Income Tax; emoluments; tax avoidance scheme; transfer of shares; whether a payment –No; whether shares a readily convertible asset – Yes; Income & Corporation Taxes Act 1988 sections 1, 19, 131, 202A&B, 203, 203A, 203F, The Income Tax (Employments) Regulations 1993 Regulation 2- appeal dismissed

FTC/94/2010
[2012] UKUT 43 (TCC)

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN

ABERDEEN ASSET MANAGEMENT PLC

Appellant

-and-

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal:

The Chamber President, the Hon Mr Justice Warren
Sitting in public in Edinburgh on 24 and 25 October 2011

Representation:

Kevin Prosser QC and Rebecca Murray instructed by Ashurst LLP for the Appellant

Julian Ghosh QC and Iain Artis, Advocate, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

The Appellant's appeal is dismissed

REASONS

Introduction

1. The Appellant, Aberdeen Asset Management PLC ("**AAM**"), is an international investment management group managing assets for both individuals and institutions. It entered into a tax avoidance scheme known as the Discounted Options Scheme ("**the Scheme**") established to provide additional remuneration to a number of employees. The Scheme was designed to avoid liability to account for income tax under the PAYE system and for national insurance contributions under the relevant social security regime. AAM was subject to a number of Notices of Determination in relation to PAYE and NI. It appealed against those determinations, and decisions.

2. AAM's appeal came before the First-tier Tribunal in June and July 2010. It was heard by J Gordon Reid QC, FCI Arb and Ian Malcolm ("**the Tribunal**") who released their decision ("**the Decision**") on 29 October 2010. They refused AAM's appeal, summarising their conclusions at [93] of the Decision in 11 sub-paragraphs. AAM now appeals against certain aspects of the Decision. If successful on those aspects, AAM's appeal against the Notices of Determination in relation to PAYE succeeds. AAM does not appeal the Tribunal's conclusions in relation to NI.

3. Kevin Prosser QC and Rebecca Murray appear for AAM. Julian Ghosh QC and Iain Artis appear for the Respondents ("**HMRC")**.

The Scheme

4. The essence of the Scheme can be found in [6] to [8] of the Decision:
    a. AAM established an offshore Employee Benefits Trust ("**EBT**") for its employees, which was a discretionary trust with professional trustees from the Isle of Man. The beneficiaries were senior employees or directors of AAM who were

to be rewarded with additional remuneration for past performance (an "**Employee**").

b. Substantial funds were transferred by AAM into the EBT.

c. An Isle of Man company (a **"Company**" - referred to by the Tribunal as a "money box company") with £2 share capital was created or acquired for each Employee who, because of his good performance, was to be favoured. The directors of the Company were professional administrators from Jersey or the Isle of Man from the same organisation as the professional trustees.

d. The EBT subscribed for the two shares in the Company. One share was paid for at par (£1) and the other at a very substantial premium which might range from about £100,000 to nearly £2.9m (the Tribunal's summary refers to a figure of "over £1m" but the larger figures appears from the details given later in the Decision).

e. At or about the same time, a Family Benefits Trust ("**FBT**") was established by the trustees of the EBT for each of the Employees; the beneficiaries were the Employee and his immediate family with a charitable longstop. The trustee of the FBT was a professional trustee again from the same organisation. The trust fund of the FBT was a nominal £10 provided by the EBT.

f. The Company's authorised share capital was increased by £10,000 and it then granted to the FBT an option to subscribe for 10,000 ordinary shares in the Company. The existence of the option was said by AAM to dilute the value of the two original shares.

g. One or both shares in the Company were transferred to a nominee company for behoof of the Employee.

h. The option would subsist usually for a year and would then lapse without exercise. In practice, none of the early options, which were exercisable for 1 year, was exercised. Later options, which were granted for 10 years, have not yet lapsed but none has been exercised.

i. The Employee held the beneficial interest in the Company. He benefited by *inter alia* receiving soft loans or the use of property from the Company. In this way, as the Tribunal put it,

> "the employee receives substantial additional financial benefits which are said to be immune from liability for PAYE and National Insurance contributions. Had the employee simply been paid a cash bonus of an identical amount to the sums paid into the money box company for good performance, the bonus would have fallen within the PAYE and National Insurance regimes."

j. The Company would ultimately be stripped of its funds by one means or another. Some tax consequences might ensue depending on how this was carried through.

5. The Tribunal concluded that the Scheme did not achieve its objective. Further, they held that AAM was liable to account for PAYE and NICs on the awards made pursuant to the Scheme. The Tribunal held, and AAM now accepts, that the Scheme failed, because the option did not dilute the value of the shares. The shares fell to be valued on the assumption that the option would <u>not</u> be exercised; on that assumption, their value was the same as the sum of money owned by the Company (or one half of it in the case of a transfer of only one share). It is now common ground that income tax and NICs are payable and that AAM is liable to account for the NI contributions. There remains a dispute, however, about who is liable to pay the income tax. Is it AAM, as HMRC contend, or is it the Employees, as AAM contends?

6. AAM accordingly appeals against the Tribunal's conclusion so far as it related to PAYE. The grounds of appeal are that the Tribunal erred in law in two ways:

   a. First, in deciding that, when each employee received shares in a company which owned money, the employee thereby received money for PAYE purposes.

   b. Secondly, in deciding (in the alternative) that the shares were "readily convertible assets".

The Facts

7. The Tribunal dealt with the facts in a long section headed "Facts". First, there was before the Tribunal an Agreed Statement of Facts which they set out at [22] of the Decision. Secondly, the Tribunal recorded additional findings of fact starting at page 19. The paragraph numbering has gone wrong and begins with a second [10] with indented paragraphs beginning at [21]. The findings continue through to [98] at page 35. AAM does not challenge any of the Tribunal's findings of fact. An understanding of the detail is unnecessary for the purposes of my decision; the description of the Scheme which I have given above and the specific matters mentioned later in this decision are enough. The interested reader will find the Decision at http://www.financeandtaxtribunals.gov.uk/judgmentfiles/j5148/TC00779.doc with the Facts section starting at page 8.

8. Mr Prosser is particularly keen to demonstrate that there was no arrangement that the directors of a Company would comply with the wishes of the Employee. In that context, and others, he draws attention in particular to, and comments on, the following findings of fact and conclusions drawn from them:

    a. The Tribunal found that the directors of the Companies did not communicate at all with the Employees until after the transfer of the shares; and the directors were not bound to comply with the Employees' wishes, including after the transfer of shares: see paragraph 70 of the additional findings of fact on p 29 of the Decision. Those are, indeed, findings of fact, and Mr Prosser relies on them as such.

    b. The Tribunal, in the same paragraph, then said:

    > "However, where the employee had a 100% shareholding the directors could easily have been compelled to do so [that is to say, to comply with the shareholder's wishes] by having the resistant directors removed and replaced with directors who would comply".

    Mr Prosser submits that this is not a finding of fact, but a statement of law (inaccurate at that) and that, more importantly, the Tribunal were there stating that the 100% shareholder's ability to procure loans and investments arose from his powers as shareholder, <u>not</u> from any arrangement, made in advance of the share transfer, that the directors would comply with his wishes. Indeed, the Tribunal made no finding, and there was no evidence, of any such arrangement.

c. In the same paragraph, the Tribunal went on to say

> "Even where only 50% shareholding was held temporarily, the reality was that the directors would generally comply with the employee's wishes as regards loans and investment".

Mr Prosser submits that by "would generally comply" the Tribunal meant that it was very likely that the directors would comply, not because of any arrangement to that effect, or indeed because of any past practice in relation to 50% shareholders, but simply because there was no reason (in the absence of impropriety) not to comply with the wishes of someone who was only "temporarily" a 50% shareholder because he would shortly be a 100% shareholder.

d. This interpretation of "would" is, he says, confirmed by a later passage in the Decision, at [41] on p 43, where the Tribunal stated that

> "the directors would distribute or deal with the pot in accordance with his [the employee's] wishes. The directors had no other agenda, and no other aims or intentions for the company's prosperity, or trading".

Again, he says that the word "would" means that a dealing with the Company's assets in accordance with the Employee's wishes was very likely to happen, not because of any arrangement to that effect, but because the directors had no independent agenda, and no other aims or intentions: therefore it would be natural for them to comply with the shareholder's wishes. In the case of a 100% shareholder, this is not unusual: it reflects the realities of 100% ownership. In the case of a 50% shareholder, it reflects the reality that the shareholder would shortly become a 100% shareholder, and so could exercise control in his own right. That is why the Tribunal repeatedly refers to the 50% shareholding as "temporary".

e. I do not disagree with Mr Prosser's submission that the Tribunal made no finding that there was an arrangement that the directors would comply with the

Employee’s wishes or even where those wishes could lawfully be given effect to. Further, I see considerable force in Mr Prosser’s submission that the directors’ compliance was more likely to have been the practical recognition of an Employee’s powers as shareholder rather than the result of a pre-existing arrangement; it is not the compliance of the directors which gives control to the Employee but the powers possessed by the Employee which lead to compliance by the directors.

f. But it should not, I consider, be taken that AAM itself simply provided the benefit by way of the Scheme out of the blue and to the surprise of the Employees. The shares were accepted, as the Tribunal held, by the employees on the basis that they formed part of their remuneration. All participants received a letter (dated 21 December 2000) explaining the essence of the Scheme. And, as the Tribunal recognised, the Scheme would be relatively worthless as an incentive to existing employees and as an attraction to suitably qualified and experienced employees in the absence of the control which an Employee had over his Company. There could hardly be any incentive or attraction unless the terms of the Scheme had been well-communicated to relevant employees and potential employees. There was, in any case, a finding that requests by Employees for loans or investments to be made were given effect to by the directors; although that is not, of course, a finding that there was a pre-existing arrangement that the directors would comply with such requests, it does give an indication of the expectation of an Employee who received shares in “his” Company.

g. Mr Prosser points out that, at paragraph 71 on p 30 of their additional findings of fact, the Tribunal found that there was no standard way in which the Companies applied their funds following the transfers: they made different kinds of investments, and made loans (including soft loans) of varying amounts, at different times, to their respective shareholders. And in one case the Company paid a dividend (on which income tax was paid), following which it was dissolved. But, with one exception, loans granted by a Company to an Employee have never been repaid.

h. In terms of findings of fact, the Tribunal expressly stated that they made "no finding that the money box companies are mere facades. There is no need to pierce the corporate veil here and no circumstances justifying doing so": see [41] on p 43 of the Decision.

i. In their discussion of the *Ramsay* issue, the Tribunal expressed the conclusion, at [27] on p 39 of the Decision, that

> "it is reasonably clear on the facts found that there was a composite transaction consisting of a series of steps which began with the establishment and transfer of money into the EBT and <u>ended with the transfer of the shares to the employees</u>. Thereafter, a variety of financial arrangements and transactions could and indeed did take place" (emphasis supplied). [Mr Prosser's emphasis.]

In other words, unlike in other tax avoidance cases, such as *DTE v Wilson* (see below), the transfer of the shares did not form part of a composite transaction which ended with a payment of money, unless the share transfer of itself was, or was to be treated as, a payment of money.

j. The Tribunal repeatedly drew attention to the control which the Employee had over his Company. This, says Mr Prosser, was so whether or not the directors were compliant. In his speaking note in Reply, he drew attention to a number of passages where the Tribunal referred to the control which the shareholder had. I do not set those passages out here. It is, however, worth setting out in this context a passage which Mr Prosser did not set out, which is found in [46] of the Decision and which is not without significance in the context of Mr Prosser's submission:

> "We were not impressed by the evidence asserting that the directors of the company did more than go through the motions of checking the propriety of making a loan to the shareholder employee. We rather think that is exactly what it [*sic*] was done. The fact that after the shares or a share was transferred the directors and the employee entered into discussions about the form of benefit which would be taken, usually loans but sometimes the use of property of one type or another which the company would acquire with the funds transferred from the EBT when they subscribed for the shares, is all nothing to the point. It is accepted by the parties that following the *Ramsay* approach, the series of transactions comes to an end when the employee (or more accurately a nominee company on his behalf) receives

> the shares of the money box company. Thereafter a range of unscripted events and transactions might follow. The fact that credit checks, about which we heard some evidence from Mr Matthews, were carried out by the directors of the money box company before granting a loan has no bearing on the fiscal effect of the transaction which ended with the transfer of the shares. We noted a degree of discomfort and unease on the part of Mr Matthews when being cross-examined on the discretion of the FBT trustee. We have in mind his cross examination on Day 2 (pages 61-73 of the transcript). We do not criticise Mr Matthews or impugn his integrity or honesty. That discomfort simply reflected the somewhat artificial role he played in a carefully crafted scheme."

9. In conclusion, Mr Prosser submits that the Tribunal did not find that when the shares were transferred there was any agreement or understanding that the directors would comply with an employee's wishes. Rather, they inferred that if and when asked the directors would be very likely to comply, in relation to a 100% shareholder because he could exercise his shareholder rights and in relation to a 50% shareholder because he could shortly do so when he became a 100% shareholder, and in relation to both because the directors had no other agenda.

10. In my view, the submission that "they inferred that….the directors would be very likely to comply" is not a fair reflection of the Tribunal's conclusions. Reading the Decision as a whole, it is clear that the exit strategy (*ie* how the Employee would obtain the benefits which he wanted by virtue of his ownership of the shares) was really a matter for the decision of the Employee. Subject, no doubt, to the lawfulness of any request, the directors would comply with the Employee's wishes. It is true that there was no arrangement that there would be a particular outcome, indeed, there was no communication between the directors of the Company and the Employee concerned until after transfer of the shares. But the Tribunal expressly stated at [29] on p 40 of the Decision that the facts, viewed realistically, show unequivocally that control was vested in the Employee who had access to the pot of money contained within the corporate money box. And at [43] on p 43 of the Decision, the Tribunal expressly stated that the directors would, in reality, be inevitably compelled to comply with the Employee's wishes. Whether that is a finding of fact or a reflection of the powers which the Employee would have as owner of the Company does not, in my view, matter. The point is that, as a result of the arrangements, the Employee became the owner of a Company from which he could in practice extract the cash within it

whenever he wished, albeit that a tax charge of one sort or another, depending on the method of extraction, might result. To use different language, it was preordained that the Employee would receive 100% of the shares in a cash-rich company. It was not pre-ordained that he would use his control of the Company in any particular way but how he would do so was his choice, a choice which would in practice be observed and implemented by the directors.

The Legislative Framework

11. The relevant legislation is set out quite fully in [10] to [21] of the Decision. For completeness, I include as the Annex to this Decision those provisions which are relevant to the points in issue on this appeal. References in this decision to section numbers are, unless otherwise appears, references to the Income and Corporation Taxes Act 1988 as in force in force for the tax years 2000/01 to 2002/03. Although those provisions have now been repealed, I refer to them in the present tense.

The Issues

12. Six Issues were identified in [11] of the Decision of which three are subject to appeal. Those three Issues were the ones identified by the Tribunal as follows:

    a. Whether the Employee in reality receives a payment of money (**the *Ramsay* Issue**)?

    b. Whether the Employee should be regarded as receiving money, being the money owned by the Company, when he acquired shares in the Company on the basis that the money owned by the Company was unreservedly at the disposal of the Employee (**the Cash-box Issue).**

    c. Whether the shares were readily convertible assets as defined in the relevant legislation (**the PAYE Issue**).

13. In its Appellant's notice and in Mr Prosser's skeleton argument, the first two of those issues are subsumed into what is called "**the *Ramsay*/cash-box Issue**" namely whether the Employees received a "payment" (*ie* a payment of money) within the meaning of sections 203 and 203A and within the meaning of the Income Tax (Employments) Regulations 1993 (**"the PAYE Regulations**"), although in his oral presentation, Mr

Prosser made submissions directed at each aspect. The *Ramsay*/cash-box Issue is reflected in the first ground of appeal, namely that the Tribunal "erred in law in deciding that, when each employee received shares in a company which owned money, the employee thereby received money for PAYE purposes". The second ground of appeal reflects the PAYE Issue and is that the Tribunal "also erred in law in deciding (in the alternative) that the shares were readily convertible assets".

The approach to construction

14. It is hardly necessary to refer yet again to the now well-established principles of construction set out by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 ("***BMBF v Mawson***"). However, I remind myself of what was said by Lord Nichols at [36]:

> "Cases such as these [*IRC v Burmah Oil Co Ltd* [1982] STC 30 (HL), *Furniss v Dawson* [1984] STC 153 (HL) and *Carreras Group Ltd v Stamp Comr* [2004] STC 1377 (PC)] gave rise to a view that, in the application of any taxing statute, transactions or elements of transactions which had no commercial purpose were to be disregarded. But that is going too far. It elides the two steps which are necessary in the application of any statutory provision: first, to decide, on a purposive construction, exactly what transaction will answer to the statutory description and secondly, to decide whether the transaction in question does so. As Ribeiro PJ said in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35], (2004) 6 ITLR 454 at [35]:
>
> > '[T]he driving principle in the Ramsay line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. **The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically.**'" [emphasis added]

15. I agree with Mr Ghosh when he submits that the guidance in *BMBF v Mawson* required the Tribunal to identify the relevant transaction to which the tax legislation was to be applied and that this involved the Tribunal in considering the relevant documents and the relevant evidence as to the intentions held by the parties. He says, and again I agree, that that was precisely what the Tribunal did. In particular:

    a. they found as a fact (see [27] of the Decision) that:

> "there was a composite transaction consisting of a series of steps which began with the establishment of and transfer of money into the EBT and ended with the transfer of the shares to the employees. Thereafter, a variety of financial arrangements and transactions could and indeed did take place."; and

b. on the facts, they concluded (see [27] to [30] at pp 39-40 and [40] to [48] at pp 42-45 of the Decision) that the money held by the Company had, by that composite transaction, been placed unreservedly at the disposal of the Employee.

16. The Tribunal therefore concluded that there had been a payment by AAM in the relevant sense. The first issue to resolve, therefore, is the meaning to be given to "payment" in the relevant statutory provisions, applying the approach in *BMBF v Mawson*. I would only add that, in seeking the meaning of the word "payment" in that context, the rival submissions do not result in significantly different consequences in terms of the amount of tax due (although there may be a difference in the amount of interest due). The issue is not whether tax is due but who should pay it. The court does not, therefore, need to give a wide meaning to "payment" in order to ensure that emoluments which are clearly meant to be taxable are in fact taxable. I do not know whether, in fact, Employees have been assessed to tax; but whether they have or not cannot affect the answer to the question who was or is liable for the tax. Nor does the Court need to give a construction which is in the least bit strained to the meaning of "payment" in order to ensure that what is clearly meant to be subject to tax is in fact subject to tax.

The *Ramsay*/cash-box Issue

17. The question here is whether the transfer of shares to an Employee was a "payment" within the meaning of section 203 and the PAYE Regulations. The two aspects of this issue (the *Ramsay* Issue and the Cash-box Issue) overlap to a very great extent as does my discussion of them although most of what I say up to paragraph 79 is directed at the first aspect with paragraphs 80 to 84 being directed at the second aspect.

18. There is no dispute that the transfer of the shares to an Employee was an emolument of the employment of the Employee taxable, at the time, under Schedule E. The shares represented money or money's worth which could be turned into money (although how

readily is a matter of dispute). This is to be contrasted with fringe benefits, such as free accommodation, which are taxed as the result of express deeming provisions and subject to codes for the quantification of the charge and how it is to be assessed to tax.

19. Mr Prosser submits it matters whether an emolument is money or money's worth since

    a. it can affect the amount of the charge;

    b. it can affect timing; and

    c. it can affect who is liable, that is to say whether PAYE operates.

20. As to b., Mr Prosser refers to section 202B. He correctly observes that where emoluments do take the form of or consist of money, sections 202B(1) to (6) provide for the time when the emoluments are treated as received. But those timing rules do not apply in cases to which subsections (8) to (11) apply. Instead, each of those subsections makes specific provision about when the emoluments are to be treated as received for the purposes of section 202A(1)(a). Subsection (11) states that "subsections (1) to (6) above shall not apply" in a case "where (a) emoluments take the form of a benefit not consisting of money, and (b) subsection (8), (9) or (10) does not apply".

21. Mr Prosser argues that the conclusion to be drawn from those provisions is that subsections (1) to (6) apply only to money emoluments. That, it seems to me, must be correct, since every emolument which is not a benefit consisting of money falls within subsection (11) unless it is already within subsections (8) to (10). Unfortunately, there is no definition anywhere of what is a benefit consisting of money any more than there is a definition of what is a payment. It clearly goes beyond cash; on any view, it must include a cheque or a credit to a bank account. But how far it goes is not certain. Further, the fact that a particular type of emolument (a benefit not consisting of money) does not fall within subsections (1) to (6) does not necessarily mean that it is not a "payment". It could simply be a payment of a type which is expressly excluded from those subsections. Indeed, the words "and in such a case subsections (1) to (6) above

shall not apply" gives rise to an argument that, absent those words, there could be emoluments not consisting of money which would fall within those subsections.

22. Mr Prosser then moves from section 202B to section 203 and submits that a "payment" within the meaning of section 203 must also be an emolument in the form of money. Leaving aside for the moment the question of what money is for this purpose, he observes that section 203(1) requires a deduction to be made on the making of any "payment" of Schedule E income; and that section 203(2) (the regulation-making power of the Board pursuant to which the PAYE Regulations were made) refers to the making of a "payment" in respect of which a deduction is to be made. He submits that a payment must therefore be of a nature from which a deduction can be made. It is not possible to make a deduction from a transfer of land, or a pair of shoes or a cow. And where there is an obligation to pay tax in relation to a notional payment, the legislation directs a deduction from other payments made in the year. He accepts, however, that it is possible to make a deduction from some assets which are not £s sterling, for instance from payments of US$s.

23. This conclusion is, he says, confirmed by reference to section 203A. Although that section was inserted into ICTA 1988 by the Finance Act 1989, section 203 and 203A itself are to be construed together. I agree with this proposition which differs from the proposition that section 203A must be construed in the light of the pre-existing 203; rather, the two sections are to be construed together and the meaning of one informs the meaning of the other.

24. What section 203A(1) does is to lay down timing rules in relation to the making of "payment" for the purposes of section 203. Those rules, in relation to payments for the purposes of section 203, are similar to the rules laid down by section 202B(1), in relation to emoluments for the purposes of section 202A. Thus, sections 203A(2) to (4) correspond to sections 202B(2) to (4) and sections 202B(5) and (6) apply, by virtue of section 203A(5), for the purposes of section 203A(1) as they apply for section 202B(1).

25. Mr Prosser argues that, since section 202B(1) applies only in relation to emoluments which takes the form of a benefit consisting of money (as a result of section 202B(11)),

sections 202B(5) and (6) only have relevance where there is a benefit consisting of money. Accordingly, he says that section 203A(5) can be relevant only where there is a payment of money. If that were not so, the meaning of "director" in section 203A would be different depending on whether there was a payment in money or not in money.

26. Further confirmation of the result is, according to Mr Prosser, to be found in section 203J. This applies where there is a notional payment of assessable income to an employee. Notional income is income <u>treated</u> as made by virtue of a number of specified sections. An example is section 203F which applies where any assessable income is provided in the form of a "readily convertible assets". I will return to this section in more detail later. In such a case, section 203J(1) provides that "the obligation to deduct income tax" shall have effect as an obligation on the employer to deduct income tax at such times as may be prescribed by PAYE regulations from any payment or payments which the employer actually makes of or on account of the assessable income of the employee. Where there is an insufficiency of payments, section 203F(3) provides that the obligation to deduct shall have effect as an obligation on the employer to account to the Board in accordance with PAYE regulations. In other words, it is recognised that an employer cannot deduct from a notional payment so that he has to deduct from some actual payment; and where there is an insufficiency of actual payments, he must account for the tax anyway. For example, if an employee receives quoted shares as an emolument, the employer cannot deduct the tax from the shares but instead deducts from other payments; if there are no sufficient payments, the employer must account for the tax. Mr Prosser submits that this shows that it is only possible to deduct tax from a payment of money.

27. AAM had understood HMRC to accept that the statutory references to "payment" are to a payment of cash or its equivalent. It suggests that this was agreed by HMRC before the Tribunal, reliance being placed on [28] on p 39 of the Decision. What the Tribunal there recorded was this:

> "There was no dispute between the parties that *payment* was a practical commercial concept which took its colour from the context and ordinarily meant a transfer of cash or its equivalent (*Garforth v Newsmith Stainless Steel Ltd* 1979 1 WLR 409 *DTE Financial Services* at paragraph 42, *Sempra Metals* at paragraph 139. It is plain that

the receipt of shares is a benefit and that the shares were the profits of employment which had a money value. Shares are capable of being turned into money (*Tennant v Smith* 3 TC 158 at 164 per Lord Chancellor Halsbury; *Abbott v Philbin* at 120 and 127."

28. AAM also rely on the concession recorded as made by counsel for HMRC in *Rogers v HMRC* [2011] UKFT 167 at [215] that section 203B applies only to a payment of money. Be that as it may, it is not accepted before me by HMRC that the transfer to an Employee of shares in "his" Company is not a payment of money. I do not consider that HMRC are now precluded from taking the point: neither an acceptance (if it was accepted) that payment <u>ordinarily</u> means a payment of cash, nor the concession in *Rogers*, precludes HMRC from now taking a different approach. It is, however, to be noted that Mr Ghosh does accept that the nature of the payment must allow for deduction. That requirement is, he submits, fulfilled in the present case because one way in which a deduction could have been made was by the EBT trustee declaring a dividend prior to the transfer of the shares to the Employee, deducting the required amount and then transferring the shares ex-dividend and the balance of the dividend itself to the Employee.

29. In their analysis of **the *Ramsay* Issue**, the Tribunal reasoned as follows (see [29] at pp 39 and 40 of the Decision):

   a. The structures put in place simply operated as means of channelling the additional remuneration from AAM to the Employees.

   b. The cash is put into the hands of the Employees by the transfer to them of the control of the Company, an offshore money box company, which has no assets other than the cash injected by the EBT received from AAM; each Employee is given the key to the money box.

   c. The assets of the Company, namely cash, were effectively at the disposal of the Employee. The facts, viewed realistically, showed unequivocally that control was vested in the Employee who had access to the pot of money contained within the corporate money box.

d. The Scheme was a mechanism to pay cash bonuses. That is a form of payment which the statutory provisions, in question, construed purposively, were plainly designed to catch.

e. In the Tribunal's view, this conclusion was entirely consistent with the theme of the *Ramsay* approach, namely to have regard to the purpose of a particular provision (or, here, combination of provisions) and interpret the statutory language so far as possible in a way which best gives effect to that purpose. The charging provisions were or at least included a combination of sections 1, 19, 131, 202A, 202B, 203 and the 1993 Regulations. Their overall purpose was to tax the material rewards of employment.

30. Mr Prosser is critical of that reasoning. Before I come to that, I make one observation about the final sentence in that last paragraph. There is no doubt that the overall purpose of sections 1, 19, 131, 202A and 202B was to tax the material rewards of employment; but they do so whether or not section 203 applies to the particular material reward concerned. As I said in paragraph 16 above, the issue is not whether tax is due but who should pay it. The fact that the overall purpose of the sections referred to by the Tribunal was to tax the material rewards of the employment is not a pointer, one way or the other, to whether a non-money emolument can be a "payment" within section 203.

31. Coming to Mr Prosser's criticisms, he accepts that the concept of payment of money is to be practical and commercial. But, he says, this in turn requires a practical and commercial approach to the composite transaction which, as found by the Tribunal, started with payment by the Employer and ended with the transfer of shares to the Employee. The question is whether that transfer was a "payment". In that context he refers to *DTE Financial Services v Wilson* [2001] STC 777 (***DTE v Wilson***) at [42] where Jonathan Parker LJ said this:

> "So far as the *Ramsay* issue is concerned, therefore, the only question (to my mind) is whether it is legitimate to apply the *Ramsay* principle – or if one prefers, adopt a *Ramsay* approach – to the concept of 'payment' in the context of the statutory provisions relating to PAYE. In my judgment it plainly is..... but for the purposes of

the PAYE system payment in my judgment ordinarily means actual payment: ie a transfer of cash or its equivalent."

32. *DTE v Wilson*, it is to be noted, was a case where the employee ended up with cash, and was always intended to end up with cash; the composite transaction included the step of providing him with cash. That is to be contrasted with the present case where the pre-ordained series of transactions ended with the transfer of shares and only put the Employee in the position of being able to obtain cash if he wanted it.

33. Mr Prosser submits that the ordinary meaning of payment is cash or money or the commercial equivalent of cash or money. This would include, for instance, crediting an amount to an account on which the account holder can draw at any time. But the transfer of an item of property is not a payment merely because it is easily sold; its liquidity does not mean that it is cash or its commercial equivalent.

34. Reference was made to the decision of Christopher Clarke J in *PT Berlian Laju Tanker TBK and another v Nuse Shipping Ltd The Aktor* [2008] EWHC 1330 (Comm), a case concerning the sale of a ship. The Judge said this at [21]:

> "Whether or not payment has occurred will depend on whether funds have been transferred by 'any commercially recognised method of transferring funds, the result of which is to give the transferee the unconditional right to the immediate use of the funds transferred': see *The Brimnes*, *Tenax Steamship Co Ltd v Brimnes* (*owners*) [1973] 1 All ER 769 at 782, [1973] 1 WLR 386 at 400; [1974] 3 All ER 88 at 98, 110, [1975] QB 929 at 948, 963 and *A/S Awilco v Fulvia SpA di Navigazione, The Chikuma* [1981] 1All ER 652 at 656, [1981] 1 WLR 314 at 318;....."

35. That is one illustration of the meaning of the word payment in a commercial context. It is not, however, necessarily the case that the same meaning is appropriate to apply in the context of a taxing statute.

36. An example of a tax case giving "payment" a broad commercial meaning is the decision of Walton J in *Garforth v Newsmith Stainless Ltd* [1979] 1 WLR 409, [1979] STC 129. In that case, a company voted bonuses to the two directors who were the controlling shareholders. The bonuses were credited directly to their current accounts with the company, on which they were entitled to draw at any time. The question was whether

that gave rise to a "payment" of each bonus within the meaning of section 204 ICTA 1970 (the predecessor of section 203). Walton J held that each bonus was a "payment". As he put it at p 133 of [1979] STC:

> "The argument really is, on the one hand, that all that happened was that the balances in the directors' loan accounts with the company were increased without them getting anything out of it unless and until they withdrew their money from the company, and, on the other hand, that the money was placed unreservedly at their disposal, they could have had it at any moment they chose, and that amounts to payment. As between those two contrasting views, I have no hesitation at all in saying that, in my judgment, when money is placed unreservedly at the disposal of directors by a company that is equivalent to payment; and I think I am entitled to derive support for that view from the judgment of the same Rowlatt J in *Inland Revenue Comrs v Doncaster*."

37. Walton J then set out the headnote in that case and a passage from the judgment of Rowlatt J. He then said this:

> "If moneys are placed by one person unreservedly (and I think that for present purposes I do not have to go very deeply into that qualification, for the simple reason that, as has already been noted, it was found as a fact by the Special Commissioners that payment of the sums standing to the credit of the current accounts would have been made had the directors demanded payment from the company, so there is no question here of any fetter whatsoever) at the disposal of any other person, that, I think, must be equivalent to payment."

38. Towards the end of his judgment (at p 135) Walton J addressed an argument that there was no "payment" because the company might not pay moneys to the directors when asked: "what then?", the Judge asked himself. "Has there been payment? Because in order to get your money out you may have to start an action". The Judge gave that argument short shrift observing that "You may have to start an action to get your legal rights in almost any sort of situation, but that does not alter the fact that you have your clear legal rights.....". He concluded in this way:

> "Whatever may be the strict meaning of the word 'payment', whatever, indeed, may be the strict meaning of the word 'payment' in s 204(1), I am clearly of the opinion that the placing of the money unreservedly at the disposal of the directors as part of their current accounts with the company was equivalent, in the present case, to payment."

39. At [33] on p 40 of the Decision, the Tribunal described the test laid down in *Garforth v Newsmith* as being that "the money is unreservedly at his [the director's/employee's]

disposal". Mr Prosser submits that that was a wrong characterisation of what Walton J said; he was answering a narrower question in the context of the facts of the case before him. I agree with Mr Prosser to this extent. Walton J did not, and did not need, to go into what might be sufficient to result in funds being unreservedly at the disposal of the directors. It certainly does not follow from his decision that, in the present case, the cash within a Company was unreservedly at the disposal of the Employee. But nor does his decision preclude the conclusion that the cash was unreservedly at the disposal of the Employee. Walton J's decision simply does not give an answer to this issue.

40. Moreover, neither Walton J nor Rowlatt J was purporting to lay down a definition of "payment". Walton J was really saying no more than that it was a sufficient condition for there to be a payment that the funds were unreservedly at the disposal of the directors; he was not laying it down as a necessary condition in order for there to be a "payment", although I accept that that was the flavour of what he was saying.

41. Nonetheless, it is relevant to ask whether, to the extent that the test is helpful, it is satisfied in the present case. Mr Prosser says that the Employee did not have the unconditional right to immediate use of the cash in the company upon receipt of 100% of the shares. Unless and until resolutions were passed to distribute moneys by way of dividend or return of capital (including on a winding-up which the Employee could bring about) or by way of loan, the Employee had no right to the money at all let alone an unconditional right to its immediate use. In any case, exercising his rights and receiving payment may give rise to a tax liability. Accordingly, the acquisition of shares, even in a money box company is very different, it is said, from acquisition of the money itself.

42. Mr Prosser submits that there is nothing at all in section 203 or elsewhere in the PAYE legislation to suggest that "payment" comprehends the transfer of a 100% shareholding in a company. He gives five reasons why the correct answer to the *Ramsay*/cash-box Issue does not turn on any special meaning of the legislation. I simply set them out at this stage.

   a. First, "payment" in section 203 is not given any special meaning, and so it is reasonable to think that the word was intended to bear its well-established commercial meaning given at paragraph 34 above, in contrast with the special meanings in other places, for instance in section 203F: that refers to a **notional** payment which is perhaps to be contrasted with an actual payment.

b. Secondly, the obligation imposed by section 203 and the PAYE Regulations to deduct tax from the payment, coupled with the special rules in section 203J in respect of notional payments, implies that a transfer of shares, from which a deduction is impossible is not a "payment". Clearly, if it is shares which constitute the "payment", HMRC are not going to accept a percentage of the shares as a deduction for which the "payer" must account.

c. Thirdly, the absence of any statutory guidance as to what measure of control is necessary in order for there to be a "payment" for section 203 purposes indicates that the word does not comprehend the transfer of a shareholding at all.

d. Fourthly, the Tribunal's proposition, that the deployment of various company law procedures in order to obtain the money is "no different" from suing to recover a debt (see [41] at p 42 of the Decision), goes completely against the grain of the tax legislation. That legislation imposes a charge to tax when company law procedures are deployed to transfer money to a shareholder, including by a 100% shareholder, thereby recognising that, unless and until those procedures are deployed, the money is at the disposal of the company <u>not</u> of the shareholder. By contrast, of course, no tax charge is imposed when a debt owed by the company is sued for or paid. Indeed, Mr Prosser says that it is "frankly incoherent" for HMRC to say on the one hand that a company's money is unreservedly at a shareholder's disposal, but on the other hand to charge tax (as they did on Mr Reid) if and when the shareholder takes steps to obtain that money from the company.

e. Fifthly, the relevant legislation provides that there shall be no charge to income tax under Schedule E in respect of an employee's acquisition of shares in certain circumstances: see section 140A ICTA. But if the Tribunal are right, income tax under Schedule E would be chargeable on a transfer of a 100% shareholding notwithstanding the application of section 140A. This makes no sense. I am afraid that I do not understand this particular argument. The dispute in the present case is not whether the transfers of the relevant shares are taxable under Schedule E: it is common ground that they are. The issue is who has to account for the tax.

43. As regards the transfer of a 50% shareholding, Mr Prosser notes that the Employee did not even obtain control over the company, and submits that it is impossible to analyse such a transfer as a payment of money merely because the employee is likely to become a 100% shareholder and in the meantime can persuade the directors of the company to comply with his request for a loan or an investment.

44. Further in relation to this issue, the Tribunal acknowledged (see [29] on p 39 of the Decision) that "the form and shape" of the additional remuneration changed from the time it left AAM's control to the time when it came under the Employee's control, but insisted that the "substance" of what was being provided did not. But this reliance on substance rather than form is, so Mr Prosser submits, fundamentally misconceived, because whether employment income is taxable on an employer under the PAYE regime, or instead is taxable on the employee, clearly depends on the <u>form</u> in which the income is provided.

45. Indeed, he suggests that this is repeatedly recognised by the PAYE legislation itself: section 203A (PAYE: meaning of payment) is identical to section 202B(1) to (4), and section 203A(5) provides that subsections (5) and (6) of section 202B shall also apply for the purposes of section 203A. But section 202B (11) is not applied for the purposes of section 203A, because subsection (11) applies "in a case where emoluments <u>take the form</u> of a benefit not consisting of money".

46. Likewise, section 203F, considered below, applies where employment income is "provided <u>in the form of</u> a readily convertible asset"; and section 203FA similarly applies where employment income "is provided <u>in the form</u> of anything enhancing the value of an asset".

47. Last but not least, section 206A (PAYE settlement agreements) defines "taxable benefit" as any benefit provided or made available "otherwise than <u>in the form of a payment of money</u>".

48. It is also to be noted that at [49] to [54] of the Decision, the Tribunal considered what the position would be if they were wrong in their conclusion that the Employees fell to be treated as if they had received cash. They considered various authorities concerning the meaning of emoluments and perquisites and reached this conclusion at [53] on p 46 of the Decision.

> "If the *Ramsay* approach is applied, and we consider it should be, then the facts viewed realistically show that the employees received bonus in the form of shares which were capable of being turned to pecuniary account. This gives a purposive construction to the charging provisions relating to emoluments."

49. But that analysis does not show why the person who has to account for the tax is the employer rather than the employee. It is not every emolument which can be converted into money which gives rise to an obligation to deduct under section 203. The question is whether the emolument in question is provided by way of a "payment" to the employee.

50. From all this it ought to follow, according to AAM, that, as the Tribunal themselves acknowledged, the Employees received income in the form of shares, not in the form of a payment of money, and therefore the Tribunal ought to have decided this issue in favour of AAM.

51. I turn now to Mr Ghosh's submissions and his answers to Mr Prosser's points.

52. He accepts that the nature of the receipt must be tested when the EBT transferred the shares to the Employee. But what makes this case different from a simple case where shares are transferred to an employee is, according to him, that the Employees obtained shares subject to an arrangement under which the directors would "do as they were told" as he put it at the start of his oral submissions. That is not quite right; the position as I see it is as set out at paragraph 10 above. There was no arrangement that the directors would take any particular course nor even an arrangement that they would do so. There was no arrangement that they would "do as they were told".

53. But that is not to say that the effect of the arrangements up to and including the transfer of the shares to an Employee was other than to put the Employee in total control of the Company and to thus in a position to achieve whatever could lawfully be achieved. Mr Ghosh’s simple point is that, when directors will in practice act according to the Employee’s wishes, the money is at the disposal of the Employee as shareholder of the money box company just as much as it would be at the disposal of the owner of a physical money box containing money, holding the key to it.

54. After making the now uncontentious points that the shares, once appointed to the Employees by the EBT trustees, were emoluments of the Employees and that the value of the shares was not discounted by the option granted by EBT, he submits that the appointment of the shares was a “payment” of emoluments. He argues that the receipt by an employee of valuable shares is an asset which can be disposed of to his advantage and is therefore the receipt of a profit in the nature of money’s worth (see *Weight v Salmon* (1934) 19 TC 174 (HL) 193-94 *per* Lord Atkin).

55. It is worth setting out, in this context, a passage from the speech of Lord Reid in *Heaton v Bell* [1970] AC728 at 742:

> “Schedule E of the 1918 Act provided that tax should be charged in certain matters "for every twenty shillings of the annual amount thereof," and one goes to the Rules applicable to Schedule E for particulars. Rule 1 provides for tax under this schedule "in respect of all salaries, fees, wages, perquisites or profits. ..." "Perquisites" is not defined, but Rule 4 provides
>
> > "(1) Perquisites may be estimated either on the profits of the preceding year, or on the average for one year of the amounts of the profits thereof in the three preceding years ... (3) Perquisites shall be deemed to be such profits as arise in the course of exercising an office or employment from fees or other emoluments."
>
> Income Tax is a tax on income and income means money income. The words profits and gains are used throughout the legislation in reference to sums of money and the passage which I have quoted appears to me to indicate that perquisites here must mean money perquisites, if profits means money profits. There is no provision for the valuation in money of other kinds of advantages which one might call perquisites. In 1842 income tax was at the rate of a few pence in the pound, "fringe benefits" were unknown for there was no incentive to create them, and it appears to me to be clear that there was no intention to saddle the commissioners with the difficult and at that time unprofitable task of putting a money value on advantages arising out of the

> employment which did not sound in money. But the division between money and that which can readily be used to produce money is thin. A cheque is not money but it would be absurd to suppose that payment by cheque instead of in legal tender could make any difference, and it would be almost equally absurd to suppose that a transfer of shares which can immediately be sold to produce money should not be regarded as a money perquisite."

56. Similarly, shares in a money box company would surely have been seen in the same way by Lord Reid, because the powers of the 100% gave him ready, if not immediate, access to the cash within the company (subject to any taxation consequences of the withdrawal). As the Tribunal put it:

> "It is plain from this line of authority [namely *Weight v Salmon* and *Heaton v Bell*] that additional remuneration in the form of shares in a money box company, structured as the offshore companies are in this appeal, is a perquisite or profit which is capable of being turned into money or pecuniary account."

57. However, the fact that a transfer of some sorts of asset can been regarded as money perquisites does not necessarily mean that the transfer of such an asset to an employee is a "payment" to an employee, either as a matter of ordinary language or within the meaning of the PAYE code. Indeed, although the transfer would be an emolument within section 202A, there is a question whether or not the emolument is a benefit consisting of money for the purposes of section 202A(11).

58. The decision of the Special Commissioners in *Paul Dunstall Organisation Ltd v Hedges* [1999] STC (SCD) 26 ("***Dunstall***") is referred to by Mr Ghosh in the context of the meaning of "payment" in section 203 and the PAYE Regulations. That decision is not, of course, binding on me. It was, moreover, decided on the basis of the legislation in place for the tax years 1988/89 and thus before the amendments made inserting sections 202A and 202B and sections 203A to 203K and before the making of what are now the PAYE Regulations and the Tax (Employments) (Notional Payments) Regulations 1994. I do, nonetheless, need to deal with it in some detail because it appears to say that almost any emolument is subject to deduction of tax.

59. In *Dunstall*, the issue was whether the awarding of a bonus to a director in the form of an interest in land was a "payment" to the directors for the purposes of section 203 and

the then PAYE regulations. The Special Commissioners concluded that it was. They reasoned as follows:

> "44. Although s 203 refers to the payment of 'any income assessable to income tax under Schedule E' and regs 6 and 13 refer to 'any payment of emoluments' there does not appear to be any significant difference between these provisions as s 131 equates 'income assessable to income tax under Schedule E' with 'emoluments'. Section 131 also gives a wide definition to emoluments and provides that the word includes 'all salaries, fees, wages, perquisites and profits whatsoever'. Although salaries, fees and wages are usually paid in money, perquisites and profits are not. *Tennant v Smith* (*Surveyor of Taxes*) [1892] AC 150, 3 TC 158; *Abbott v Philbin* (*Inspector of Taxes*) [1961] AC 352, 39 TC 82; and *Wilkins* (*Inspector of Taxes*) *v Rogerson* [1961] Ch 133, 39 TC 344 are authority for the view that something which can be turned into money is a perquisite or profit and that the taxable subject matter is the value received, namely what the recipient would get for it if he sold it as soon as he received it.
>
> 45. The question then arises as to whether there can be a 'payment' of a perquisite or profit. The word payment is not defined and so should be given its ordinary meaning. There is nothing in s 203, or in regs 6 and 13, which restricts the obligation to deduct to payments in money. Indeed, the fact that the obligation to deduct arises 'on the occasion of any payment of emoluments' assumes that there could be payments if the emoluments take the form of perquisites or profits; otherwise the provision would have been restricted to the payment of emoluments in money."

60. For my part, I do not understand the reasoning in the first sentence of [44]. It may well be correct to say that there is no difference between the "payment of....any income assessable to income tax under Schedule E" in section 203 and "the payment of emoluments" within regulations 6 and 13 of the relevant regulations, but this does not depend on section 131. Section 131 says nothing about "income assessable to income tax" but simply provides that tax under Case I, II or III of Schedule E shall, except as provided to the contrary by any provision of the Tax Acts, be chargeable on the full amount of the emoluments falling under that Case. Section 131 itself tells us nothing about what emoluments can be the subject of "payment" or, indeed, whether it is possible to receive an emolument which is conferred otherwise than by a "payment". We have to look elsewhere to find an answer to those questions.

61. In [45] of their decision, the Special Commissioners argued in this way:

a. The word payment is not defined and so should be given its ordinary meaning.

b. There is nothing in section 203 or regulations 6 and 13 which restricts the obligation to deduct to payments in money.

c. The fact that the obligation to deduct arises "on the occasion of any payment of emoluments" assumes that there could be payments if the emoluments take the form of perquisites or profits. Otherwise the provision would have been restricted to the payment of emoluments in money.

62. As to step a., the Special Commissioners did not, at least in paragraph [45], consider what that ordinary meaning was. It might come as a surprise to many people to learn that the transfer of an interest in land is a payment within the ordinary meaning of that word. In any case, it is not a correct approach to construction to say that, because there is no definition, a word or phrase must be given its ordinary meaning, although the ordinary meaning may be the starting point.

63. As to step b., it is true that there is nothing expressly restricting payment to a payment of money. But in saying that, the Special Commissioners were impliedly acknowledging that the transfer of land was not a payment <u>of money</u> even if it was a payment.

64. As to step c., I am not at all sure that it is correct to say that there is such an assumption. But even if it is correct that some emoluments other than payments of money could be the subject matter of a payment, so that it would not have been right for the provision to have been restricted to the payment of money, it certainly does not follow that all emoluments are necessarily capable of being the subject matter of a payment.

65. The Special Commissioners then went on to consider *Garforth v Newsmith Stainless Ltd*, concluding in this way:

> "49. *Garforth* is, therefore, authority for the view that the word 'payment' has no settled meaning. That means that it is not therefore, necessarily, restricted to payments of money. The word takes it colour very much from the context in which it is found. In the context of s 203, and regs 6 and 13, the reference is to the payment of emoluments, which include perquisites and profits. It must therefore be assumed that there could be payment of perquisites or profits. If placing money unreservedly at the

> disposal of a recipient is equivalent to payment then it follows that if a perquisite or profit is placed unreservedly at the disposal of an employee that is equivalent to payment.
>
> 50. Applying those principles to the facts of the present appeal we find that Mr Dunstall received from the company a beneficial interest in an undivided share of the land at Sutton. That could be, and was, turned into money. It was, therefore, a perquisite or profit and so was an emolument (and both the company and Mr Dunstall accepted that he had received an emolument). The perquisite or profit was placed by the company unreservedly at the disposal of Mr Dunstall by means of the contract of 22 June 1988. Accordingly, in our view, there was a payment."

66. I do not differ from the view that the word "payment" has no settled meaning and that it must take its meaning from the context in which it is used. Nor do I take issue with the statement in [49] that section 203 and regulations 6 and 13 are referring to the payment of emoluments (including perquisites and profits) since, for reasons already given, there is really no difference between the payment of emoluments and the payment of income assessable under Schedule E. I am less sure that the conclusion that there could be a "payment" of perquisites is correct. But as I have said in considering step c., it does not follow that every perquisite can be the subject matter of a payment. Accordingly, even though placing money unreservedly at the disposal of a recipient is a payment, it does not follow that placing a perquisite or profit unreservedly at the disposal of a recipient is also a payment. That would follow only in cases where the perquisite or profit would be the subject matter of a "payment" if actually transferred to the recipient.

67. That was the first reason for the decision. The Special Commissioners had an alternative reason for their decision based on *Ramsay* but I do not need to go into that. Nor do I need to decide whether the first reasons for decision in *Dunstall* was right or wrong because I am dealing with an amended scheme of legislation. But I have to say that I see very great difficulties with the way in which the Special Commissioners reached their decision. In particular, their reasoning does not address what I see as the powerful point, made by Mr Prosser, that it must be possible to make a deduction when the "payment" is made. I do not consider that the provision of an emolument can be the subject of an obligation to deduct income tax unless, at the least, there is a mechanism by which the required deduction can be made from the emolument. Thus, in the case of a payment of money, whether effected in cash or by cheque or by crediting a bank account or director's loan account, a deduction can be made from the full amount of the

payment of the relevant tax. In the present case, Mr Ghosh submits that the deduction can be made by the declaration of a dividend of the amount of tax (which the EBT Trustees would then account for to HMRC) with the shares being transferred to the Employer ex-dividend together with the dividend itself reduced by the amount of the PAYE deduction. But in the case of an emolument in the form of land, it seems to me impossible – at least I have not been able to think how this might be done – to effect a deduction of tax from the emolument itself, that is to say the land.

68. The legislation as it applies in the present case is different from that which applied to *Dunstall*. Not only are the PAYE Regulations a different set of regulations, but those Regulations fall to be construed not only in the context of sections 19, 131 and 203, but also in the context of sections 202A, 202B and 203A which were introduced by the Finance Act 1989 and thus formed no part of the consideration of the tribunal in *Dunstall*.

69. Under section 19, all emoluments are charged under Schedule E, and section 131 charges tax under Schedule E on the full amount of those emoluments. Emoluments include what Lord Reid described as “money benefits”. Those benefits include, for instance, a transfer of shares in a publicly quoted company and would, I consider, certainly include a transfer of shares such as the transfer to an Employee in the present case. Section 202A then provides that, for any year of assessment, tax is to be charged on the full amount of the emoluments received: emoluments here clearly has the same meaning as in sections 19 and 131.

70. But section 202B, dealing with the timing of the receipt of emoluments, draws a clear distinction between emoluments which take the form of a benefit not consisting of money and those which do take the form of a benefit consisting of money. In the former case, the emoluments are treated as received at the time when the benefit is “provided”. The word used is “provided” not “paid”, indicating that the use of the word “payment” in the section (and elsewhere) is really apposite only to the provision of money emoluments.

71. Section 202B(11) is clearly drafted on the basis that there can be actual emoluments (and not simply benefits which are treated as emoluments such as the sort of fringe

benefits referred to by Lord Reid) which are emoluments not consisting of money. It is not to be supposed, I consider, that section 202B(11) is concerned only with benefits which are treated as emoluments (other than those which already fall within subsections (8) to (10)) but which are not actual emoluments. If it were concerned only with such benefits, then section 202B(11) would be devoid of content. It must follow that there can be emoluments which, at one and the same time (i) are emoluments which "take the form of a benefit not consisting of money" within section 202B(11) and yet (ii) are of the sort which Lord Reid described as a money perquisite. If that were not so, then section 202B(11) would again be devoid of content.

72. Accordingly, I consider that emoluments do not fall within section 202B(1) simply because they are readily realisable into money. For instance, a transfer of shares in a publicly quoted company is an emolument which takes the form of a benefit not consisting of money and would thus be treated as received at the time when the transfer was made, pursuant to section 202B(11).

73. Section 202B is concerned with the time of <u>receipt</u> of <u>emoluments</u>. Section 203 is concerned with the time of the <u>making of</u> a <u>payment</u> and applies where the payment is of "any income assessable to income tax under Schedule E". Manifestly, not all income which is assessable under Schedule is provided by way of "payment". The wording of section 203(1) reflects that fact, I consider, by referring to payment of "income" rather than to payment of "emoluments".

74. Section 203 did not contain any definition of "payment", but it is right, in my judgment, to construe it (and the PAYE Regulations) together with sections 202A, 202B and 203A. All of these sections must operate together and, if they are to provide a coherent scheme, must be construed together. Even if section 203 had the meaning ascribed to it by the tribunal in *Dunstall* prior to the introduction of sections 202A, 202B and 203A, that meaning is to be seen as modified if and so far as is necessary to give the old and new provisions together a coherent interpretation.

75. Sections 203A(1) to (4), as I have already said in recording Mr Prosser's submissions, reflect, very closely, sections 202B(1) to (4); and section 203A(5) provide for sections 202B(5) and (6) to apply for the purposes of section 203A(1) as they apply for the

purposes of section 202B(1). But section 203A contains no provision corresponding to sections 202B(8), (9) or (10): there is no need for such provision because the emoluments within those subsections are clearly not seen as being provided by way of payment so that section 203 would not bite.

76. More importantly, section 203A contains no provision corresponding to section 202B(11). The reason why it does not do so, I consider, is that it does not need to do so; and it does not need to do so because the provision of an emolument which takes the form of a benefit not consisting of money is not the "payment" of "income assessable". The contrary view would be very odd. The timing of receipts under section 202B is exactly matched by the timing of payments under section 203A in a case where the emoluments are money emoluments which can be the subject of payment. This is so whether of not the recipient is a director. But for a non-money emolument provided to a director, there would be no such match. A non-money emolument given to a director is treated as received under section 202B(11) at the time when the benefit is provided. In contrast, if the provision of a non-money benefit can be a "payment" within section 203A, the time of payment ascertained under, for instance, subsections (1)(c) or (d), may be different.

77. Moreover, this result is consistent with the view I take of section 202B(11). It is to be noted that the closing phrase of that subsection provides that subsections (1) to (6) shall not apply. The reason for that is, in my view, to ensure that the provisions relating to directors, that is to say subsections (1)(c) to (e) and (2) to (6), do not apply; instead, the director is treated as receiving his emolument when the benefit is actually provided. It is not, in my view, a purpose of that closing phrase to exclude from the operation of subsection (1) the provision of a non-money emolument to a non-director since such provision would not be a "payment" within subsections (1)(a) and (b) in the first place.

78. If a non-money benefit is not a payment for the purposes of section 202B, it is difficult to see how it could be a payment for the purposes of section 203 or section 203A. In my judgement, section 203 is concerned only with emoluments which take the form of a benefit consisting of money. And just as an emolument does not fall within section 202B(1), simply because it is readily realisable into money, I do not consider that it is a "payment" within section 203 either.

79. I would add this, although it is not necessary to my decision on the point. As I have said, Mr Ghosh accepts that an emolument cannot fall within section 203 unless there is the possibility of deduction (subject always to specific provisions treating emoluments as payments). For instance, an emolument in the form of a cow would not fall within section 203 because deduction would not be possible. That is an obviously correct concession, if I may say so. It does not follow, necessarily, from that concession that an emolument which is a non-money emolument is not within section 203: there may be non-money emoluments form which deduction is possible. But then the phrase “On the making of any payment” in section 203(1) would have to read as including the words “in respect of which deduction is possible” after those words. But that is not what the provision actually says. It is unnecessary to read those words into the subsection if “payment” is given a more ordinary meaning of payment in money or of a benefit consisting of money.

80. **The Cash-box Issue:** None of this is to say that an emolument which is not in cash is a non-money emolument. A cheque is not cash, but clearly it is a benefit consisting of money. Lord Reid’s observations that “it would be absurd to suppose that payment by cheque instead of in legal tender could make any difference” is as apposite in relation to sections 202B, 203 and 203A as it was in the context in which he said it. However, his further observation that “it would be almost equally absurd to suppose that a transfer of shares which can immediately be sold to produce money should not be regarded as a money perquisite” is not, in my judgement, apposite in the context of section 202B(11); and nor, therefore, is it apposite in the context of section 203 read with sections 202A and 202B. But just as for him the division between money and that which can readily be used to produce money is thin, so the division between money (in the sense of cash) and a benefit consisting of money is also thin. The question then is whether the transfer of a money box company to an Employee is an emolument which takes the form of a benefit consisting of money.

81. That question must be answered in the context of the Scheme. The purpose of the Scheme was to provide a bonus to Employees. It was the mechanism by which the benefit of a sum of money was to be channelled to an Employee, although it failed in its aim of diluting the value of the shares, and thus of providing an actual substantial value

to the Employee at a diluted value for income tax purposes. The Scheme was a composite transaction; the Scheme itself, ending as the Tribunal found with the transfer of shares, did not provide the Employee with cash or money in his own bank account, but it did provide the Employee with the rights of a shareholder holding 100% of the shares in a cash-rich debt-free company. As the Tribunal held (see paragraph 10 above) the facts, viewed realistically, show unequivocally that control was vested in the employee who had access to the pot of money contained within the corporate money box and the directors would, in reality, be inevitably compelled to comply with the individual employee's wishes. And as I put it in that paragraph, the Employee became the owner of a Company from which he could in practice extract the cash within it whenever he wished, subject of course to whatever tax charge of one sort or another, depending on the method of extraction, might result.

82. But even so, the Employee had no present right to receipt of cash from the company when its shares were transferred to him. The case is different from *Garforth v Newsmith Stainless Steel Ltd* where the directors had an immediate right to payment (even though it might have been necessary to sue for the debt, just as it might be necessary to sue on a cheque representing payment of salary if the employer defaulted). Mr Ghosh says that what the Employee received was as good as money. I do not agree with that. There is a difference, in my view, between an immediate right to obtain money (*eg* by drawing on a bank account to which salary has been credited by direct debit or cheque) and obtaining money only after the implementation of a procedure required by company law. This is not a case where it is possible to lift the corporate veil so as to treat the company's money as that of the Employee. Nor, on the findings of fact, is this a case where the composite transaction ends up with money (in the conventional sense) in the hands of the Employee (*eg* in his bank account). Indeed, it needs always to be remembered that the emolument in question is the shares and not the money in the company.

83. In my judgment, the transfer of shares to an Employee was not a "payment" to that Employee for the purposes of section 203. The powers which he had over "his" company did not result in his rights being "as good as cash" as Mr Ghosh would have it or, as I would say, being able to turn what was *prima facie* a benefit in a form not consisting of money (*ie* shares) into a benefit consisting of money. The money is not

unreservedly at the disposal of the Employee, a condition which is, I consider, a necessary, even if not a sufficient, condition for there to be a payment within section 203.

The PAYE Issue: section 203F

84. I now turn to section 203F which is headed “PAYE: tradeable assets". This section as in force at the relevant time applies where any assessable income is provided in the form of “a readily convertible asset”. That phrases is defined in subsection (2). HMRC rely on a combination of subsection (2)(f), (g) and subsection (3A) which are set out in the Appendix to this decision. In addition, section 203F(3B) provides that reference to enabling a person to obtain an amount of money shall be construed as reference to enabling an amount to be obtained **by any means**.

85. The Tribunal held that the shares were readily convertible assets, a conclusion which HMRC seeks to maintain on this appeal. AAM contends that the shares were not readily convertible assets for which trading arrangements were in existence, although, if that is wrong, AAM accepts that the amount of money which the Employee would obtain was similar to the expense incurred on the shares.

86. The Tribunal dealt with this aspect of the case at [81]*ff* of the Decision. They identified the relevant arrangements as being the offshore company primed with money equal to the amount of additional remuneration or benefit which the Remuneration Committee recommended the Employee receive, endorsed by AAM and then given to the employee by the EBT. They reasoned as follows. The **effect** (the word used in section 203F(3A)) of the arrangements was that the Employee was able to obtain an amount of money by means of, for example, a loan (which would not be repaid). The amount obtained might be obtained **by any means**: see section 203F(3B)(a). Although the Scheme was exhausted once the shares were transferred to the Employee (or more accurately the nominee company), the underlying arrangements created by the Scheme remained in existence. The money box company remained in existence. The share capital remained the same as the option in favour of the FBT was not exercised. The pot of money placed in the company remained in it until drawn down by the Employee by one means or another. The company had no real function other than to serve the wishes of the

Employee. The directors did not promote the company, or engage in any form of trading or business apart possibly from investment at the behest of the Employee. The arrangements enabled the Employee to use the shares to obtain money, for example in the shape of loans from the company, which would not be repaid, equal to the amount subscribed for shares. The bundle of rights which comprised the shares enabled him to use company law procedures to secure the granting of the loan. It was the pre-existing arrangements (*ie* the Scheme which created the money box company), which enabled the Employee to obtain the amount in question. But for these arrangements, whereby substantial sums were injected into the company, the shares themselves would have no significant value at all. In short, the provision of the valuable shares is the culmination or result of the underlying arrangements. Whether or not this is described as an arrangement extraneous to the asset, the ingredients of section 203F(3A) are all present.

87. Mr Prosser submits that this analysis is wrong as a matter of law. It was part of the Tribunal's reasoning that "the bundle of rights which comprised the shares enabled [the Employee] to use company law procedures to secure the granting of the loan". Mr Prosser submits that the trading arrangements cannot be found in the shares themselves, for two reasons:

a. First, because the reference in subsection (2)(f) to "an asset for which" trading arrangements exist when the asset is provided, and the reference in subsection (3A) to the existence of arrangements having an effect "in relation to that asset" both indicate that the asset and the arrangements are conceptually distinct. He relies on the decision of the Court of Appeal in *DTE v Wilson.* In that case, Jonathan Parker LJ observed that section 203F, in its then form, contemplated trading arrangements "which were extraneous to the asset itself": see at [47].

b. Secondly, because section 203F draws a clear distinction between specified kinds of asset which are subject to PAYE because they "consist" in a right or rights (paragraphs (c) to (e) on the one hand), and any assets at all for which trading arrangements exist or may come into existence (paragraphs (f) and (g) on the other hand). Thus, the statutory purpose is not to treat the provision of an asset as a payment for PAYE purposes merely because it <u>consists</u> of rights which are convertible into money; in addition the asset must fall within one or other of paragraphs (c) to (e).

88. Mr Prosser submits, in relation to the 50% shareholding cases, that the shares did not even carry a right to obtain money. The Tribunal said that "the practical effect of the arrangement was the same", but Mr Prosser contends that the only arrangements identified by the Tribunal were the company, its money and the shares. In these circumstances, he submits that it is impossible to conclude that the 50% shareholding was a "readily convertible asset".

89. As to the first of the reasons identified in paragraph 87 above, the Tribunal dealt with *DTE v Wilson* in the following way at [88] and [89] of the Decision:

> "88. The reasoning on the section 203F point was brief (paragraph 47). Even if the legislation which the Court of Appeal considered is regarded as being substantially the same as the provisions we have to construe and apply, that does not enable us to identify as universally applicable a condition that the trading arrangements must be *extraneous to the asset* itself. What is or is not extraneous to an asset may be a matter of some debate.
>
> 89. As we construe section 203F(3A), what is required is (i) the existence of some arrangement, (ii) the arrangement has an effect which relates to the asset, (iii) the effect is that it enables the employee to obtain an amount of money, and (iv) the amount so obtained is similar to the expense incurred in providing the asset. While the arrangement may be extraneous to the asset itself, it may on occasion be inextricably linked to the asset."

90. Mr Prosser identifies a difference in the nature of the assets within subsections (2)(a) to (e) and those within subsections (2)(f) and (g). The former paragraphs focus on the nature of the asset; thus (a) and (b) are assets capable of being sold on certain markets, and (c) to (e) identify what it is the relevant asset must "consist" of. The latter focus, in the light of subsection (3A), on the arrangements which exist for obtaining an amount of money. What one is trying to do is to identify arrangements "in relation to" the asset. So (f) and (g) are not, he says, looking at types of asset at all, and are not looking to see whether there are arrangements (such as a market) in relation to assets of that type. Instead, the question is whether there are arrangements in relation to the particular asset concerned.

91. Thus he says that “arrangements” is to be given a very narrow meaning; arrangements are something which go beyond what the nature of the asset and available markets already enable in any event. If it were otherwise, then (f) and (g) would, he submits, subsume (a) to (c): I suppose it would logically follow from that last submission that a market capable of being brought within (b) would automatically fall within (f) or (g) in any case. He says that HMRC have been unable to explain how (f) and (g) should be interpreted without “infecting” (a) and (b). It is right, of course, to say, as Mr Ghosh does, that the present case is not concerned with markets; but it is not only legitimate, but necessary, to consider the implications of HMRC’s interpretation; if that interpretation leads to an absurd result in other situations, it must cast doubt on the correctness of the interpretation.

92. I would not quarrel with the conclusion that one should reject an interpretation of section 203F which automatically and in all cases brought within (f) or (g) assets dealt with on a market within, or potentially within, (a) or (b). But I think Mr Prosser takes an extreme position in saying that the explanation has to be that “arrangements” means an agreement or plan or understanding. One can well imagine the draftsman considering the assets which he wished to bring within the section. He started with markets (in (a) and (b)), moved on to other specific assets and then came to (f) and (g) as sweeping-up provisions. It would not be at all surprising, if that was his approach, to find an overlap between the sweeping-up provisions and the specifics which preceded them.

93. In any case, it does not seem to me that HMRC’s approach has the result that (f) and (g) do capture the entirety of (a) and (b) or assets potentially within (b). Paragraphs (f) and (g) are concerned with trading arrangements, that is to say arrangements which enable the asset-holder to obtain <u>an amount similar to the expense incurred in the provision</u> of that asset. Paragraphs (a) to (c) are not restricted to cases where the amount obtained is similar to the expense incurred. Due to movements in the markets referred to in paragraphs (a) and (b), the person to whom the asset is provided may in fact, even if acting promptly, receive an amount of money significantly different from the value, on the relevant market, of the asset at the time when it was provided to him. Moreover, if the employer acquires the asset on one day at its then market value, and its value has

changed significantly by the time it is provided to the employee, it is far from clear that the "expense incurred in providing" it is the market value on the date of its provision rather than the value at the date of its acquisition by the employer. In other words, (f) and (g) do not always capture (a) to (c); but the reason they do not always do so might not be that there are no "arrangements" but rather that there are no arrangement with the effect specified in subsection (3A). Debate about those sorts of issues is eliminated by providing, in a straightforward way, that an asset dealt with on certain markets is a readily convertable asset.

94. But even if this is an inadequate cure for the "infection" which Mr Prosser identifies, and even if he is correct to say that "arrangements" involve an agreement or plan or understanding, I see no reason why such an agreement, plan or understanding should not involve factors which are not extraneous to the asset concerned. Suppose that there exists, in a particular case, an agreement, plan or understanding that a chain of events would take place, which enabled a person to obtain an amount of money, and that one of the links in that chain involved a matter internal to the asset in question. I see no reason why that link should be incapable of forming part of the arrangements.

95. Thus, suppose in the present case that the Company had not held money but instead held an asset in relation to which there were in place arrangements the effect of which was to enable the holder of the asset to obtain a sum of money from it. Suppose, when the shares in the Company were transferred to the Employee, that there was an agreement, plan or understanding that the Company would be put into liquidation by the Employee and that the asset would be transferred to the Employee who would immediately obtain a sum of money in respect of it pursuant to those arrangements. One step in the implementation of the agreement, plan or understanding would be the winding-up of the Company by the Employee. That step is no less a step because it involves the operation of procedures – the winding-up – which rely on the powers of the Employee as shareholder under the constitution of the Company in the light of the applicable company law. The "arrangements", in this example, for the purposes of subsection (3A) comprise the agreement, plan or understanding coupled with the arrangement first identified (that is to say, the arrangement the effect of which is to enable the holder of the asset to obtain a sum of money from it). It would, I consider, be a very odd conclusion if the shares in this example were precluded from being a

tradable asset on the basis that there were no "arrangements" because, as Mr Prosser would have it, one step in those "arrangements" is the exercise of a right or power inherent in the shares.

96. If my view is correct, and Mr Prosser is wrong, then I see no reason to apply a different approach if, in the example, the money box company owns cash rather than an asset such as I have described. In this case, too, the winding-up is a step in the arrangements which result in money passing to the Employee. If it is necessary to identify an agreement, plan or understanding then that can be found in the company's own constitution which governs the relationship between the company itself (as a separate entity) and the shareholders. The articles of association under English law constituted a contract between the members and the company even before the introduction of section 33 Companies Act 2006: see *Hickman v Kent or Romney Marsh Sheepbreeders' Association* [1915] 1 Ch 881. There is nothing before me to suggest that the law of the Isle of Man (where the money box companies were incorporated) was any different at the relevant time. I see no reason to think that a structure which enables, but does not require, a shareholder to obtain money from the company is not properly to be seen as "arrangements" in relation to that company. The position is distinguishable from *DTE v Wilson* where the right to receive money was automatic when the interest became absolute.

97. I do not, in any case, think that it is necessary to demonstrate the existence of an agreement, plan or understanding before there can be "arrangements" within subsection (3A). In my judgment, the very presence of powers which can be exercised unilaterally by the shareholder the effect of the exercise of which is to result in the shareholder obtaining money, is of itself sufficient to amount to "arrangements".

98. In my judgment, the powers of the 100% shareholding in each of the actual money box companies amounted to "arrangements" the effect of which was to enable the shareholder to obtain an amount of money. The critical elements in that conclusion are (i) that the company held only cash and had no liabilities at the time of the transfer (ii) that the shareholder was able unilaterally to exercise appropriate company law procedures such as winding-up, payment of dividend or reduction of capital and distribution and (iii) he was thereby enabled to obtain cash.

99. It is also to be noted, as Mr Ghosh points out, that the *obiter* dictum of Jonathan Parker LJ in *DTE v Wilson* was made in the context of legislation which referred to the "purpose" rather than the "effect" of the relevant arrangements. He also submits that there is no support for the conclusion in *DTE v Wilson* from the text of the relevant provisions or from a consideration of principle. Mr Prosser teases Mr Ghosh for saying that this difference in wording is "very, very important" and submits that the change in wording makes no difference. He relies on [47] of the judgment of Jonathan Parker LJ, which does not, he submits, depend on the word "purpose" rather than "effect". But, as he himself says, the decision was based on a reading of the section as a whole and a change of wording is quite likely to have an impact on the overall meaning. Without in any way suggesting that Jonathan Parker LJ was wrong in his conclusion in relation to the old wording and the asset in question in the case before him, I reach a different conclusion on the new wording and the asset in question in the present case. I think Mr Ghosh is right and so, one might think, the point is of importance.

100. This is not, however, enough to get HMRC home. The arrangements not only have to have the effect that the shareholder is enabled to obtain an amount of money, but they must also have the effect that the actual amount is, or is likely to be, similar to the expense incurred in providing the shares. This requirement is satisfied, in my judgment, in the present case. The money in the Company is of an amount similar to the expense in providing the 100% shareholding to the Employee. The Employee can exercise his powers as a 100% shareholder to obtain all of the money in the Company (less, perhaps, some costs and expenses). He will therefore obtain an amount similar to the expense incurred in providing him with the shares. It is true that the Employee might suffer a tax change when he receives the money from the Company; but this does not mean that he is not enabled to <u>obtain</u> that money. Indeed, it is the very act of obtaining it which is likely to give rise to the tax charge. Accordingly, I consider that the Employee is able to obtain from the Company the cash within it by the declaration of a dividend or the winding-up of the company and distribution of its assets. Although the former may give rise to a tax charge on the Employee the latter would not do so. Since the Employee would have acquired the shares at market value, there should not have been any capital gains tax on a winding-up implemented swiftly after the acquisition.

101. In the case of the 50% shareholder, the position is, I think, *a fortiori*. Although the transfer of the first 50% may not have given the Employee the necessary powers to obtain the money in the Company, it was part of the Scheme that he would receive, in due course the other 50%. The obtaining of the other 50% therefore forms, as I see it, part of the "arrangements" in relation to the first 50% for the purposes of subsection (3A). It can therefore be said, when the first 50% was transferred, that there were in place arrangements the effect of which, in relation to that first 50%, was to enable the Employee to obtain an amount of money (that is to say, one half of the cash in the Company) which was likely to be similar to the expense incurred in providing that 50% (as to which it is clearly appropriate, in my view, to attribute 50% of the total cost of provision of 100% of the shares to the first 50%).

102. It follows from this analysis that the shares in the money box company transferred by the EBT trustee to an Employee were a readily convertible asset, both in the case where there was one transfer of 100% and in the case where there were two transfers of 50%. Accordingly, AAM is treated, for the purposes of the PAYE Regulations as making a payment of income of that amount. Section 203J then provides for how tax is to be accounted for.

Disposition

103. AAM's appeal from the decision of the Tribunal is dismissed.

Warren

Mr Justice Warren, Chamber President **31 January 2012**

RELEASE DATE: 01 FEBRUARY 2012

ANNEX

THE LEGISLATIVE FRAMEWORK

1. At the relevant time the charge to income tax was established by section 1 of the Income and Corporation Taxes Act 1988. Schedule E is set out in section 19 under which tax was charged

   "in respect of any office or employment on emoluments therefrom."

2. Sections 202A and 202B establish the receipts basis of assessment and set out the meaning of "receipt" in various circumstances as follows:-

202A Assessment on receipts basis

(1) As regards any particular year of assessment-

(a) income tax shall be charged under Cases I and II of Schedule E on the full amount of the emoluments received in the year in respect of the office or employment concerned;

(b) income tax shall be charged under Case III of Schedule E on the full amount of the emoluments received in the United Kingdom in the year in respect of the office or employment concerned.

(2) Subsection (1) above applies-

(a) whether the emoluments are for that year or for some other year of assessment;

(b) whether or not the office or employment concerned is held at the time the emoluments are received or (as the case may be) received in the United Kingdom.

....

(4) Section 202B shall have effect for the purposes of subsection (1)(a) above"

202B Receipts basis: meaning of receipt

(1) For the purposes of section 202A(1)(a) emoluments shall be treated as received at the time found in accordance with the following rules (taking the earlier or earliest time in a case where more than one rule applies)-

(a) the time when payment is made of or on account of the emoluments;

(b) the time when a person becomes entitled to payment of or on account of the emoluments;

(c) in a case where emoluments are from an office or employment with a company, the holder of the office or employment is a director of the company and sums on account of the emoluments are credited in the company's accounts or records, the time when sums on account of the emoluments are so credited;

(d) in a case where the emoluments are from an office or employment with a company, the holder of the office or employment is a director of the company and the amount of the emoluments for a period is determined before the period ends, the time when the period ends;

(e) in a case where the emoluments are from an office or employment with a company, the holder of the office or employment is a director of the company and the amount of the emoluments for a period is not known until the amount is determined after the period has ended, the time when the amount is determined.

(2) Subsection (1)(c), (d) or (e) above applies whether or not the office or employment concerned is that of director.

(3) Paragraph (c), (d) or (e) of subsection (1) above applies if the holder of the office or employment is a director of the company at any time in the year of assessment in which the time mentioned in the paragraph concerned falls.

(4) For the purposes of the rule in subsection (1)(c) above, any fetter on the right to draw the sums is to be disregarded

(5) In subsection (1) above "director" means -

(a) in relation to a company whose affairs are managed by a board of directors or similar body, a member of that board or similar body,

(b) in relation to a company whose affairs are managed by a single director or similar person, that director or person, and

(c) in relation to a company whose affairs are managed by the members themselves, a member of the company.

(6) In subsection (1) above "director", in relation to a company, also includes any person in accordance with whose directions or instructions the company's directors (as defined in subsection (5) above) are accustomed to act; and for this purpose a person is not to be deemed to be a person in accordance with whose directions or instructions the company's directors are accustomed to act by reason only that the directors act on advice given by him in a professional capacity

....

(11) In a case where-

(a) the emoluments take the form of a benefit not consisting of money, and

(b) subsection (8), (9) or (10) above does not apply,

for the purposes of section 202A(1)(a) the emoluments shall be treated as received at the time when the benefit is provided; and in such a case subsection (1) to (6) above shall not apply.

3. Section 203 provides for the establishment of the PAYE system. Sub-section (1) is as follows:

"On the making of any payment of, or on account of, any income assessable to income tax under Schedule E, income tax shall, subject to and in accordance with regulations made by the Board under this section, be deducted or repaid by the person making the payment, notwithstanding that when the payment is made no assessment has been made in respect of the income and notwithstanding that the income is in whole or in part income for some year of assessment other than the year during which the payment is made."

The relevant regulations are the Income Tax (Employments) Regulations 1993 (SI 1993/744).

4. Section 203A defined *payment* as follows:-

(1) For the purposes of section 203 and regulations under it a payment of, or on account of, any income assessable to income tax under Schedule E shall be treated as made at the time found in accordance with the following rules (taking the earlier or earliest time in a case where more than one rule applies)

(a) the time when the payment is actually made;

(b) the time when a person becomes entitled to the payment;

(c) in a case where the income is income from an office or employment with a company, the holder of the office or employment is a director of the company and sums on account of the income are credited in the company's accounts or records, the time when sums on account are so credited

(d) in a case where the income is income from an office or employment with a company, the holder of the office or employment is a director of the company and the amount of the income for a period is determined before the period ends, the time when the period ends;

(e) in a case where the income is income from an office or employment with a company, the holder of the office or employment is a director of the company and the amount of the income for a period is not known until the amount is determined after the period has ended, the time when the amount is determined.

(2) Subsection (1)(c), (d) or (e) above applies whether or not the office or employment concerned is that of director.

(3) Paragraph (c), (d) or (e) of subsection (1) above applies if the holder of the office or employment is a director of the company at any time in the year of assessment in which the time mentioned in the paragraph concerned falls.

(4) For the purposes or the rule in subsection (1)(c) above, any fetter on the right to draw the sums is to be disregarded.

(5) Subsections (5) and (6) of section 202B shall apply for the purposes of subsection (1) above as they apply for the purposes of section 202B(1).

5. Section 203B provides as follows:-

203B PAYE: payment by intermediary

(1) Subject to subsection (2) below, where any payment of, or on account of, assessable income of an employee is made by an intermediary of the employer, the employer shall be treated, for the purposes of **PAYE r**egulations, as making a payment of that income of an amount equal to the amount determined in accordance with subsection (3) below.

(2) Subsection (1) above does not apply if the intermediary (whether or not he is a person to whom section 203 and PAYE regulations apply) deducts income tax from the payment he makes and accounts for it in accordance with PAYE regulations.

(3) The amount referred to is-

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

(b) in any other case, the amount of the payment made by the intermediary.

(4) For the purposes of this section, a payment of, or on account of, assessable income of an employee is made by an intermediary of the employee if it is made –

(a) by a person acting on behalf of the employer and at the expense of the employer or a person connected with him; or

(b) by trustees holding property for any persons who included or class of persons which includes the employee.

(5) Section 839 applies for the purposes of subsection (4) above.

6. Section 203F provides as follows:-

203F PAYE: tradeable assets

(1)Where any assessable income of an employee is provided in the form of a readily convertible asset, the employer shall be treated, for the purposes of PAYE regulations, as making a payment of that income of an amount equal to the amount specified in subsection (3) below

(2) In this section “readily convertible asset” means-

(a) an asset capable of being sold or otherwise realised on a recognised investment exchange (within the meaning of the **M1**Financial Services Act 1986) or on the London Bullion Market;

(b) an asset capable of being sold or otherwise realised on a market for the time being specified in PAYE regulations;

(c) an asset consisting in the rights of an assignee, or any other rights, in respect of a money debt that is or may become due to the employer or any other person;

(d) an asset consisting in, or in any right in respect of, any property that is subject to a fiscal warehousing regime;

(e) an asset consisting in anything that is likely(without anything being done by the employee) to give rise to, or become, a right enabling a person to obtain an amount or total amount of money which is likely to be similar to the expense incurred in the provision of the asset;

(f) an asset for which trading arrangements exist; or

(g) an asset for which trading arrangements are likely to come into existence in accordance with any arrangements of another description existing when the asset is provided or with any understanding existing at that time.

....

(3) The amount referred to is the amount which, on the basis of the best estimate that can reasonably be made, is the amount of income likely to be chargeable to tax under Schedule E in respect of the provision of the asset.

(3A) For the purposes of this section trading arrangements for any asset provided to any person exist whenever there exist any arrangement the effect of which in relation to that asset is to enable that person, or a member of his family or household, to obtain an amount or total amount of money that is, or is likely to be, similar to the expense incurred in the provision of that asset.

(3B) References in this section to enabling a person to obtain an amount of money shall be construed-

(a) as references to enabling an amount to be obtained by that person by any means at all, including, in particular-

(i) by using any asset or other property as security for a loan or advance, or

(ii) by using any rights comprised in or attached to any asst or other property to obtain any asset for which trading arrangements exist; and

(b) as including references to cases where a person is enabled to obtain an amount as a member of a class or description of persons, as well as where he is so enabled in his own right.

(3C) For the purposes of this section an amount is similar to the expense incurred in the provision of any asset if it is, or is an amount of money equivalent to –

(a) the amount of the expense so incurred, or

(b) a greater amount; or

(c) an amount that is less than that amount but not substantially so.

(4) For the purposes of this section, “asset” does not include-

(a) any payment actually made of, or on account of, assessable income;

(b) any non-cash voucher, credit-token or cash voucher (as defined in sections 141 to 143) or

(c) any description of property for the time being excluded from the scope of this section by PAYE regulations

(5) Subject to subsection (4) above, for the purposes of this section “asset” includes any property and in particular any right or interest falling within any paragraph in Part 1 of Schedule 1 to the Financial Services Act 1986.

....

7. Section 203J provides *inter alia* as follows:-

203J s 203B to 203I: accounting for tax

(1) Where an employer makes a notional payment of assessable income of an employee, the obligation to deduct income tax shall have effect as an obligation on the employer to deduct income tax at such time as may be prescribed by PAYE regulations from any payment or payments he actually makes of, or on account of, such income of that employee.

(2) For the purposes of this section-

(a) a notional payment is a payment treated as made by virtue of any of sections 203B, 203C and 203F to 203I, other than a payment whose amount is determined in accordance with section 203B(3)(a) ....

8. Regulation 2(1) of the Income Tax (Employments) Regulations 1993 provides *inter alia:-*

“emoluments” means the full amount of any income to be taken into account in assessing liability under Schedule E after the deduction of-

(a) Allowable superannuation contributions, and

(b) Any sum withheld from an employee in accordance with section 202 of the Taxes Act;

“employee” means any person in receipt of emoluments;

“employer” means any person paying emoluments;”

9. Regulation 6(1) provides *inter alia* as follows:-

“..... every employer, on making any payment of emoluments to any employee during any year, shall deduct ..... tax in accordance with these Regulations...”

10. The Income Tax (Employments) (Notional Payments) Regulations 1994 provide *inter alia* as follows:-

Regulation 7

(1) Paragraph (2) below prescribes the time at which an employer shall deduct income tax in accordance with subsection (1) of section 203J in respect of a notional payment made by him of assessable income of an employee ....

(2) The time prescribed is any occasion on or after the time when the notional payment is made and falling within the same income tax period, on which the employer actually makes a payment of, or on account of, assessable income of that employee.

Regulation 8

(1) Paragraph (2) below prescribes the time at which an employer shall account to the Board in accordance with subsection (3) of section 203J for an amount of income tax in respect of a notional payment made by him of assessable income of an employee ....

(2) The time prescribed is within 14 days of the end of the income tax period in which the notional payment was made.