT in *Foulser*. At [28], the UT said the difficulties which arise in this context are largely attributable to the fact that the phrase "abuse of process" has been used to describe two different things:

> (1) One type of "abuse of process" is where "a party abuses the procedure of the court or tribunal and the court or tribunal needs to react to that abuse by making appropriate orders, which might extend to an order striking out a case or a defence".
>
> (2) Another type is where "a party's conduct in bringing the process is unlawful in public law and a court is asked to exercise its judicial review jurisdiction to restrain such behaviour".

The UT concluded that only the first type of abuse of process falls within the tribunal's jurisdiction.

258. The UT formed this conclusion on the basis of the distinction drawn between the two types of abuse of process in the authorities dealing with the position of magistrates' courts. In *R v Horseferry Road Magistrates' Court, ex p Bennett* [1994] AC 42, for example, Mr Bennett alleged that he had been kidnapped from the Republic of South Africa and brought to England where he was prosecuted for an offence allegedly committed in England. Mr Bennett sought judicial review of the magistrates' court refusal of his request for an adjournment which he sought to enable him to challenge that court's jurisdiction to commit him for trial on the basis that the prosecution was an abuse of process. He did not allege that he would not get a fair trial but that it was unfair to try him at all, in view of the fact that he had been kidnapped, rather than having been brought within the jurisdiction pursuant to an available extradition procedure. The House of Lords held that, in the exercise of its supervisory jurisdiction, the High Court had power to inquire into those circumstances and that, if there had been a disregard of extradition procedures, the High Court might stay the prosecution as an abuse of process. The UT cited the following comments of Lord Griffiths at 64B to E:

> "I would accordingly affirm the power of the magistrates…..to exercise control over their proceedings through an abuse of process jurisdiction. However, *in the case of magistrates this power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing, such as delay or unfair manipulation of court procedures.* Although it may be convenient to label the wider supervisory jurisdiction with which we are concerned in this appeal under the head of abuse of process, it is in fact a horse of a very different colour from the narrower issues that arise when considering domestic criminal trial procedures. I adhere to the view I expressed in *Reg. v. Guildford Magistrates' Court, Ex parte Healy* [1983] 1 W.L.R. 108 that this wider responsibility for upholding the rule of law must be that of the High Court and that if a serious question arises as to the deliberate abuse of extradition procedures a magistrate should allow an adjournment so that an application can be made to the Divisional Court which I regard as the proper forum in which such a decision should be taken." (Emphasis added,)

259. At [31], the UT noted that the distinction made in the *Bennett* case was also referred to in the judgment of Buxton LJ in *R v Belmarsh Magistrates Court ex p*

Watts [1999] 2 Cr App R 188 at 194 to 195. The citation which the UT set out from this case included the following:

> "…..*there is a limited category of cases, involving infractions of the rule of law outside the narrow confines of the actual trial or court process, where the magistrates do not have jurisdiction, or alternatively as a matter of law should not exercise such jurisdiction as they may have*. So much is clear from Lord Griffiths's speech in *Bennett*…….That category is however a narrow one. It excludes every complaint that is directed at the fairness or propriety of the trial process itself…………
>
> 5. The wide category of cases over which magistrates have jurisdiction includes investigation of the bona fides of the prosecution or of whether the prosecution has been instituted oppressively or unfairly: see for instance *per* Lord Oliver of Aylmerton in Bennett at pages 132 and 70…….
>
> The category of domestic trial procedures to which Lord Griffiths referred in *Bennett* must include cases that fall foul of the Hunter rule." (Emphasis added.)

260. At [32] the UT noted the passage highlighted above and, at [33], referred to the comments of Brooke LJ in *R (Ebrahim) v Feltham Magistrates' Court* [2001] 1 WLR 1293 as further illustrating the distinction in two types of abuse of process at 1300 to 1302:

> "18 *The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are (i) cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried.* We derive these two categories from the judgment of Neill LJ in *R v Beckford (Anthony)* [1996] 1 Cr App R 94, 101. He observed that in some cases these categories may overlap. There may, of course, be other situations in which a court is entitled to protect its own process from abuse, for example where it considers that proceedings brought by a private prosecutor are vexatious (see *R v Belmarsh Magistrates' Court ex p Watts* [1999] 2 Cr App R 188), but we are not here attempting to carry out an exhaustive review of this jurisdiction.
>
> 19 We are not at present concerned with the second of these two categories (which we will call "category 2 cases"), in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment. In some of these cases it is this court, rather than any lower court, which possesses the requisite jurisdiction: see Ex p Watts, per Buxton LJ at p 195 B – D.
>
> 20 In these cases the question is not so much whether the defendant can be fairly tried, but rather whether for some reason connected with the prosecutor's conduct it would be unfair to him if the court were to permit them to….The court's inquiry is directed more to the prosecutor's behaviour than to the fairness of any eventual trial. Although it may well be possible for the defendant to have a fair trial eventually, the court may be satisfied that it is not fair that he should be put to the trouble and inconvenience of being tried at all.
>
> …
>
> 24 The first category of case (see paragraph 18 above: we will call these "category 1 cases") is founded on the recognition that all courts with criminal jurisdiction, including magistrate's courts, have possessed a power to refuse to try a case, or to refuse to commit a defendant for trial, on the grounds of

> abuse of process, but only where it is clear that otherwise the defendant could not be fairly tried. An unfair trial would be an abuse of the court's process and a breach of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In these cases, the focus of attention is on the question whether a fair trial of the defendant can be had." (Emphasis added.)

261. At [35] the UT concluded as follows:

> "I consider that for the purpose of determining the jurisdiction of the FTT to deal with arguments as to abuse of process, cases of alleged abuse of process can be divided into two broad categories. The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it. In the first of these categories, the FTT will have power to determine any dispute as to the existence of an abuse of process and can exercise its express powers (and any implied powers) to make orders designed to eliminate any unfairness attributable to the abuse of process. In the second category, the subject matter of the alleged abuse of process is outside the substantive jurisdiction of the FTT. The FTT does not have a judicial review jurisdiction to determine whether a public authority is abusing its powers in public law. It cannot make an order of prohibition against a public authority."

262. In addition to relying on *Foulser*, Ms Redston relied on comments of Lord Diplock in *Hunter v Chief Constable of West Midland* [1982] AC 529 (as cited in the *Belmarsh* case cited in *Foulser*):

(1) As Lord Diplock explained, the abuse of process in question in that case related to:

> "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made".

(2) Lord Diplock then made the following general comments on which Ms Redston relied:

> "This is a case about abuse of the process of the High Court. *It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.* The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power." (Emphasis added.)

(3) Lord Diplock then said that the principle applicable was "simply and clearly" stated in passages from the judgment of A. L. Smith, L.J. in *Stephenson* v. *Garnett* [1898] 1 Q.B. 677 and the speech of Lord Halsbury L.C. in *Reichel* v. *Magrath* 14 App. Cas. 665, where they said respectively:

(a) "the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so *when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court*"; and

(b) "I think it would be a scandal to the administration of justice *if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again*".

(4) HMRC said that the comments in *Belmarsh* and *Hunter* are not relevant. In their view, (a) the UT in *Foulser* did not suggest that a "collateral attack" of the type under consideration in *Hunter* is the type of abuse of process in respect of which the tribunal has jurisdiction, and (b), in any event, in this case there is no "collateral attack" involving an attempt to re-litigate a matter which has already been decided. Ms Redston said that HMRC have made a "collateral" challenge in issuing the s 684 decisions, which are targeted at the very issue to be decided by the tribunal (namely, whether there is a tax credit which should have been taken into account in the s 28 amendments) and stating that the lead appellants must take proceedings in the administrative court to resolve that issue.

Conclusion

263. I can see no basis for the tribunal to exercise its case managements powers to bar HMRC from all or any part of these proceedings as a result of the issue of the s 684 decisions. In my view, the lead appellants' arguments on this issue do not add to the debate on how the issue as regards the validity of the s 684 decisions is to be dealt with:

(1) It is plain that the issue of the s 684 decisions does not constitute an abuse of the procedure of the tribunal of the kind envisaged in *Foulser*. The issue of the s 684 decisions evidently has no impact on the ability of the tribunal to decide the issues before it fairly and justly.

(2) I cannot see that HMRC have made a "collateral attack" on these proceedings of the type envisaged in *Hunter*. It is, of course, open to the lead appellants to challenge the validity of the s 684 decisions. The lead appellants consider that the tribunal has jurisdiction to and should determine the arguments they have raised in that respect. However, for all the reasons set out above, I have decided that the public law matters raised by the lead appellants are for the administrative court to determine. The lead appellants can pursue the matter in the administrative court (and have already initiated proceedings) and/or seek to appeal against the tribunal's decision in that respect. However, for the tribunal to bar HMRC from these proceedings purely because they have issued the s 684 decisions and disagree with the lead appellants on how that issue is to be resolved, in effect, would pre-empt the substantive decision on the relevant public law matter which remains to be made (whether by the administrative court or, if I am found to be wrong on this, by the tribunal).

Part F - Transfer of assets abroad

264. HMRC submitted that the Profit Share is taxable under the ToAA provisions which, for most of the years in question, were contained in s 739 to 745 of chapter 3 of Part 17 ICTA and, from 2007/08 onwards, are contained in chapter 2 of part 13 Income Tax Act 2007 ("**ITA**"). I have set out below the provisions in ICTA and I note that the parties did not suggest in their respective submissions that their analysis

is any different as regards the corresponding provisions in ITA. Unless expressly stated to the contrary, therefore, all references in this part to sections of legislation are to sections in chapter 3 of part 17 ICTA.

Law

265. Section 739 provided, so far as relevant, as follows:

> "(1) … the following provisions of this section shall have effect for the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfer of assets by virtue or in consequence of which, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled outside the United Kingdom.
>
> …
>
> (2) Where by virtue or in consequence of any such transfer, either alone or in conjunction with associated operations, such an individual has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled outside the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all purposes of the Income Tax Acts."

266. The terms "associated operations" and "power to enjoy….income" are defined in s 742 as follows:

> "(1) For the purposes of sections 739 to 741 "an associated operation" means, in relation to any transfer, an operation of any kind effected by any person in relation to any of the assets transferred or any assets representing, whether directly or indirectly, any of the assets transferred, or to the income arising from any such assets, or to any assets representing, whether directly or indirectly, the accumulations of income arising from any such assets.
>
> (2) An individual shall, for the purposes of section 739, be deemed to have power to enjoy income of a person resident or domiciled outside the United Kingdom if -
>
> (a) the income is in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to enure for the benefit of the individual; or
>
> (b) the receipt or accrual of the income operates to increase the value to the individual of any assets held by him or for his benefit; or
>
> (c) the individual receives or is entitled to receive, at any time, any benefit provided or to be provided out of that income or out of moneys which are or will be available for the purpose by reason of the effect or successive effects of the associated operations on that income and on any assets which directly or indirectly represent that income; or
>
> (d) the individual may, in the event of the exercise or successive exercise of one or more powers, by whomsoever exercisable and whether with or without the consent of any other person, become entitled to the beneficial enjoyment of the income; or
>
> (e) the individual is able in any manner whatsoever, and whether directly or indirectly, to control the application of the income.
>
> (3) In determining whether an individual has power to enjoy income within the meaning of subsection (2) above—
>
> (a) regard shall be had to the substantial result and effect of the transfer and any associated operations, and

(b) all benefits which may at any time accrue to the individual (whether or not he has rights at law or in equity in or to those benefits) as a result of the transfer and any associated operations shall be taken into account irrespective of the nature or form of the benefits….."

267. The lead appellants also referred to the following provisions in s 743:

"(2) In computing the liability to income tax of an individual chargeable by virtue of section 739, the same deductions and reliefs shall be allowed as would have been allowed if the income deemed to be his by virtue of that section had actually been received by him….

(5) In any case where an individual has for the purposes of that section power to enjoy income of a person abroad by reason of his receiving any such benefit as is referred to in section 742(2)(c), then notwithstanding anything in subsection (1) above, the individual shall be chargeable to income tax by virtue of section 739 for the year of assessment in which the benefit is received on the whole of the amount or value of that benefit except in so far as it is shown that the benefit derives directly or indirectly from income on which he has already been charged to tax for that or a previous year of assessment."

Overview of submissions

268. HMRC submitted that the ToAA provisions apply on the basis that:

(1) For the purposes of s 739, each lead appellant made a transfer of assets to a person outside the UK by the creation of rights on entering into a contract with the Partnership. Such a contract can constitute a transfer of assets just as an employment contract can (see *IRC v Brackett* [1986] STC 521 (at 538 to 539) and *Boyle v HMRC* [2013] UKFTT 723 (TC) (at [114])). That transfer was made with the intention of avoiding UK income tax on the Profit Share.

(2) As a result of that transfer of assets, income in the form of the Profit Share became payable to the partners in the relevant Partnership as allocated to the relevant Trustee as a partner in the Partnership and thereby came to be held within the terms of the relevant Trust.

(3) As the life tenant of the relevant Trust, each lead appellant had power to enjoy the income allocated to the Trustee, which if it were income of the lead appellant received by him in the UK, would be chargeable to income tax. Accordingly, the income arising to each Trust is deemed to be income of the relevant lead appellant under s 739(2).

269. As set out in further detail below, the lead appellants submitted in the alternative that:

(1) For the reasons set out below, there was no transfer of assets within the meaning of s 739.

(2) The deeming provisions of s 739(2) do not apply because, in the alternative:

(a) Due to the application of s 44 ITEPA, the income received into the Trust was already the income of each lead appellant (as their deemed earnings under that provision) before it was paid to the Partnership or the Trust. On that basis, there is nothing to which s 739(2) can apply.

(b) Any power to enjoy the relevant income arises only under s 742(2)(c) on the basis that the lead appellants received or were entitled to receive any benefit provided or to be provided out of the relevant income. However, any benefit falls within the exemption from the charge to tax under s 739 under s 743(5) as it "derives directly or indirectly from income on which [the relevant individual] has already been charged to tax for that or a previous year of assessment", namely income which has already been *charged* to tax" for the relevant tax years under s 44 ITEPA.

(3) If the deeming provision of s 739 applies, the lead appellants are nevertheless entitled to credit for the tax credit in computing the resulting income tax charge for each relevant tax year on the basis that, in the alternative:

(a) Section 739 would operate only to treat the Profit Share as being the income of the lead appellants. It was confirmed in *R v Dimsey* [2001] 2 WLR 843 (at [40], [41] and [51]) that the deeming under s 739(2) only affects the position of the transferor. It would not, therefore, affect the analysis that, under the PAYE system, the Clients were required to account for income tax in respect of the lead appellants' earnings for each relevant tax year (but failed to do so) and that the lead appellants were entitled to the tax credit that thereby arose.

(b) Each lead appellant is, in any event, entitled to a deduction for the tax credit in computing his liability to tax under s 739 under the specific provision in s 743(2) which entitles the individual to "the same deductions and reliefs…as would have been allowed if the income deemed to be his by virtue of [s 739] had actually been received by him".

Discussion and decision

Transfer of assets abroad

270. As noted, HMRC relied on the decision in *Brackett* for the proposition that the lead appellants made a transfer of assets to an overseas person. In that case, Mr Brackett established a Jersey trust which in turn established a Jersey-resident company, which employed him to provide his services to clients in the UK. The company paid him modest amounts of salary from time to time but most of the profits were used to assist him in other ways, notably by buying real property from him in a difficult market. HMRC successfully sought to assess Mr Brackett under the the relevant provision which was in place before s 739.

271. At pages 538 to 539, in the High Court, Hoffman J (as he then was) held that the Special Commissioners were wrong to reject HMRC's view that:

> "by entering into the contract of employment the taxpayer created rights vested in [the company] which were valuable and capable of being turned to account, and that by virtue of those rights, together with the associated operation of carrying on a trade as business consultant, income became payable to [the company]."

272. In making this finding, he rejected the Special Commissioners' view that the taxpayer's earning capacity was not an asset in respect of which rights could be transferred to or created in favour of the company. He could see no basis for this restrictive interpretation:

> "The Special Commissioners found, in my judgment rightly, that the contract of employment conferred enforceable rights against the taxpayer. *O' Brien (Inspector of Taxes) v Benson Hosiery (Holdings) Ltd* [1979] STC 735….shows that such rights can be assets for the purposes of a disposal under the capital gains legislation. In my judgment they are equally rights which qualify as assets under [the predecessor to s 739]."

273. Ms Redston submitted that:

(1) In *Brackett*, it was relevant to the decision that the taxpayer's remuneration was deferred and that the relevant arrangements created

enforceable rights between the parties. She also noted that in *R (oao Dickinson) v HMRC* [2017] UKHC 1705 (Admin) at [73] the High Court noted that "the facts [of *Boyle*]…are stark and so at least potentially easily distinguishable from other cases".

(2) Applying the usual principles of contractual construction to the interpretation of the Services Agreement, as those principles are set out in *Autoclenz v Belcher*, the true agreement between the parties was that the monies the lead appellants expected to receive for the provision of their services to the Clients would pass through the Partnership into their hands in a largely tax free form. Moreover, on HMRC's own case, the Partnerships had no enforceable rights against the lead appellants: HMRC accepted in submissions that (i) in effect, the arrangements could be switched on or off at the lead appellants' option; (ii) the provision in the Services Agreements which required that the appellants worked for 1200 hours per year was inoperable; (iii) the provisions relating to termination of the agreement on the giving of notice were not enforceable and those in the Assignment Contracts related to the requirements of the Recruitment Agent and the Clients.

274. HMRC countered as follows:

(1) The fact that the lead appellants obtained a fixed Fee under the Services Agreement is immaterial; there is no requirement in the case law that to constitute a transfer of assets in the form of the creation of a contract for the provision of services, the services must be provided for no value or at an undervalue (although, in this case, they clearly were provided at an undervalue).

(2) The fact that some of the provisions in the Services Agreement may be unenforceable does not alter the fact that the agreement created rights in favour of the Partnership which were of at least some value to the Partnership; the obligation to work for the Partnership or its clients plainly produced value for it in the form of the income it then received (and thereby for the Trust). The rights created may not be as valuable as those created in *Brackett* or in *O'Brien*, but the provision does not require an assessment of the precise value of the rights created.

(3) Moreover, if the lead appellants are correct that there was no creation of any rights then their argument cannot succeed that s 44 ITEPA applies on the basis that there was a binding agency contract between the lead appellants and the Partnership. The lead appellants cannot argue that there was a creation of such rights for the purposes of s 44 but not for the purpose of the TOAA provisions.

275. Essentially, I agree with the points made by HMRC. Applying the reasoning in *Brackett*, the creation of rights under the Services Agreement constituted a transfer of assets to the partners in the Partnership. On the factual findings made above, in entering into the Services Agreement:

(1) Each lead appellant plainly created rights vested in the relevant Partnership which were valuable and capable of being turned to account and by virtue of which, together with the associated operation of the lead appellant providing his services to Clients, income became payable to the partners in the Partnership as allocated in its entirety to the Trustee.

(2) In return for those rights, each lead appellant was contractually entitled to receive the Fee. It could perhaps be argued that each lead appellant had the benefit of an undertaking by the Partnership (albeit not written into the Services Agreement) or at any rate an assurance that the relevant sums would be

allocated exclusively to the Trustee in its capacity as partner in the Partnership thereby falling within the income arising to the Trust which was to be paid to the lead appellant as the life tenant of the Trust. However, the fact that the lead appellants were entitled to the fixed Fee under the Services Agreement suffices to create a binding contract between the parties.

(3) I note that, as HMRC submitted, the lead appellants cannot "have it all ways". Once it has been found that the Services Agreements constitute binding contracts for the purposes of s 44 ITEPA (thereby supporting the lead appellants' analysis in that respect), it can hardly be argued they are not binding contracts for the purposes of the s 739 analysis.

Application of s 739(2)

276. As regards the application of s 739(2), the lead appellants made the following main points:

(1) For the reasons set out above, under s 44 ITEPA the lead appellants are taxable on the Fee and the Profit Share as though they are earnings. The lead appellants emphasised that the full Profit Share is captured by s 44(2) ITEPA having regard to the principles set out in *Rangers*.

(2) The operation of deeming provisions is well-established. It is encapsulated in the following comments which have been cited in many other decisions:

(a) In *Marshall v Kerr* [1994] 3 All ER 106 at [118] the House of Lords approved the following dictum of Gibson J, who gave the leading judgment in the Court of Appeal (emphasis added):

> "For my part I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

(b) Similarly, in *East End Dwellings v HMRC* [1952] AC 109 at p 132, Lord Asquith said:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it."

(3) On the facts of these appeals, it is simply not possible for the income received by the relevant Trustees to be "deemed to be" the lead appellants' income under s 739(2):

(a) The lead appellants had no power to enjoy the income generated by their work for the Clients until, in effect, it arose to the Trust in the form of the Profit Share but it was already their income before it was paid to the Trust as s 44 ITEPA applied to deem it to be such. Therefore, there is no point in time when the income received by the Partnership could be deemed to be the income of the lead appellants for the purposes of s 739.

In other words, sums which are already deemed to be taxable income of the relevant individuals for income tax purposes (in this case under s 44 ITEPA) cannot be deemed to be the very thing that such sums already constitute.

(b) Similarly, it is clear that the lead appellants had no power to enjoy the income of the Partnership because the lead appellants' only right under the Services Agreements was to the fixed Fee. They had no power to enjoy the rest of the income derived from their work until it was transferred to the Trust. In any event, at the very moment when the income was received by the Partnership, s 44 ITEPA applied to charge it to tax as the lead appellants' deemed earnings under that provision.

277. HMRC responded as follows:

(1) It is clear that s 739 can apply even where another taxing provision also applies. It is expressly stated to apply to income "whether it would or would not have been chargeable to income tax" apart from the application of s 739 for all the purposes of the Income Tax Acts. In other words, s 739 takes precedence over any other provisions which may potentially apply such as s 44 ITEPA. Furthermore, this is clear from the decision in *IRC v McGuckian* [1997] STC 908 (see, for example, the comments of Lord Steyn.)

(2) The lead appellants are incorrect that the Profit Share is to be treated as earnings when the relevant monies are received by the Partnership:

(a) It is only when the Profit Share was paid out of the Trust to the relevant lead appellant that s 44(2) ITEPA is triggered to deem those monies to be earnings, as sums "receivable under or in consequence" of an agency contract. The monies do not lose their inherent character as income of a trading Partnership arising to the Trustee until that point. If that were not the case, the lead appellants would be liable to tax under s 44 ITEPA on the gross sums before the deduction of items such as the Arrangement Fee.

(b) Moreover, there is no straight read across from *Rangers* to the facts of this case given that that case dealt with the general charging provisions in ITEPA.

(c) In any event, the general provisions in ITEPA do not assist the lead appellants as, under those provisions (s 18 ITEPA), a tax charge is triggered by reference to the time when a payment is received or when a person has an entitlement to receive it. The lead appellants had no entitlement to the relevant sums until the sums arose to the relevant Trust and did not receive them until they were paid to them.

278. The lead appellants added that:

(1) On the point about when a tax charge is triggered under ITEPA, as Lord Hodge said in *Rangers* at [38], the rule in s 18 is "unspecific as to the identity of the recipient". In this case, the lead appellants carried out the work which gave rise to remuneration, the monies were received by the Partnerships and paid into the Trusts at their direction and so were charged to tax when they were received by the Partnerships.

(2) Neither the wording in s 739(2) which HMRC referred to nor Lord Steyn's words assist HMRC. Those words have a different effect; they refer to the taxability of the income in anyone's hands. That wording does not allow a deeming provision to apply when the necessary conditions do not exist.

Moreover, no avoidance provision has to be "invoked" here; it is simply the case that the normal charging provisions in ITEPA applied to the income before it reached the Partnership and the Trust.

279. In my view, s 739(2) applies notwithstanding that the lead appellants are also taxable in respect of sums arising under the arrangements under s 44 ITEPA. Essentially, given the conditions are satisfied for both s 44 ITEPA and s 739 to apply, the question arises as to which of the two sets of deeming provisions takes precedence. Section 44 does not contemplate that any other provision may be in point to tax the relevant sums it captures. However, s 739(2) states that, where the relevant conditions are satisfied, the income in question (namely, the income of a person resident or domiciled outside the UK) "shall *whether it would or would not have been chargeable to income tax apart from the provisions of this section*, be deemed to be income of that individual for all purposes of the Income Tax Acts":

(1) The reference to whether the income "*would or would not have been* chargeable to income tax "apart from s 739, plainly indicates that where the conditions for s 739 to apply are met it takes precedence over any other charge to income tax which would have been chargeable but for the application of s 739.

(2) Given the breadth of the language used it appears that s 739 is intended to apply however the relevant income may otherwise be chargeable to income tax: whether the income in question would have been chargeable to income tax under any other provision for any reason on any person, whether the transferor or of some other party (such as the overseas person).

280. Moreover, I cannot see that there is scope for the view that s 44 ITEPA somehow takes priority over s 739 on the basis that s 739(2) does not bite because, so the lead appellants say, s 44 applies to deem the income received by each Trustee to be earnings of the relevant lead appellant as soon as it is received into the relevant Partnership. There is no indication in the broad language used that whether or not s 739 applies is to be tested by reference to the notional time at which income arising to the relevant overseas person would otherwise be treated as chargeable to income tax under another provision. As already set out, on its natural meaning s 739 is intended to override any other charge to income tax arising apart from the provisions of s 739 without qualification as to precisely when or how any such other charge may have arisen.

281. That this is to be taken to be the intended effect of the provision is supported by the decision in *McGuckian*. In that case, the taxpayer appealed against an assessment to income tax on a dividend paid by an offshore company. As explained by Lord Browne-Wilkinson, at pages 911 to 913, the facts and issues which the House of Lords considered were as follows:

(1) Originally the taxpayer and his wife had owned the shares in the offshore company but in 1976 and 1977 they took steps whereby the shares ended up in the hands of the trustee of an offshore settlement of which the taxpayer and his wife were the beneficiaries.

(2) In 1979, the trustee assigned to a UK company the right to any dividend payable by the offshore company in that year for a sum equal to 99% of the dividend which was in fact then paid by the offshore company. When the offshore company declared the dividend, it gave a cheque for the full sum to the solicitor for the UK company, who then paid 99% of that amount to the trustee and the balance to an agent for the UK company.

(3) HMRC made an assessment to income tax on the taxpayer for the 1979/80 tax year in the amount of the dividend. The notice of assessment referred to the part and chapter of the Income and Corporation Taxes Act 1970 which contained the charging provisions of s 478 (the predecessor to s 739). HMRC later argued that s 470 of that act applied which did not fall in that chapter. At the date of the assessment, HMRC had not discovered the existence of the settlement.

(4) In the appeal proceedings before the special commissioner, HMRC contended that the transactions between the trustee and the UK company were a sham and that there was a liability to tax under s 470. Section 470 applied "where in any chargeable period the owner of any securities (in this section referred to as 'the owner') sells or transfers the right to receive any interest payable (whether before or after the sale or transfer) in respect of the securities without selling or transferring the securities". In those circumstances, then:

> "for all the purposes of the Tax Acts, that interest, whether it would or would not be chargeable to tax apart from the provisions of this section -
>
> (a) shall be deemed to be the income of the owner or, in a case where the owner is not the beneficial owner of the securities and some other person (hereafter in this section referred to as 'a beneficiary') is beneficially entitled to the income arising from the securities, the income of the beneficiary; and
>
> (b) shall be deemed to be the income of the owner or beneficiary for that chargeable period, and
>
> (c) shall not be deemed to be the income of any other person; . . ."

(5) The special commissioner held that the transactions were not a sham and that, since the notice of assessment stated that the tax liability arose under s 478, he could not uphold it under s 470.

(6) In the Court of Appeal HMRC contended that (a) although the transactions were not a sham they fell to be disregarded under the principles set out in *W. T. Ramsay Ltd v Inland Revenue Commissioners* [1982] AC 300 and (b) the special commissioner should have upheld the assessment under s 470 and the Court of Appeal could remit the case to him with a direction that he should do so. The Court of Appeal by a majority rejected the argument based on the *Ramsay* principle but held that it did have power to remit the case to the special commissioner with a direction that he uphold the assessment under s 470.

(7) In the House of Lords HMRC appealed against the dismissal of their claim based on the *Ramsay* principle and the taxpayer cross-appealed against the order remitting the case to the special commissioner.

282. As Lord Browne-Wilkinson explained at page 912, the crucial question was whether the moneys received by the trustee as consideration for the assignment of the right to the dividends fell to be treated as "income" of the trust for the purposes of s 478. On the face of it, those moneys constituted capital not income, being the price of the sale by the trustee of its right to the future dividends of the offshore company. However, HMRC argued that, applying the approach in *Ramsay*, the sale of the right to the dividends, though not a sham, had to be disregarded for tax purposes. The sale was an artificial transaction inserted for the sole purpose of gaining a tax advantage: the reality of the transaction was the payment of a dividend by the offshore company to the shareholder, the trustee, which received it as income.

283. Lord Browne-Wilkinson considered that the circumstances in *McGuckian* fell squarely within the classic requirements for the application of the *Ramsay* principle as stated by Lord Brightman in *Furniss v Dawson* [1984] AC 474, 527D-E. He said, at page 913, that on that basis, the liability for tax on the indirect receipt of such dividend by the trustee "has to be determined by stripping out the artificial steps and applying the provisions of the Taxes Acts to the real transaction, i.e. the payment of a dividend to the shareholder, [the trustee], which received such dividend as income". It followed, he said, that the claim to tax under s 478 must succeed unless there was some other statutory provision which demonstrated that s 478 did not apply.

284. He continued to note, at pages 913 and 914, that taxpayer argued that s 478 did not apply because s 470 applied. The argument was as follows:

(1) The assignment of the right to the dividend to the UK company was a sale or transfer by the owner of the securities (the trustee) of the right to receive an interest in the shares in the offshore company (the dividend to be declared) with the result that "for all the purposes of the Tax Acts" the dividend paid by the offshore company was to be treated as the income of the taxpayer's wife (as income beneficiary under the settlement) and was not to be deemed to be the income of any other person (it was *not* the income of the trustee). On that basis s 478 could not apply as it only applies to "income of a person resident . . . out of the United Kingdom": the taxpayer's wife was resident in the UK

(2) As, if HMRC had made an assessment under s 470, tax would have been payable, neither s 478 nor the *Ramsay* principle applied since no tax advantage was *in fact* gained as a result of the assignment. This was based on the words in the preamble to s 478 (which correspond to the current wording in s 739(1)): "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax…" The taxpayer's submission was, therefore, that s 478 does not apply unless tax is *in fact* avoided.

285. Lord Browne-Wilkinson held, at page 914, that:

(1) Section 470 did not apply. Under the *Ramsay* principle the artificial step inserted (the assignment by the trustee to the UK company for value) fell to be disregarded in construing the relevant taxing provisions so that the basic requirement to bring s 470 into operation (the sale of the right to the dividend) had to be disregarded. Accordingly, s 470 did not apply and the income was not to be deemed to be the income of the taxpayer's wife.

(2) However, he went on to suggest that s 478 would have applied even if s 470 was in point. He said that the words quoted from the preamble to s 478:

> "refer not to the intention of the transferor of the assets or the effect of such transfer but to the intention of Parliament in enacting the section. That parliamentary intention is certainly relevant in construing the section. But the words of subsection (1) *make it clear that the actual avoidance of tax is not a precondition to the application of the section. The income is deemed to be the income of the United Kingdom resident "whether it would or would not have been chargeable to income tax apart from the provisions of this section". It is therefore clear that section 478 can still apply even though the effect of the transfer of assets abroad would not have been successful in avoiding United Kingdom income tax*." (Emphasis added).

286. Finally, he rejected the further submission that the *Ramsay* principle only requires the artificial steps inserted for tax purposes to be disregarded if, apart from the *Ramsay* principle, they would have been effective to achieve a tax advantage. He

concluded that the taxpayer was assessable to income tax on the amount received by the trustee.

287. Lord Steyn also held that, applying the *Ramsay* approach, the monies received by the trustee on the sale of the right to the dividend were not capital. He agreed that on the *Ramsay* approach there was no scope for the application of s 470 because for fiscal purposes the assignment to the UK company was disregarded. However, he also suggested that s 478 would have applied whether or not s 470 also applied. He said the following at page 918:

> "Secondly, I would reject the argument that it is a condition precedent to section 478 applying that there must be proof of an actual avoidance of tax liability. Such a construction treats section 478 as a power of last resort and it substantially emasculates the effectiveness of the power under section 478. Nothing in the language or purpose of section 478 compels such a construction. *Properly construed the opening words of section 478 merely provide that there must be an intention to avoid liability for tax. The sensible construction is that section 478 can be applied even if there are other provisions which could be invoked to prevent the avoidance of tax. That the revenue authorities should have overlapping taxation powers is an unremarkable consequence. And such a construction cannot cause any unfairness to the taxpayer since he cannot be taxed twice in respect of the same income*." (Emphasis added.)

288. Lord Cooke of Thorndon and Lord Clyde reached the same conclusion but did not comment specifically on the meaning of the wording in the preamble.

289. In my view, it is plain that both Lord Steyn and Lord Browne-Wilkinson considered that s 478, which contained substantially the same wording as that in s 739, is capable of applying even where there is another taxing provision which HMRC could have invoked to subject the income in question to income tax. I note that in *McGuckian*, the argument was that s 478 did not apply on the basis that HMRC could have assessed the taxpayer's wife to income tax on the relevant sums under a different set of provisions rather than that the taxpayer himself was otherwise chargeable to income tax. However, in my view the comments of Lord Steyn and Lord Browne Wilkinson apply whoever the relevant income is otherwise taxable on. Lord Steyn plainly contemplated that s 478 applies where the taxpayer himself is otherwise chargeable to income tax on the relevant sums given his comment that s 478 can apply even if there are other provisions which could be invoked and that such a construction "cannot cause any unfairness to the taxpayer since he cannot be taxed twice in respect of the same income".

Application of s 743(5)

290. On the argument in relation to s 743(5), the lead appellants made the following points:

(1) Section 9A ITEPA sets out the amount of employment income which is charged to tax under the relevant part of ITEPA for a particular tax year (s 9 (1)). The amount charged as "general earnings" is the net taxable earnings from an employment in the year which includes income which is taxable under s 44 (see s 97 ITEPA). It is clear that income is "charged to tax" if it is within the charge to tax according to the nature of the income in question; this is not a reference to whether tax has actually been paid or charged in the sense of assessed at the time in question. Income is, therefore, charged to tax as it arises during a tax year and not simply when an assessment is made after the end of the tax year.

(2) The meaning of "charged to tax" in s 9 ITEPA is consistent with that in earlier provisions: the concept is longstanding (see s 1 ICTA and s 181 of the Income and Corporation Taxes Act 1970).

(3) That this is right is also clear from s 743(5), which refers to "…income on which he *has already* been charged to tax *for that* or a previous year of assessment" (emphasis added).

(4) This interpretation gives the outcome one would expect. If a person has employment income which is charged to tax under s 9 ITEPA which he transfers to an offshore trust, s 743(5) would apply. The fact that the income has been paid into an offshore trust does not mean that it ceases to be charged to tax: it is already charged to tax due to the nature of the income. The position is the same here.

291. HMRC noted that s 743(5) applies only where s 742(2)(c) is in point. However, HMRC said that they rely on s 742(2)(a) which applies where the relevant income is "in fact so dealt with by any person as to be calculated, at some point of time, and whether in the form of income or not, to enure for the benefit of the individual.." Their view appeared to be that the partners in each Partnership calculated the relevant income arising to them as applicable for the benefit of the relevant lead appellant in allocating it wholly to the relevant Trustee as a partner in the Partnership or, that the Trustee calculated it as so applicable, acting in its capacity of trustee of the relevant Trust. In HMRC's view, in any event, for income to be "charged" to tax income within the meaning of s 743(5), income tax must have been paid on it.

292. In my view, the application of s 739 is not disapplied by s 743(5). I consider that the description in s 742(2)(a) is more apt than s 742(2)(c) to describe the circumstances of this case. The arrangements operated on the basis that each Partnership entered into Services Agreements with several individuals who used the arrangements and its partners comprised the Trustees of each of the Trusts set up by those individuals. Each Partnership, therefore, received, as trading income from its consultancy business, monies in respect of the work which each of those Individuals undertook for Clients and split out those monies by allocating and paying the portion of the total monies which were generated by each individual to the Trustee of that individual's Trust. Once the relevant portion of the monies was so allocated, as each Trustee's share of the trading profits arising to the Partnership, it automatically constituted Trust income under the terms of the Trust which arose to the individual as the life tenant of the Trust. The allocation and payment exercise necessarily involved, therefore, a calculation of the sums arising to the Partnership attributable to each individual's work which was to be allocated to the Trustee of his Trust for that individual's benefit.

293. In any event, it appears that the various categories listed in s 742(2) are not necessarily mutually exclusive; a set of circumstances may fall within one or more of them. On that basis, even if s 743(5) applies to prevent s 742(2)(c) applying, s 742(2)(a) would remain in point as there is no corresponding exclusion. It is not necessary, therefore, to consider the other points raised by the lead appellants on this issue.

Relief for tax credit

294. Essentially, I accept the submissions made by HMRC as to why the lead appellants cannot obtain relief for any tax credit in computing the income tax charge under s 739:

(1) It was not disputed that the decision in *Dimsey v Allen* has established that the deeming provision in s 739 only affects the transferor (see [12], [31] to [33] and [39] to [41]). However, I agree with HMRC that the lead appellants are not assisted by the fact that s 739 does not affect the tax position of any other person such as the Clients. Under s 739(2), it is the income of the relevant overseas person which is deemed to be the income of the lead appellants; namely, the trading income arising to the partners in the Partnership in respect of its consultancy business specifically relating to the provision of the relevant lead appellant's services to the relevant Clients. For the reasons already set out, s 739 takes precedence over s 44 ITEPA. On this analysis, therefore, s 44 is no longer in point so that the lead appellants are not deemed to receive any earnings under the arrangements and, accordingly, no tax credit can arise; under the analysis in Parts B and C a tax credit arises only if the sums in dispute are chargeable to income tax as earnings.

(2) For similar reasons s 743(2) does not enable the lead appellants to off-set a sum equal to the tax credit which would arise under s 44 ITEPA under the analysis set out in Parts B and C against the income they are deemed to receive under s 739(2). To recap, s 743(2) provides that "the same deductions and reliefs shall be allowed as would have been allowed if the income deemed to be his [the lead appellant's] by virtue of [s 739] had actually been received by him". It is plainly designed to allow the relevant individual to receive the reliefs and allowances he would have received had income of the particular kind been received by him directly. In this case, therefore, the applicable reliefs are those which would be available to the lead appellants if they had actually received income from a trade of carrying on a consultancy business. This provision does not entitle the lead appellants to claim relief which would be available if they were chargeable to income tax under an entirely different set of rules, such as those in s 44 ITEPA.

Part G – Closure notice issue

Facts

295. As set out above, in their returns for the relevant tax years, the lead appellants (a) included the Fee as self-employment income received from the relevant Partnership and accounted for income tax and Class 2 and 4 NICs on those sums or, in Mr Johnson's case only, in relation to the employment period, as earnings from an employment, and (b) included the Profit Share on the basis that it was not taxable in reliance on article 3 as explained in a note.

296. As set out below, HMRC opened enquiries into each relevant tax year under s 9A TMA which it appears were handled centrally by HMRC's Special Civil Investigations Unit.

297. Montpelier notified HMRC of the arrangements under the DOTAS rules on 30 September 2004. I note that in the disclosure Montpelier referred to there being a contract with a UK business for "the provision of the services of a particular individual", the services were typically entered into via a UK agent who was unconnected with any of the other parties and the individual had "an agreement with the Partnership whereby he provides his services exclusively to them for onward assignment by the Partnership to a business or businesses". Montpelier identified the legislation which in its view is avoided by the use of the arrangements as including s 44 ITEPA.

Mr Lancashire

298. There was the following main correspondence in relation to Mr Lancashire's tax position in the relevant tax years:

(1) In a letter of 27 September 2006, HMRC opened an enquiry into the 2004/05 tax year, in which they asked (a) for Mr Lancashire's P11D and P60, confirmation of whether he was still a settlor/beneficiary of any trust based in the UK or offshore, the amount of income received from the trust and a copy of the deed of settlement, and (b) for clarification of "precisely what the nature of the income received via your trust refers to" and an explanation "in detail why you are claiming relief under [article 3]. This aspect relates solely to a Manx enterprise trading in the Isle of Man and not to Interest in Possession Trusts".

(2) On 25 October 2006 Montpelier replied to HMRC as follows:

> "Mr Lancashire is the settlor/beneficiary of the [Trust] the trust deed of which was executed on 18/5/04 and is based in the Isle of Man.….
>
> …..Mr Lancashire is the settlor/beneficiary of the [Trust] a trust established and controlled in the Isle of Man. The trust is a partner in a trading partnership written under the laws of the Isle of Man. The income received relates to the profits of the trading partnership distributed to the family settlement.
>
> According to [article 3] the profit from a Manx enterprise is exempt from the UK taxes on income. Income from the offshore partnership is treated as income from "Manx Enterprise" because all the partners are Isle of Man residents. The management and control of the partnership is carried out in the Isle of Man. No trade is carried out by a permanent establishment in the UK, thus the profits of the partnership are assessable by the Isle of Man and not the UK.
>
> The income which was received from the trust, represents the commercial profits of a Manx enterprise (the partnership profits), which are exempt from UK tax under [article 3]. This foreign income is subject to UK tax and has been disclosed in the 2004/05 tax return with a claim for double tax relief because such income is precisely the same income that has been exempted from UK tax.
>
> The principles of Archer Shee v Baker support this argument that the income arising to our client from the trust is not subject to UK tax as the income from the trust distributed to the beneficiary retains its character as treaty protected income earned by the Isle of Man partnership. Thus the income received by Mr Lancashire from the trust is characterised as income from the "Manx enterprise" and consequently he is entitled to claim Double Taxation Relief under [article 3]."

(3) In a letter of 30 November 2006 HMRC said the letter had been sent to Mr Alan Brannigan of Special Civil Investigations. They noted they had not received the deed of settlement and enclosed a notice (issued under s 19A TMA) requiring this to be provided. Montpelier sent the deed to HMRC on 8 December 2006.

(4) On 21 December 2006, HMRC replied that the relevant income was taxable on the basis that the "income arising to the trustees is chargeable on the life tenant because it is regarded as his income under the authority of Archer Shee v Baker". They said that alternatively s 739 ICTA 1988 applies noting that this "operates to treat your client as chargeable to income tax on an amount equivalent to the income arising to the Isle of Man Partnership". They said that the conditions for s 739 to apply were satisfied on the basis that (a) there was a transfer of assets by Mr Lancashire (the settlement of funds into the offshore

trust), (b) as a result of the transfer along with associated operations income became payable to a no- resident person (both the Partnership and the Trust) and Mr Lancashire had power to enjoy the income of the Partnership through his status as beneficiary of the Trust. They asked for accounts for the Partnership, the name of the Partnership and of the partner which related to the Trust.

(5) In a letter of 21 February 2007 Montpelier wrote to HMRC setting out why they disagreed with HMRC's analysis set out in their letter of 21 December 2006. They said that final accounts for the Partnership were being prepared, gave the name of the Partnership and the name of the Trustee.

(6) On 6 March 2007 HMRC replied stating that the letter from Montpelier of 21 February 2007 had been sent to Mr Brannigan of Special Investigations who was co-ordinating these issues.

(7) In a letter of 16 May 2007 HMRC wrote to Mr Lancashire stating they did not accept that his claim under article 3 was valid and that they believed that the income arising in the Trust/Partnership was chargeable on him. They said that following advice they intended taking "a number of representative cases forward for hearing before the Special Commissioners and possibly beyond to establish the income is chargeable". They asked if Mr Lancashire was prepared to await and accept the decision in the courts and if he would consider making a payment on account of the asserted liability. They also asked for, to the extent not already provided, the accounts of the Trust/Partnership for the period from inception to 5 April 2006 or if earlier the date of cessation of the Trust.

(8) In a letter of 12 September 2007, HMRC opened an enquiry into the 2005/06 tax year stating: "As you are aware enquiries are ongoing into your previous Tax Returns with regard to your claim for relief under [article 3]. I note that you have claimed relief again for 2005/06. As such, this year will be included as part of HMRC's overall enquiry for this notice". Mr Lancashire was asked to confirm the amount of income received from the Trust in that year and to provide the accounts for the Trust and the Partnership for that year.

(9) In a letter of 13 May 2008 HMRC issued a notice (under s 19A TMA) requiring Mr Lancashire to produce a copy of the agreed accounts for the Partnership for the period to 5 April 2005 and 5 April 2006. Montpelier replied on 22 May 2008 that they were unable to provide final accounts as yet. They said that "our management team is in discussion with Mr Brannigan at HMRC Special Civil Investigations regarding timing for submission of accounts and we will revert to you in due course".

(10) On 3 June 2008 HMRC opened an enquiry into the 2006/07 tax year again stating that this year was to be included as part of HMRC's overall enquiry and that:

> "In the Budget on 12th March the Government announced proposals to introduce legislation to retrospectively put it beyond doubt that claims such as yours are invalid.
>
> The consequence of the announcement is that assuming the proposals become law then, the claims you have made under the DTA will not be effective and the share of income arising in the Partnership(s) you have an interest in via your Trust(s) will be chargeable on you for every year in which such income arose or arises. Given this you may now wish to submit an amended return for 2006/07 to reflect that the partnership income is chargeable."

(11) In a letter of 18 July 2008 in relation to an unrelated tax issue in the tax year 2006/07, HMRC noted that Mr Lancashire's self-assessment for that year was under enquiry in respect of the claim for relief under article 3. HMRC referred to the fact that proposals in the Finance Bill were moving to Royal Assent in July and that a colleague, Mr Alan Brannigan, who was dealing with this matter, hoped to meet with Montpelier to resolve outstanding issues.

(12) On 23 November 2009, HMRC opened an enquiry into the 2007/08 year stating: "Every year we check a number of returns to make sure that they are correct …I would now like to check your return….I note that you have claimed relief under [article 3]". They referred to the changes which by then had been made to the legislation in similar terms as in the previous letter.

(13) In an undated letter Montpelier wrote to Mr Brannigan of Special Civil Investigations enclosing the final accounts for the Coalmine Partnership.

(14) On 16 February 2009, Mr Brannigan wrote to the compliance office at HMRC. The letter was headed "Isle of Man Partnership/Trust Avoidance Scheme 64863085". He said that he had reviewed the accounts, he set out information from the accounts and said that the income shown in the accounts was chargeable as partnership income and as such was liable to both income tax and Class 4 NICs. He asked the officer in the compliance office to issue closure notices and amendments for the years 2004/05 to 2006/07 to bring into charge the partnership income as per the accounts. He said that if there "is a Tax Credit issue then we need to keep our s 9A enquiries open until that issue is considered."

(15) In letters of 16 March 2009, HMRC closed the enquiries in relation to the 2004/05, 2005/06 and 2006/07 tax years using the same wording in each case. For example, in the letter relating to 2004/05 they said: "*My conclusion is that the Isle of Man Partnership income is taxable and therefore you have under-declared your tax*. I am amending your return to reflect this…My amendment results in a £37,582.66 increase in tax due" (emphasis added). In the accompanying tax calculation the relevant amount is shown as a profit from a partnership.

(16) In a letter of 22 May 2012 HMRC closed the enquiries in relation to 2007/08 stating:

> "The income of the trust, which you have claimed as exempt *is chargeable as partnership income and as such is liable to both income tax and Class 4 NICs*. I have amended your tax return to reflect my conclusion. It previously showed you are due to pay £184.05 tax. It now shows you are due to pay £12,383.20 tax. The difference is £12,199.15." (Emphasis added.)

(17) Mr Lancashire appealed to HMRC against the closure notices in each case in the same terms. For example, in a notice of appeal date 2 April 2009 in respect of 2004/05 the conclusion from the enquiry is stated to be "partnership income is taxable" and the grounds of appeal were stated to be that:

> "We are of the opinion that the distributions from the Isle of Man Settlement are exempt from UK tax by virtue of [article 3]. We do not consider the distributions to be partnership profits under s 858 ITTOIA 2005… We further contend that s 58(4)(5), Finance Act 2008, are contrary to the UK Human Rights Act under the First Protocol and Article 14."

(18) On 30 April 2009 HMRC acknowledged receipt of the appeals and said the matter was being dealt with by Special Investigations.

Mr Lee

299. There was the following main correspondence in relation to Mr Lee's tax position under the arrangements:

(1) In a letter dated 8 December 2004 HMRC raised an enquiry into Mr Lee's return for 2002/03 asking the same questions as they raised in relation to Mr Lancashire initially (see [298(1)] above).

(2) On 25 February 2005, Mr Lee wrote to HMRC stating the following:

> "The income that I received from the offshore trust, in my capacity as the sole income beneficiary, represents the share of the profit of an Isle of Man Partnership whose profits are excluded from tax by virtue of [article 3]..My claim for Double Tax Relief, as the life tenant, is based on Baker v Archer Shee principles."

(3) On 1 March 2005 HMRC replied to Mr Lee stating that they were likely to challenge the validity of the claim made under article 3. They said that HMRC were "also aware of the payment structure and in particular the use of your trust as a vehicle for receiving income," and they asked for accounts for the Trust.

(4) On 10 March 2005, HMRC informed Mr Lee that "SCO Liverpool" was dealing with the article 3 issue.

(5) In a letter dated 1 July 2005 HMRC said that they were likely to challenge the claim under article 3 and that the "complexity of the claim requires careful consideration and consultation with the Revenue Technical Consultant" which was likely to take some time. They invited Mr Lee to make a payment on account of the tax they calculated to be due.

(6) On 30 November 2005, Mr Lee sent HMRC a copy of the draft Partnership accounts for the year ended 31 March 2003.

(7) In a letter dated 14 February 2006 HMRC set out their concern in relation to s 739 in similar terms as they did in relation to Mr Lancashire. They also asked for agreed accounts for the Partnership for all periods up to 5 April 2004, confirmation of the name of the Partnership and the name of the partner in the Partnership which related to Mr Lee's Trust.

(8) On 11 April 2006 Montpelier replied to HMRC on a similar basis as they responded to HMRC in relation to Mr Lancashire (see [298(2)]).

(9) HMRC raised enquiries into Mr Lee's tax returns for the tax years 2003/04, to 2006/07 in letters dated 19 December 2005, 2 November 2006, 27 November 2007 and 22 September 2008 respectively in each case using similar wording to that used in the letters opening enquiries into Mr Lancashire's returns (other than the first one) (see [298(8)] and [298(10)] above).

(10) In a letter dated 16 December 2009 HMRC raised an enquiry into the 2007/08 tax return. They said "[a]s you aware enquiries are ongoing into your previous Tax Returns with regard to your claim for relief under [article 3]. I note that you have claimed relief again for 2007/08. As such this year will be included as part of HMRC's overall enquiry under this notice". They noted that following the Budget on 12 March 2008, provisions had now been introduced to block the structure from working with retrospective effect and asked Mr Lee if he wished to make a payment on account.

(11) In a letter to HMRC of 21 December 2009, Montpelier stated that the accounts for the Fearnleigh Partnership were not yet finalised but that the Trustee had confirmed that the distribution paid to Mr Lee for 2007/08 was £129, 350.

(12) HMRC issued closure notices for the 2002/03 to 2006/07 tax years on 17 November 2009 and for the 2007/08 tax year on 22 March 2012. The same wording was used but with different amounts specified. The wording for 2002/03 was as follows:

> "My conclusion is that the income of the trust, which you claimed as exempt, is chargeable as partnership income and as such is liable to both income tax and Class 4 NICs. I have amended your SA return to reflect my conclusion.
>
> It previously showed you were due to pay £2,330.83 tax.
>
> It now shows you are due to pay £49,439.36 tax.
>
> The difference is £47,478.60."

300. On 27 November 2009 and 29 March 2012, Montpelier lodged appeals with HMRC in respect of the tax years (a) 2002/03 to 2006/07 and (b) 2007/08 respectively, in each case on the same basis as the appeals made by Mr Lancashire.

Mr Johnson

301. As regards Mr Johnson:

(1) On 12 November 2008 HMRC wrote to Mr Johnson opening their enquiries into his return for 2006/07 noting that in that return he had claimed relief under article 3. They referenced the proposals announced in the Budget which had become law and stated that: "The consequence is that the share of income arising in the Partnership(s) you have an interest in via your Trust(s) will be chargeable on you for every year in which such income arose or arises". They suggested that he may wish to amend his tax return for 2006/07 and asked whether he wanted to make a payment on account. (I note that Royal assent to the finance bill was given on 21 July 2008.) In this letter, HMRC asked for full details of the arrangements which resulted in the claim under article 3 and the final accounts for Mr Lee's Trust and Partnership for periods to the end of 5 April 2007.

(2) On 10 February 2009, HMRC issued a closure notice in respect of the 2006/07 tax year which included the following conclusions:

> "My conclusion is that the income of the trust, which you have claimed as exempt is chargeable as partnership income and as such is liable to both income tax and Class 4 NICs.
>
> I am amending your tax return to reflect this…
>
> Your Tax Return is amended as follows:
>
> Your self-assessment before my enquiry showed that £684 of tax was due.
>
> My amendment results in a £7,990.70 increase in tax due.
>
> The amended self-assessment is now £8,674.70 tax due."

(3) Mr Johnson appealed against the closure notice. In the notice of appeal, he set out HMRC's conclusion as set out in their letter of 10 February 2009 and said that the grounds of appeal were: "Your calculation appears to have ignored my claim for exemption from UK income tax in respect of certain receipts. This claim was made in box 6.39 of my tax return. Perhaps you would be so kind as to give effect to that claim and adjust your calculation accordingly."

(4) In a letter dated 15 September 2009 HMRC wrote to Mr Johnson stating that they were opening an enquiry into his tax return for 2007/08 and "[a]s you aware enquiries are ongoing into your previous Tax Returns with regard to your claim for relief under [article 3]. I note that you have claimed relief again for 2007/08. As such this year will be included as part of HMRC's overall enquiry under this notice". They noted that, following the Budget on 12 March 2008, provisions had now been introduced to block the structure from working with retrospective effect and asked Mr Lee if he wished to make a payment on account. HMRC asked for the final accounts for his Trust and Partnership for the periods up to the tax year 2007/08.

(5) On 20 October 2009 HMRC notified Mr Johnson that they had closed their enquiries into his tax return for 2007/08 on setting out their conclusion as follows:

> "My conclusion is that the income of the trust, which you have claimed as exempt is chargeable as partnership income and as such is liable to both income tax and Class 4 NICs.
>
> I have adjusted your self-assessment return to reflect my conclusion. The amended figure for your self-assessment return is as follows:
>
> - Your original self-assessment return said you were due to pay £1,279.76 tax.
> - Your self-assessment return now says you are due to pay £12,407.50 tax."

302. On 27 October 2009 Mr Johnson wrote to HMRC notifying them that he wished to appeal against their amendments made to his 2007/08 return in respect of foreign income received up to 12 March 2008.

Caselaw

303. The parties both referred to the Supreme Court's detailed consideration of how to determine the scope of an appeal in *HMRC v Tower MCashback LLP 1 & Anor* [2011] STC 1143 and to the comments made in the lower courts. I refer to this case as "*Tower MCashback*". Ms Redston referred, in particular, to the approach set out by Moses LJ in the Court of Appeal in *Tower MCashback* whereas HMRC focused more on the comments of Henderson J in the High Court.

304. In summary, the relevant facts of *Tower MCashback* are as follows:

(1) The partners in a limited liability partnership, claimed capital allowances under s 45 of the Capital Allowances Act 2001 in relation to expenditure they claimed they had incurred under a software licence agreement.

(2) HMRC opened an enquiry in which they focused on s 45(4), which withholds first year allowances for expenditure on software rights "if the person incurring it does so with a view to granting another person a right to use or otherwise deal with any of the software in question". In their closure notice, HMRC said "as previously indicated my conclusion is: the claim for relief under section 45 is excessive". The closure notice was sent with a covering letter which stated: "I am satisfied that the *Tower MCashback* scheme fails on the section 45(4) point alone."

(3) HMRC later wanted to rely on a new argument, namely, that the taxpayer had not incurred the expenditure in buying the software licence within the meaning of s 45 because over 75% of the funds needed for the purchase had been borrowed against security provided by the seller on uncommercial terms.

305. The Special Commissioner ruled in favour of HMRC that he had jurisdiction to consider the new argument. Mr Justice Henderson reversed this in the High Court (*HMRC v Tower MCashback LLP 1 and Another* [2008] EWHC 2387, [2008] STC 3366) but the Court of Appeal (*HMRC v Tower MCashback LLP 1 and Another* [2010] EWCA Civ 32, [2010] STC 809) and the Supreme Court decided in favour of HMRC.

306. Mr Justice Henderson made a number of comments which were referred to by the Supreme Court:

(1) At [113], he noted that there was no express requirement for the officer to set out his reasons for his conclusions and that what mattered "is the conclusion which the officer has reached upon completion of his investigation of the matters in dispute, not the process of reasoning by which he has reached those conclusions."

(2) He said, at [115], that there is a principle of tax law "to the general effect that there is a public interest in taxpayers paying the correct amount of tax……[which] still has at least some residual vitality in the context of section 50 [TMA]" such that the Commissioners must:

> "be free in principle to entertain legal argument which played no part in reaching the conclusions set out in the closure notice. Subject always to requirements of fairness and proper case management, such fresh arguments may be advanced by either side or may be introduced by the Commissioners on their own initiative."

(3) He then said, at [116], that this did not mean that an appeal against a closure notice "opens the door to general roving enquiry into the relevant tax return". Rather:

> "The scope and subject matter of the appeal will be defined by the conclusion stated in the closure notice and by the amendments (if any) made to the return. The legislation does not say this in so many words, but it follows from the fact that the taxpayer's right of appeal under section 31(1)(b) is confined to an appeal against any conclusion stated or amendments made by a closure notice. That is the only appeal which the Commissioners had jurisdiction to entertain."

(4) At [128], he noted that "the result may from the Revenue's point of view be characterised as conferring a windfall benefit on the taxpayer" but that another way of looking at the limitation on the scope of the appeal is as "part of the protection given by Parliament to taxpayers under the self-assessment system. There is always a balance to be struck between the interest of individual taxpayers on the one hand and the interest of the State and the general body of taxpayers on the other hand. Parliament has decreed how the balance is to be struck…"

307. In the Court of Appeal, the majority of Moses LJ and Scott Baker LJ (with Arden LJ dissenting) largely appeared to agree with the reasoning of Henderson J but reached a different conclusion in applying those principles. Moses LJ also noted the public interest in the correct amount of tax being paid and, at [29], that the self-assessment regime contains a system of checks and balances which, at [31], it is not to be supposed that Parliament intended to be overridden by the retention of a system of "thoroughly uninformative notices of assessment and notices of appeal". He noted, at [31] and [32], that HMRC accepted some restriction being that it is implicit in the statutory scheme that an appeal "is confined to the subject matter of the conclusions and any amendments stated in the notice" (as was held by Dr John Avery Jones CBE

in *D'Arcy v Revenue and Customs Comrs* [2006] STC (SCD) 543) but, at [33], "it all depends what one means by the 'subject-matter'."

308. Moses LJ referred, at [34], to Henderson J's comments at [113] and [116] and concluded, at [35], that he was driven (by the relevant provisions in the context of the restrictions imposed on HMRC's power to amend a self-assessment) to the same view as Henderson J:

> "The subject matter of this appeal is defined by the subject matter of the enquiry and the subject matter of the conclusions which close that enquiry. But that statement of principles serves only to give rise to further questions and problems. As this appeal demonstrates, there is likely to be controversy as to how one draws the boundaries of the subject matter of the conclusions stated in the closure notice. Are reasons for the conclusion to be distinguished from the conclusion stated, and if so, how?"

309. At [37], he warned against too rigid an approach noting that, as Parliament had not chosen to identify some legal principle on this issue, it would be wrong for the court to attempt to do so and any such statement of principle "is likely to condemn both taxpayer and the Revenue to too rigid a straitjacket" and may "prevent a taxpayer from advancing a legitimate factual or legal argument which had hitherto escaped him or deprive, on the other hand, the public of the tax to which it is entitled."

310. At [38], he said that "with those nebulous observations" he would leave it to the Commissioners (now the tribunal) to identify the subject matter of the enquiry and thus the subject matter of the conclusions in which exercise the tribunal will have to "balance the need to preserve the statutory protection for the taxpayer afforded by notification that the inspector has completed his enquiries and the need to ensure that the public are not wrongly deprived of contributions to the fisc."

311. He continued, at [41], to state that it is to the tribunal that the statute looks to identify what s 28ZA describes as the subject matter of the enquiry:

> "The closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of that enquiry. The appeal against the conclusions is confined to the subject matter of the enquiry and of the conclusions. But I emphasise that the jurisdiction of the Special Commissioners is not limited to the issue whether the reason for the conclusion is correct. Accordingly, any evidence or any legal argument relevant to the subject matter may be entertained by the Special Commissioner subject only to his obligation to ensure a fair hearing."

312. At [42], he expanded on this as follows:

> "Protection of the public requires, at the least, that other issues arising from the subject matter of the enquiry ought to be considered, if necessary, by the fact-finding tribunal. In *D'Arcy* [2006] STC (SCD) 543 at para 11, the Special Commissioner ruled that the scope of an appeal against a conclusion or amendment made by a closure notice will depend on the facts. The conclusion in that case was, as described by Dr Avery Jones, very specific and relied upon the *Ramsay* principle. But the Special Commissioner permitted other issues arising from the facts to be advanced since the tribunal must form its own view on the law without being restricted to what the Revenue stated in their conclusion or the taxpayer states in the notice of appeal (see para 13). I see no reason for confining that view merely to legal issues. Provided a party can be protected from ambush, the only limitation on issues which might be entertained by the Special Commissioner is that those issues must arise out of the subject matter of the enquiry and consequently its conclusion, and be subject to the case management powers to which I have referred."

313. Lord Justice Moses concluded, at [51], that the closure notice did not of itself allow so restricted a view of the subject matter of the appeal as had been decided by Henderson J. Whilst "it did refer to previous correspondence which clearly focused on section 45(4), the closure notice itself was in plain terms a refusal of the claim for relief under section 45".

314. In the Supreme Court, Lord Walker, at [15], approved Henderson J's comments at [113], [115] and [116] of his judgment noting that he had reached his conclusion "despite having correctly made" those observations. He then referred, at [16], to the comments of Moses LJ, at [32] and [41] of his decision, concluding, at [17], that there was "little if any difference" between the majority of the Court of Appeal and Henderson J as to the principles to be applied; the difference was as to the application of those principles. He preferred the approach of Moses LJ.

315. Lord Walker cautioned, at [18], against the decision being taken as encouragement to draft every closure notice in wide and uninformative terms although, "if, as in the present case, the facts are complicated and have not been fully investigated, and if their analysis is controversial, the public interest may require the notice to be expressed in more general terms". As both Henderson J and the Court of Appeal observed, unfairness to the taxpayer can be avoided by proper case management during the course of the appeal. He noted that similarly, Dr Avery Jones observed in *D'Arcy v HMRC* [2006] STC (SCD) 543, para 1:

> "'It seems to me inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal. It follows that either party can (and in practice frequently does) change their legal arguments. Clearly any such change of argument must not ambush the taxpayer and it is the job of the Commissioners hearing the appeal to prevent this by case management.'"

316. Lord Hope said, at [83], that, as the right of appeal under the relevant provision is against the conclusion stated in or amendment made by a closure notice, "it is desirable that the statement by the officer of his conclusions should be as informative as possible". He noted that the closure notice was in very bald terms and whilst "the statute does not spell out exactly what it means by the words 'his conclusions' … taxpayers are entitled to expect a closure notice to be more informative".

317. He continued, at [84], that such notices "are seldom, if ever, sent without some previous indication during the enquiry of the points that have attracted the officer's attention. They must be read in their context." In that case, as the officer drew attention to his previous indications and sent a covering letter which cast further light on the approach, he did not think that it was unfair to the taxpayers to hold that the issue as to their entitlement to allowances should be examined as widely as may be necessary to determine whether they are indeed entitled to what they have claimed. Furthermore:

> "while the scope and subject matter of the appeal will be determined by the conclusions and the amendments made to the return, s 50 of TMA does not tie the hands of the commissioners (now the Tax Chamber) to the precise wording of the closure notice when hearing the appeal."

318. The parties also referred to the decision of the Court of Appeal in *Fidex Ltd v HM Revenue & Customs* [2016] EWCA Civ 385, [2016] STC 1920, in which that court considered the decision in *Tower MCashback*. The issue was whether under a complex scheme, the appellant had generated an allowable loss of nearly €84 million where Fidex sought to obtain the benefit of a specific rule in the loan relationship provisions (para 19A in the relevant provisions). In their closure notice, HMRC

referred only to their argument on that provision but later sought to argue that the debit was not allowable under a different provision in the loan relationship rules. It was held that the tribunal was right to conclude that the subject matter of the enquiry/the closure notice and of the review related to the admissibility of the debit claimed and that the new argument could be raised as an additional ground upholding that conclusion.

319. In setting out a comprehensive review of *Tower MCashback*, Kitchin LJ noted, at [43], that the appellant drew attention to the use by Moses LJ in his judgment of the phrase "the subject matter of the enquiry" but, at [44], that he did not think Moses LJ had meant to expand the permissible scope of an appeal in his use of this phrase beyond that contemplated by Henderson J nor did he understand the Supreme Court to have sanctioned any such expansion. In his view, Moses LJ was, "doing no more than explaining that the closure notice must be considered in context and in light of the enquiry that preceded it".

320. He concluded, at [45], that the principles to be applied are those set out by Henderson J as approved by and elaborated upon by the Supreme Court which, so far as material to that appeal, may be summarised in the following propositions:

> "i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> iii) The closure notice must be read in context in order properly to understand its meaning.
>
> iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

321. He noted, at [51], that in his view the UT had been right not to take too rigid an approach as though this was a question of statutory construction. He agreed with them that "it is not appropriate to construe a closure notice as if it is a statute or as though its conclusions, grounds and amendments are necessarily contained in watertight compartments, labelled accordingly". He also thought they had rightly emphasised that "while there must be respect for the principle that the appeal does not provide an opportunity for a new roving enquiry into a company's tax return", the tribunal is not deprived of jurisdiction "where it reasonably concludes that a new issue raised on an appeal represents an alternative or an additional ground for supporting a conclusion in the closure notice". He said, at [64], that just as Lord Hope observed in *Tower MCashback*, it was not unfair to Fidex to hold that the issue as to its entitlement to the debit should be examined as widely as might be necessary to determine whether it was indeed entitled to what it had claimed.

Submissions

322. Mr Tallon submitted that, on the basis of the caselaw set out above, the scope of the appeal is determined by the conclusions stated and amendments made to the lead appellants' returns in the s 28 amendments when HMRC closed their enquiries, albeit they are to be viewed in the context of the previous enquiries. On that basis, it is clear that the subject matter and the scope of these appeals is confined to the question of whether the Profit Share is taxable as income from a partnership or is exempt under article 3.

323. Mr Tallon said that Ms Redston was wrong to focus on the subject matter of the enquiry as based on the comments of Moses LJ in the Court of Appeal's decision in

Tower MCashback. Rather the correct approach is that set out by Henderson J in the decision in the High Court, as approved by the Supreme Court in that case, and as explained by the Court of Appeal in *Fidex*.

324. In submissions made on a similar theme to those made on the fairness issue (see [326]), Mr Tallon noted that:

(1) Each of the lead appellants presented the Profit Share in their tax returns as taxable income from a Trust/Partnership in respect of which they claimed relief from tax under article 3. Accordingly, in their correspondence during their enquiries, HMRC focused specifically on whether the lead appellants were entitled to the relief provided for under article 3 and on obtaining information relevant to that such as copies of the accounts for the Partnership and the Trust.

(2) The PAYE Grounds were not raised by the lead appellants in their tax returns, during the enquiry or at the closure of the enquiry (or for some time beyond that). Those grounds raise arguments which are fundamentally inconsistent with the position adopted by the lead appellants throughout. In fact, the argument that the sums in dispute are taxable under ITEPA would have undermined entirely the analysis which the lead appellants relied on in their returns and during the whole course of HMRC's enquiries.

325. Mr Tallon said that if the above points are not accepted by the tribunal, the tribunal should exercise its discretion to prevent the lead appellants raising the PAYE Grounds as a new argument on the basis it is unfair and contrary to the proper case management required. In his view, overall, the unfair disadvantage of introducing the PAYE Grounds cannot be remedied by case management directions. He noted the following, in particular:

(1) When the appellants notified their appeals to HMRC (in 2009 and 2012), the stated grounds of appeal did not contain the PAYE Grounds. The PAYE Grounds were raised formally only when the appellants notified their appeals to the tribunal in July 2015 (although they were raised in July 2014, in the context of wider case management of the group of appeals).

(2) As the PAYE Grounds were raised only after the closure of HMRC's enquiries in 2009 and 2012, HMRC were deprived of the opportunity to enquire into the factual basis of the claims now made.

(3) By the time the point was raised, given the passage of time, HMRC were unable to obtain information from the Clients and TPP.

(4) The impact of the above points is demonstrated by the lack of documentation available in these appeals. The missing documents include all of the Partnership agreements, all of the contracts with the Clients (under which the services were ultimately provided) and the purported employment contracts with TPP.

(5) Had the PAYE Grounds been raised at an earlier stage, HMRC may have been able to protect their position by issuing determinations under regulation 80 of the PAYE regulations to the Clients and TPP as regards the income tax which the appellants argue those parties were liable to account for under the PAYE system.

(6) HMRC opened their enquiries into the returns of those who used the arrangements promptly in order to address the use of this marketed tax avoidance scheme. The lead appellants are now seeking to shift liability for the income tax arising from these tax avoidance arrangements to third-parties (the

Clients), in circumstances where HMRC cannot enforce any liabilities against those parties.

326. Mr Tallon also suggested that HMRC did not have sufficient information to form the view that s 44 ITEPA could potentially apply to the lead appellants until they received more information as part of the preparation for these appeal proceedings. Whilst by the time they closed their enquiries, HMRC may have known in general terms how the arrangements operated, they received only very limited information/documentation from the lead appellants. As set out above, the lead appellants did not raise any issue that the sums in dispute are taxable under ITEPA and, in fact, they presented the analysis on an entirely different basis. When the schemes were disclosed to HMRC, HMRC did not have access to the scheme documents and had (and still have) no witness statements from de Graaf or Montpelier or the Clients.

327. Ms Redston said that, on the contrary, on the basis of the approach set out in caselaw, in particular, having regard to the comments of Moses LJ in the Court of Appeal's decision in *Tower MCashback*, the PAYE Grounds are plainly within the scope of the conclusions reached by HMRC in the closure notices. On that basis, she submitted that:

(1) The focus of HMRC's enquiries into the lead appellants' returns was on the correct tax treatment of the sums received by the lead appellants under the arrangements. The subject matter of the enquiry was, therefore, the arrangements and the income therefrom and the only issue was whether tax is payable on those arrangements. The PAYE Grounds are simply another legal argument against HMRC's conclusion that the relevant sums are taxable which the tribunal has the jurisdiction to entertain subject only to the tribunal's obligation to ensure a fair hearing.

(2) Three of Mr Lancashire's closure notices simply referred to the sums in dispute being taxable. It cannot possibly be the case that the tribunal is prevented by that wording from considering the PAYE Grounds even on the narrow reading of the tribunal's jurisdiction which HMRC are advocating. Even though HMRC referred to the Profit Share as being taxable as partnership income in the other closure notices, it would be extraordinary if the tribunal had jurisdiction to consider Mr Lancashire's appeals in relation to those three years but could not consider either his 2008 appeal, or the appeals of the other appellants, given that the issue, the disclosure, the scope of HMRC's enquiry and the subject matter are all identical.

328. On HMRC's fairness points Ms Redston made the following main submissions:

(1) It is clear from the caselaw that the type of unfairness to which HMRC refer is not a matter which the tribunal can take into account in deciding whether it has jurisdiction to hear the PAYE Grounds. The tribunal is concerned only with procedural unfairness in relation to the appeal proceedings in the tribunal and not substantive matters such as whether HMRC are too late to take action required to counteract the PAYE Grounds.

(2) There is no question of HMRC being ambushed. They have had notice of the PAYE Grounds since 18 December 2008 when this was raised by Mr Warr in relation to Mr Swarbrick (see [79] and [80] above). Mr Renshaw, who is part of the group co-ordinating the appellants' appeals, met with HMRC's Counter-Avoidance Unit on 28 July 2014 and raised the application of s 44 ITEPA with them and it has been in the appellants' grounds of appeal since their notices of appeal were filed with the tribunal in July 2015.

(3) The fact that documents are missing is down to the passage of time and that the lead appellants had no right to see some of the documents (such as the Partnership agreements, the agreements between Montpelier and the Recruitment Agent and the agreements between the Recruitment Agent and the Client). It seems that HMRC discussed obtaining documents direct with Montpelier but as the lead appellants were not involved in that discussion it is not known whether HMRC could have obtained the relevant documents from Montpelier and, if not, why not. The lead appellants have submitted all documentation that they could obtain. For the reasons already given, it is not necessary to establish the full contractual chain for all agreements to be in writing in order to establish that s 44 applies.

(4) As regards Mr Tallon's suggestion at [326] above, Ms Redston submitted that the tribunal should exercise its case management powers to exclude HMRC from raising this at this point but that, in any event, the contention is not correct. She noted the following in particular:

(a) HMRC have not previously suggested that they did not know that the lead appellants were working as contractors for Clients. There was no such submission in their statement of case or their skeleton argument.

(b) If HMRC had made this assertion at an earlier point in the proceedings the lead appellants would have asked for witness evidence to be provided by members of HMRC's investigation team and for disclosure of relevant correspondence between Montpelier and HMRC about the operation of the arrangements generally.

(c) The evidence demonstrates that HMRC were fully aware of the facts:

(i) As early as 2002 HMRC publicly stated that the arrangements were being used by those seeking to avoid the rules commonly referred to as IR35. Those rules apply where persons provide their services to third party clients through an intermediary (such as a personal services company).

(ii) When Montpelier disclosed the arrangements under the DOTAS rules on 30 September 2004, they disclosed sufficient detail for HMRC to be aware that s 44 ITEPA could be in point (see [298]).

(iii) The enquiries were managed by a single team at HMRC's Special Civil Investigations unit and it would be extraordinary if they did not have a clear picture of what the arrangements involved. In fact, that they were fully aware of the position is clear from the correspondence; for example, in 2005, HMRC wrote to Mr Lee stating: "the Revenue are also aware of the payment structure and in particular the use of your trust as a vehicle for receiving income".

(5) In any event, there is no substantive unfairness, HMRC should have known that the agency rules apply before they issued their decisions. For the reasons already given, they had all they needed to know to establish that was the case (see, in particular, the correspondence relating to Mr Swarbrick (see [79] and [80]). The breadth of what may be taxed as earnings was entirely apparent from the caselaw at the time HMRC were considering this (even though the decision by the Supreme Court in *Rangers* came later) (see also [80]).

329. Mr Tallon responded that the fact that Mr Swarbrick, a party who is not involved in these proceedings, may have raised with HMRC similar arguments to those raised by the lead appellants in the PAYE Grounds does not alter the unfair

disadvantage to HMRC outlined above. He noted in particular, (a) the PAYE Grounds were not raised by any of the appellants until a late stage, (b) the information and documentation available to HMRC in these appeals was (and remains) very little, (c) at the time when HMRC took the stance that in Mr Swarbrick's case s 44 ITEPA only applied to the Fee and not to the Profit Share the case law on remuneration was not as developed as it is today, (d) little can be taken from the limited information available as regards Mr Swabrick's position given he is not present to give evidence.

330. Mr Tallon added that it is unrealistic to say that HMRC should have considered that s 44 extended to the Profit Share at an earlier point on the basis of the cases Ms Redston referred to. Those cases are concerned with the tax position of actual employees and not those deemed to be employees under s 44 ITEPA. There is no straight read across from the facts and circumstances of those cases and those in these appeals as regards the specific statutory terms of s 44 ITEPA. In effect s 44 ITEPA provides its own code for what is taxable under it.

Conclusion

331. For all the reasons, set out below I have concluded that the tribunal has jurisdiction to hear the PAYE Grounds and that it is not unfair or unjust to permit the lead appellants to raise these grounds of appeal.

Correct approach

332. It is clear from the principles set out in *Tower MCashback* and *Fidex* that the scope and subject matter of an appeal is determined essentially by the conclusions and amendments set out in the closure notice as viewed in the context of the preceding enquiry and related correspondence. As Henderson J said, in the passages from his judgment in *Tower MCashback* which were expressly approved by Lord Walker in the Supreme Court, the tribunal cannot stray beyond that.

333. This caselaw relates to determining the scope of an appeal for the purpose of assessing what issues HMRC can raise in the appeal proceedings. However, both parties seemed to accept that it is also necessary to decide on the scope of the appeal according to the principles set out in this caselaw, in order to determine what arguments an appellant may raise in support of an appeal. Moreover, in *Tower MCashback* the courts plainly envisaged that their comments were just as relevant to deciding what arguments an appellant may raise.

334. The courts have emphasised that the tribunal is not merely acting as an arbiter between the parties but in the public interest in determining the correct amount of tax due. Inevitably, the exercise involves balancing the protection for the individual and the public interest in the payment of the right amount of tax. So, whilst the legislature has, as Henderson J noted, provided for the drawing of a line by reference to the subject matter of the conclusions, precisely where to draw that line, taking into account this balancing exercise, is left to the tribunal to determine on the facts of the particular case.

335. I note that in the Supreme Court decision in *Tower MCashback* Lord Walker, like Moses LJ in the Court of Appeal, approved the comments of Dr Avery Jones in the *D'Arcy* case that it is "inherent in the appeal system that the tribunal must form its own view on the law without being restricted to what the Revenue state in their conclusion or the taxpayer states in the notice of appeal" and that it followed that "either party can (and in practice frequently does) change their legal arguments" although "clearly any such change of argument must not ambush the taxpayer and it is the job of the commissioners hearing the appeal to prevent this by case management".

336. As Lord Hope said, closure notices "must be read in their context" and s 50 does "not tie" the tribunal's hands "to the precise wording of the closure notice" when hearing the appeal. As the UT said in *Fidex*, as approved by Kitchin LJ in the Court of Appeal, it is not appropriate "to carry out this exercise as though it were a matter of statutory construction or as though its conclusions, grounds and amendments are necessarily contained in watertight compartments, labelled accordingly".

337. As noted, Ms Redston focussed on the judgement of Moses LJ in the Court of Appeal in *Tower MCashback* whereas Mr Tallon said the correct approach is that set out by Henderson J, as expressly approved by the Supreme Court in that case, and as explained by the Court of Appeal in *Fidex*. The parties suggested, therefore, that there is a difference in approach between Henderson J and Moses LJ and Mr Tallon seemed to cast doubt on whether the Supreme Court fully endorsed the comments of Moses LJ.

338. As noted in *Fidex,* Moses LJ referred several times to the need to have regard to the *subject matter of the enquiry*. For example, at [41] of his judgment, he said that the tribunal must have regard to "the subject matter of the enquiry" as "the closure notice completes that enquiry and states the inspector's conclusions as to the subject matter of that enquiry". The only limitation, as he continued at [42], on what might be entertained "is that those issues must arise out of the subject matter of the enquiry and consequently its conclusion". On the other hand, Henderson J referred only to the subject matter of the appeal and of the conclusions stated in the closure notice.

339. However, as Kitchin LJ said in *Fidex*, it does not seem that in making reference to the subject matter of the enquiry that Moses LJ intended to broaden the scope of the exercise beyond that described by Henderson J. Nor did Kitchin LJ consider that the Supreme Court in *Tower MCashback* sanctioned any such extension.

340. I note that Moses LJ was clearly of the view that the context of the subject matter of the enquiry may be highly relevant but, when he referred to this, he focussed on the fact that the closure notice completes that enquiry. I take this to mean that the conclusions in the closure notice are to be informed by the subject matter of the enquiry, as the document bringing the enquiry to an end. This accords with the view of Kitchin LJ that Moses LJ was simply doing no more than explaining that the closure notice must be considered *in context and in light of the enquiry that preceded it*. That Henderson J also regarded context as relevant is inherent in his decision, which was essentially based on what was said in the surrounding correspondence, as limiting the scope to s 45(4).

Scope of the appeal proceedings

341. In my view, the conclusions stated and amendments made by HMRC on closure of their enquiries into the appellants' tax returns, viewed in the context of the prior correspondence during the enquiries, set the parameters of the subject matter of the appeals in broad terms, as, whether the appellants are subject to income tax in respect of sums arising under the arrangements. I cannot see any scope for any other interpretation as regards the three closure notices issued by HMRC to Mr Lancashire in which HMRC concluded simply that the Partnership income is taxable. The other closure notice issued to Mr Lancashire and those issued to the other appellants refer more specifically to the income being chargeable as partnership income. However, viewing that conclusion in the context of the prior correspondence, I consider that it is to be viewed as the reason supporting HMRC's conclusion that the relevant sums are taxable as income.

342. In my view, the factors HMRC put forward in support of their stance do not justify the tribunal taking a narrow view of the scope of the appeal. HMRC seem to

say that the tribunal should assess the scope of the appeal for the purpose of determining whether it has jurisdiction to hear an argument made by the appellant, by assessing the validity of HMRC's assertions, in effect, that they have been denied the opportunity to investigate fully the position in relation to whether s 44 ITEPA (and the related relevant provisions in ITEPA and the PAYE regulations) apply. However:

(1) The self-assessment system confers on HMRC far ranging powers of investigation once an enquiry is launched into "anything contained in the return, or required to be contained in the return" (under s 9A TMA) and, on closing the enquiry, HMRC have the broad power to "make the amendments of the return required to give effect to [the relevant officer's] conclusions" (under s 28A TMA). HMRC are not constrained in any way to approach their investigation and assessment of the correct tax position as a matter of law by reference to the position as presented by the taxpayer in his return or arguments made during the course of the enquiry. In fact, the correspondence relating to the period when they were conducting their enquiries indicates that HMRC were considering whether the lead appellants were subject to income tax in respect of the arrangements more generally than simply as regards whether article 3 applied, given that they commented on the potential application of s 739.

(2) In my view, in any event, in order to determine the scope of the appeal it is not for the tribunal to concern itself with an examination, as is the effect of HMRC's argument, of how HMRC's enquiry and investigatory powers could or should have been exercised by HMRC. For the purposes of the current exercise, the tribunal simply has to assess what the subject matter of the appeal *is* by reference to the relevant facts, namely the terms of the closure notices and related s 28 amendments, as viewed in the context of the relevant factual background. It is not a question of the tribunal assessing, in effect, what the scope of the appeal ought to be according to its own view of how matters between the taxpayer and HMRC should have been conducted. I note that the tribunal has no general supervisory power over HMRC whether in relation to the exercise of these particular enquiry and investigation powers or otherwise.

(3) I can see that HMRC may have a viable argument that the subject matter of their conclusions and s 28 amendments does not extend to income tax which may arise under provisions which could apply in factual circumstances which they were unaware of when they closed their enquiries. However, the documentary evidence available does not suggest that HMRC were unaware that the arrangements involved the lead appellants routing consideration for their work for third party clients through the Partnership and Trust structure. I note the following:

(a) The DOTAS disclosure made by Montpelier set out (albeit briefly) that the individuals who used the arrangements worked for third parties and explicitly referred to s 44 ITEPA, as further set out at [297].

(b) HMRC said in correspondence with Mr Lee (a) on 1 March 2005 that HMRC were "also aware of the payment structure and in particular the use of your trust as a vehicle for receiving income," and (b) on 1 July 2005 that the "complexity of the claim requires careful consideration and consultation with the Revenue Technical Consultant" which was likely to take some time. They were evidently of the view, at this relatively early stage, that they had sufficient information for their technical team to consider the income tax position.

(c) Whilst the correspondence in relation to Mr Swarbrick relates to a person who is not a party to these proceedings, it does at least indicate an awareness of the s 44 ITEPA issue amongst those at HMRC dealing with these arrangements. It is to be borne in mind that HMRC's Special Investigation team appear to have dealt with the investigation of the arrangement generally albeit that their comments and decisions were generally communicated to the relevant individuals through different HMRC officers.

343. In my view, the above facts demonstrate that, during the enquiry period, HMRC had enough knowledge of the factual background to the arrangements to investigate and consider the possibility that s 44 ITEPA may apply to the arrangements. It is simply not known whether HMRC overlooked the possible application of s 44 ITEPA or chose not to pursue that line of enquiry. To the extent that the burden is on the lead appellants to establish that the relevant facts were known to HMRC, they have at least established a prima facie case to that effect. On that basis the evidential burden shifts to HMRC to demonstrate the contrary, by providing positive evidence, such as that of the officers involved in the enquiries (see *Wood v Holden* [2006] STC 443 at [31] and [32] and the decision in *Rhesa Shipping Co SA v Edmunds, The Popi M* [1985] 1 WLR 948 at 955-956 cited in *Wood v Holden* at [33]). That is particularly the case given that the relevant facts regarding what HMRC knew about the arrangements are likely to be known only to HMRC.

344. I note that, on HMRC's own view, the caselaw which the lead appellants submit makes plain the extent to which s 44 ITEPA applies (namely that it applies to the Profit Share as well as the fixed Fee) is not directly relevant to the analysis on this point; section 44, in their view, forms its own mini-code. On that basis, their argument that the caselaw was not sufficiently developed to enable them to assess the impact of s 44 ITEPA during the enquiry period is not sustainable.

345. Finally, it seems to me that there is an inconsistency in HMRC's stance on the scope of the appeal. On the one hand, they argue that the scope of the appeal is limited to the narrow question of whether income arising under the arrangements is exempt from tax under article 3 so that, so they say, the lead appellants are precluded from raising the PAYE Grounds. On the other hand, they consider that they can rely on the s 739 argument notwithstanding that reliance on that provision formed no part of the conclusions stated in their closure notices and related amendments (although it was mentioned in the correspondence during the course of their enquiries). However, if it were the case that the scope of the appeal is limited as HMRC argue for, it would follow inevitably that the tribunal would not have jurisdiction to hear the s 739 argument.

Case management issue

346. As is plain from the case law, the tribunal's jurisdiction is not limited to considering whether the stated reason for the relevant conclusions is correct. As Moses LJ put it in the Court of Appeal decision in *Tower MCashback* "any evidence or any legal argument relevant to the subject matter may be entertained by the tribunal subject only to his obligation to ensure a fair hearing". On that basis, given the conclusions on the scope of the appeal set out above, subject to case management considerations, the lead appellants may raise the PAYE Grounds in support of their stance that the sums in dispute are not in fact subject to income tax (and related national insurance contributions).

347. As in relation to their argument on jurisdiction, HMRC's arguments that it is unjust and unfair for the lead appellants to be able to raise the PAYE Grounds are

based around the proposition that, because the appellants only raised the PAYE Grounds following the closure of their enquiries, HMRC have been denied the opportunity to consider the application of s 44 ITEPA during the course of their enquiries and to take protective action (such as issuing determinations to the Clients under regulation 80 of the PAYE regulations). In my view, however, the matters raised by HMRC in this respect can be taken into account only at the first stage of the required analysis in determining the scope of the subject matter of the appeal to the limited extent set out at [342] to [344] above. Such matters have no relevance at the second stage of the analysis in deciding whether, although the tribunal has jurisdiction to consider the relevant argument, as a procedural matter, it would not be just and fair for the PAYE Grounds to be raised.

348. It is plain that in the decisions referred to above, the courts envisaged that, even where the tribunal has jurisdiction to hear a new argument, the tribunal may exercise its general case management powers (as conferred under the Rules governing the tribunal) to prevent a party raising that argument where necessary to ensure that the appeal proceedings before it are conducted, in a procedural sense, justly and fairly. It may be necessary to take such action, for example, where a new argument is raised with insufficient time for the relevant party to address it at the hearing. The courts were not envisaging that the tribunal could use its case management powers to bar a party from raising a new argument according to how the parties have conducted themselves during the periods in which HMRC made their enquiries into the taxpayer's tax affairs where that has no bearing on the parties' ability to participate fully in subsequent appeal proceedings in the tribunal or on other procedural matters relating to the proceedings.

349. Moreover, I cannot see that the discretionary powers conferred on the tribunal under the Rules governing the tribunal enable it to take the matters raised by HMRC into account in exercising its case management powers as regards proceedings before it and there is no other rule which entitles it to do so. The overriding objective of the Rules is to enable the tribunal to deal with cases fairly and justly which includes (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties; (b) avoiding unnecessary formality and seeking flexibility in the proceedings; (c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; (d) using any special expertise of the Tribunal effectively; and (e) avoiding delay, so far as compatible with proper consideration of the issues. Plainly this objective is aimed at requiring the tribunal to ensure that proceedings before it are conducted, in a procedural sense, fairly and justly. It does not confer on the tribunal power to deny a party the right to raise an argument which it is within the tribunal's jurisdiction to consider on the basis of HMRC's assertions that they had an inadequate opportunity to deal with the point raised during the period prior to the closure of their enquiries.

350. In this case, HMRC have plainly had sufficient time to deal with the PAYE Grounds (and they did not argue to the contrary) and the matters raised by HMRC have no other impact on the conduct of the proceedings in the tribunal.

Dismissal of appeals and rights to appeal

351. For all the reasons set out above, the appeals are dismissed. I note that HMRC accept that, to the extent that the lead appellants are taxable in respect of the relevant periods under the TOAA provisions, the NICs charges which HMRC sought to impose under the s 28 amendments made to the lead appellants' relevant returns fall away. This means that the effect of this decision is that the s 28 amendments are

upheld except in relation to such NICs other than, in Mr Johnson's case, such NICs shown as due in respect of the first period. The tribunal directs that the parties shall seek to agree the numerical changes required to the s 28 amendments as a consequence of this decision.

352. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HARRIET MORGAN

TRIBUNAL JUDGE

RELEASE DATE: 13 OCTOBER 2020