[2021] UKUT 0082 (TCC)

Appeal number: UT/2019/0145 & 0138

INCOME TAX– UK contractor with offshore employer providing services to UK end-users remunerated through EBT arrangements – whether FTT had jurisdiction to consider whether taxpayer entitled to PAYE credits under Regulations 185 and 188 of PAYE Regulations for sums end-users liable to deduct under PAYE -no. Whether FTT erred in finding discovery assessments valid – no. Transfer of Assets Abroad code -whether FTT erred in finding motive defence did not apply - no – whether FTT erred in finding income of "person abroad" was nil – no. Whether TOAA infringed taxpayer's EU law free movement of capital – no. Taxpayer's appeal dismissed, HMRC's cross-appeal allowed in part.

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

STEPHEN HOEY	**Appellant** **Respondent to HMRC's cross-appeal**
-and-	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS	**Respondents** **Appellants in respect of HMRC's appeal**

TRIBUNAL **MR JUSTICE ADAM JOHNSON**
JUDGE SWAMI RAGHAVAN

Sitting in public by way of remote video skype for business hearing treated as taking place in, London, on 22,23, and 26 October 2020. Written submissions received on 30 October, 3, 9, 11, 16, 23 November, 17, 18 December, 8 January, 19 and 23 February 2021

Rory Mullan, counsel, instructed by RPC for the Appellant, and for the Respondent to the Commissioners' cross-appeal)

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DECISION

Introduction

1. This is Mr Hoey's appeal and HMRC's cross appeal against the decision of the FTT published as *Stephen Hoey v HMRC* [2019] UKFTT 489 (TC).

2. Mr Hoey is a UK-based IT contractor who provided services to end users who were also in the UK. Mr Hoey's employers were however based offshore (the first one in the Isle of Man and the second in Guernsey). The employers made contributions to Employee Benefit Trusts ("EBT") which in turn made loans to Mr Hoey. Shortly before the FTT hearing, Mr Hoey conceded the payments of contributions into the EBT were, following the Supreme Court's decision in *Rangers*[1], taxable employment income which was subject to PAYE under the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA").

3. The obligation to deduct PAYE normally falls on a person's employer. An employee's self-assessment would therefore show that the employee was liable to tax on the employment income but then reflect a credit for the PAYE ("PAYE credit") deducted by the employer. But, because Mr Hoey's employers were based outside the UK, ITEPA provided that it was the UK end users of Mr Hoey's services who were liable for PAYE on the employment income (that was, following *Rangers*, the employers' contributions to the EBT). HMRC took the view it was not appropriate to hold those end users liable for the PAYE and exercised a statutory discretion, to relieve the end users from liability. That, HMRC say, meant no PAYE credit was due as Mr Hoey remained liable for the tax. In any case, HMRC argue the FTT had no jurisdiction, in the context of an appeal against an assessment or otherwise, to deal with the PAYE credit; that was a matter for collection proceedings.

4. Mr Hoey submits the relevant regulations do still give him the PAYE credit, and that the question of what amount a taxpayer must pay, which goes to the heart of an assessment, is within the FTT's jurisdiction. He disputes the scope and legality of the discretion HMRC exercised (under s684(7A) ITEPA "the 7A discretion") and submits these matters too fall within the FTT's jurisdiction. He says the FTT was wrong to agree with HMRC that it lacked jurisdiction on the PAYE credit issue and regarding the 7A discretion. We refer to this group of issues as **"the PAYE and jurisdiction issues"**.

5. Mr Hoey's appeal before the FTT dealt with his appeals against two discovery assessments (2008-9, 2009-10) and an appeal against a closure notice (2010-11). Mr Hoey further submits the FTT erred in upholding the validity of the discovery

[1] *RFC 2012 (in liquidation) v Advocate General for Scotland* [2017] UKSC 45

assessments. We refer to this issue as **"the discovery assessment validity issue"**. With the permission of the FTT, Mr Hoey raises a number of grounds before us relating to the PAYE and jurisdiction issues and the discovery assessment validity issue.

6. The assessments and closure notice, as well as imposing a charge based on employment income, raised a charge based on the Transfer of Assets Abroad ("TOAA") code[2] in respect of amounts arising to the offshore employers. Mr Hoey also argued the TOAA charge did not apply because he had a statutory defence based on the lack of tax avoidance motive and that in any case that the TOAA code contravened EU law rights on free movement of capital. The FTT did not consider it strictly necessary, in the light of Mr Hoey's concession on the employment charge, to deal with the TOAA arguments but nevertheless went on to analyse those. It considered Mr Hoey could not avail himself of the relevant defence, and that the TOAA code did not contravene EU law. However, it considered the income charged under TOAA was nil once the amounts the offshore employers received were offset by the sums the employers paid out in remuneration. HMRC's cross-appeal, granted with permission of the FTT, maintains the FTT made various errors of law in reaching these findings. We refer to these as **"the TOAA issues"**.

7. We deal in turn with the PAYE credit and jurisdiction issues, the discovery assessment validity issue and the TOAA issues.

Background facts

8. We set out the basic background facts the FTT found, some of which, in particular concerning Mr Hoey's motivations, are subject to challenge and which we consider in more detail when discussing the relevant ground of appeal. Paragraph numbers are to those in the FTT Decision.

9. Mr Hoey is an IT specialist who provided his services to end users ([13]). He had previously, in around 2004, done this through a personal service company but had found the complexities of running his own company too much for him to deal with. He engaged the services of an intermediary (Dynamic Management Solutions Ltd "DMS"), and subsequently Cascade (the intermediary / intermediaries). DMS introduced him to Penfolds (an Isle of Man company ([3(1)][15]) who became Mr Hoey's employer. In September 2009 he transferred his employment to Hamilton Trust, a Guernsey based trust company ([15]) (each an "Employer" and together "the Employers").

[2] Chapter 2 Part 13 Income Tax Act 2007 ("ITA 2007")

10. The Employers provided Mr Hoey's services to the end users who in the relevant periods were UK-based entities: Axa Investment Managers Ltd., Aviva Investors and Threadneedle Investments ([20][31]-[35] and [42]-[47]).

11. The Employers paid Mr Hoey a basic wage for his work, on which tax was paid in full by the Employers ([21] [36] [49]). Further payments were made to a trust for the benefit of employees of the Employer ("the Trust") ([22] [37] [49]). The trust would then make interest free loans to the employees [(38]-[39] [50]-[51]).

12. The arrangements were disclosed to HMRC under the DOTAS legislation[3] and allocated scheme reference numbers ([24] [27] and [40]).

13. At the time, it was understood that only the benefit of the loans was taxable, by reason of Chapter 7, Part 3 ITEPA 2003. That benefit was declared on Mr Hoey's tax returns. The tax treatment, for employment income purposes, of sums paid into EBTs was considered in the *Rangers* litigation culminating in the judgment of the Supreme Court given in 2017. On 12 June 2019, shortly before the FTT hearing, which took place on 1-9 July 2019, Mr Hoey accepted that the sums paid to the trusts were taxable payments of earnings within s62 ITEPA 2003.

14. To make sense of the PAYE credit and jurisdiction issues, which ultimately turn on statutory interpretation, it is convenient to deal first with the relevant law. We set these provisions at some length in order to see the relevant parts (which we have emphasised in bold) in their context, we later narrate in the discussion section our understanding of how the provisions fit together.

The PAYE credit and jurisdiction issues: The statutory provisions

15. In broad outline, in this section we set out: 1) a) the provisions in ITEPA which charge tax, b) provisions in ITEPA setting out what PAYE regulations may provide for, c) the ITEPA provision under which HMRC's statutory discretion to relieve the end-users is said to arise, and then 2) the basic framework of PAYE regulations. We then turn to 3) the provisions in the Taxes Management Act 1970 ("TMA 1970") which set out the provisions on tax returns, assessments, payments and appeals, before returning at 4) to the specific PAYE Regulations 185 and 188 said to give rise to Mr Hoey's PAYE credit.

[3] The "Disclosure of Tax Avoidance Schemes" legislation contained primarily in the Finance Act 2004, Part 7 (ss306 to 319 as amended)

ITEPA

16. Section 6 describes the nature of the charge to tax on "employment income" which is further defined in s7(2) and which includes, at s7(2)(a), "earnings within Chapter 1 of Part 3". The term "earnings" is defined "in relation to an employment" in s62. That definition includes:

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

17. Section 9 defines the amount of employment income charged to tax.

18. Section 13(1) provides that the person liable for any tax on employment income [under this Part] is the "taxable person" as defined. That definition includes (subsection 2), if the tax is on general earnings, "the person to whose employment the earnings relate."

19. Part 11 of ITEPA, as explained by s682 ITEPA, "provides for the assessment, collection and recovery of income tax in respect of PAYE income", which s683 defines to include amongst other things, any "PAYE employment income", which term in turn includes "any taxable earnings from an employment in the year…". There is no dispute here that the sums paid into the trusts were PAYE employment income.

20. The PAYE regulations, which we come on to, deal with the standard situation of an employer paying its employee earnings and deducting tax from those earnings.

21. In so far as is relevant here, s689 applies where: a) an employee works for a person who is not the employee's employer ("the relevant person"), b) the employer paid the employee PAYE income, c) PAYE regulations do not apply to the person making the payment, and d) income tax is not deducted, or not accounted for, in accordance with the regulations (the PAYE regulations) by the person making the payment.

22. There is no dispute that HMRC considered s689 to apply: a) Mr Hoey worked for the end-users, not his employers (Penfolds and Hamilton), b) those employers paid him, c) the PAYE regulations were not considered by HMRC to apply to Penfold and Hamilton because they were outside of the UK, and d) Penfold and Hamilton did not deduct or account for income tax on the payments into the trusts.

23. The consequence of s689 applying is that (under s689(2)) the person for whom the employee works (i.e. the end user) is treated as making a payment of PAYE income.

24. That end user is treated, by virtue of s710(2)(b), as an "employer", and the amount of PAYE income paid by it is termed a "notional payment" (s710(2)(a)) for the purposes of s710. That section provides:

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

(2) For the purposes of this section—

(a) a notional payment is a payment treated as made by virtue of any of sections 687, 689 and 693 to 700, other than a payment whose amount is given by section 687(3)(a) or 689(3)(a), and

(b) any reference to an employer includes a reference to a person who is treated as making a payment by virtue of section 689(2).

(3) Subsection (4) applies if, because the payments actually made are insufficient for the purpose, the employer is unable to deduct the full amount of the income tax as required by subsection (1).

(4) The employer must, subject to and in accordance with PAYE regulations, account to the Commissioners for Her Majesty's Revenue and Customs at the relevant time for an amount of income tax equal to the amount of income tax the employer is required, but is unable, to deduct.

25. Section 684(1) requires HMRC to make regulations ("PAYE Regulations") with respect to the assessment, charge, collection and recovery of income tax in respect of all PAYE income. Section 684(2) provides PAYE regulations may:

"…in particular, include any such provision as is set out in the following list.

LIST OF PROVISIONS

1. Provision—

(a) for requiring persons making payments of, or on account of, PAYE income to make, at the relevant time, deductions or repayments of income tax calculated by reference to tax tables prepared by the Commissioners for Her Majesty's Revenue and Customs, and

(b) for making persons who are required to make any such deductions or repayments accountable to or, as the case may be, entitled to repayment from the Board.

"The relevant time" is–

…

(b)…the time when the payment is made.

1A. Provision—

(a) for deductions to be made, if and to the extent that the payee does not object, with a view to securing that income tax payable in respect of

any income of a payee for a tax year which is not PAYE income is deducted from PAYE income of the payee paid during that year; and

(b) as to the circumstances and manner in which a payee may object to the making of deductions.

…

4A. Provision authorising the recovery from the payee rather than the payer of any amount that an officer of Revenue and Customs considers should have been deducted by the payer.

…

8. Provision for the making of decisions by Her Majesty's Revenue and Customs as to any matter required to be decided for the purposes of the regulations and for appeals against such decisions.

9. Provision for appeals with respect to matters arising under the regulations which would otherwise not be the subject of an appeal.

10. Different provision for different cases or classes of case.

11. Any incidental, consequential, supplementary and transitional provision which appears to the Board to be expedient…

26. Further subsections in s684 provide:

(5) PAYE regulations must not affect any right of appeal to the General or Special Commissioners which a person would have apart from the regulations.

(6) It does not matter for the purposes of PAYE regulations that income is wholly or partly income for a tax year other than that in which the payment is made.

(7) PAYE regulations have effect despite anything in the Income Tax Acts.

27. We come on to the relevant parts of the PAYE regulations but at this point we highlight the particular importance to this appeal of s684(7A) ITEPA. According to HMRC, this gives HMRC the ability to remove the liability to deduct and account for PAYE from the end user with the result, that the employee, Mr Hoey, is liable for the tax.

(7A) Nothing in PAYE regulations may be read—

(a) as preventing the making of arrangements for the collection of tax in such manner as may be agreed by, or on behalf of, the payer and an officer of Revenue and Customs, or

(b) as requiring the payer to comply with the regulations in circumstances in which the Inland Revenue is satisfied that it is unnecessary or not appropriate for the payer to do so.

(7B) References in this section and section 685 to income tax in respect of PAYE income are references to income tax in respect of that income if reasonable assumptions are (when necessary) made about other income.

(7C) In this section and section 685—

"payer" means any person paying PAYE income and "payee" means any person in receipt of such income;

"specified" means specified in PAYE regulations.

(8) In this Act and any other enactment (whenever passed) "PAYE regulations" means regulations under this section.

PAYE regulations

28. Regulation 2 defines "notional payment" by reference to s710(2)(a) ITEPA and "other payer" as "a person making relevant payments [defined in Regulation 4] in a capacity other than employer, agency or pension payer."

29. Regulation 3 provides a definition of "Net PAYE" income (neither of the amounts used to derive that amount – allowable pension contributions and charity donations – are relevant in this case).

30. Regulation 4 – defines "relevant payments" as "payments of, or on account of, net PAYE income….[exceptions not relevant]".

31. Under Regulation 12 "other payers" are treated as employers.

32. Under Regulation 21(1) an employer, on making a relevant payment to an employee during a tax year, "must deduct or repay tax in accordance with [the PAYE Regulations] by reference to the employee's code, if the employer has one for the employee".

33. Regulation 62 applies if an employer (which according to Regulation 12 above includes an "other payer") makes a relevant payment which is a notional payment. Under Regulation 62(2), the employer (other payer) must "so far as possible, deduct tax required to be deducted in respect of a notional payment…from any relevant payment or payments which the employer actually makes to the employee at the same time as the notional payment", or (under subsection 4) from other payments of net PAYE income. Regulation 62(5) provides that if such payments made "are insufficient to deduct the full amount of tax due in respect of notional payments" then the employer must account to HMRC for any amount which the employer is unable to deduct. (Again by virtue of Regulation 12 "employer" includes an "other payer".)

34. There are then a number of provisions enabling HMRC to make a direction transferring liability from the employer/ end user to the employee: Regulations 72, 72F

and 81. Each contain notice provisions the employee and appeal rights for the employee.

35. Mr Hoey's case, that if such a direction is not made, he is entitled to treat the PAYE tax as having been paid by the employer, rests on Regulation 185 and Regulation 188. As those provisions cross refer to provisions in the Taxes Management Act ("TMA") it is convenient to deal with those TMA provisions first.

TMA: Provisions on self-assessment / assessment

36. Section 8 sets out the obligation on a taxpayer to file a personal return:

> 8.— Personal return.
>
> (1) For the purpose of establishing **the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment**, and the **amount payable by him by way of income tax for that year**, he may be required by a notice given to him by an officer of the Board—
>
> (a) to make and deliver to the officer, a return containing such information as may reasonably be required in pursuance of the notice, and
>
> (b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.
>
> (1AA) For the purposes of subsection (1) above—
>
> (a) the amounts in which a person is chargeable to income tax and capital gains tax are net amounts, that is to say, amounts which take into account any relief or allowance a claim for which is included in the return; and
>
> (b) the amount payable by a person by way of income tax is the difference between the amount in which he is chargeable to income tax and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) or 397A(2) of ITTOIA 2005 applies.
>
> …
>
> (5) In this section and sections 8A, 9 and 12AA of this Act, any reference to income tax deducted at source is a reference to income tax deducted or treated as deducted from any income or treated as paid on any income.

37. Section 9 provides:

> 9.— Returns to include self-assessment.

(1) Subject to [subsections (1A) and (2)]3 below, every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—

(a) an assessment of the **amounts** in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is **chargeable** to income tax and capital gains tax for the year of assessment; and

(b) an assessment **of the amount payable by him by way of income tax**, that is to say, **the difference** between the amount in which he is assessed to income tax **under paragraph (a)** above and the **aggregate amount of any income tax deducted at source and any tax credits** to which section 397(1) or 397A(2) of ITTOIA 2005 applies.

but nothing in this subsection shall enable a self-assessment to show as repayable any income tax treated as deducted or paid by virtue of section 246D(1) of the principal Act, section 626 of ITEPA 2003 or section 399(2), 400(2), 414(1), 421(1) or 530(1) of ITTOIA 2005.

38. Section 28A deals with closure notices and s29 with discovery assessments. The provision giving a right of appeal is s31 which provides as follows:

31 Appeals: right of appeal

(1) An appeal may be brought against–

(a) any amendment of a self-assessment under section 9C of this Act (amendment by Revenue during enquiry to prevent loss of tax),

(b) any conclusion stated or amendment made by a closure notice under section 28A or 28B of this Act (amendment by Revenue on completion of enquiry into return),

(c…. or

(d) any assessment to tax which is not a self-assessment.

39. Under s49D the taxpayer may notify the appeal to the tribunal. Section 50(6) sets out the powers of the tribunal to reduce or increase the assessment.

40. Section 59A deals with payments on account of income tax making provision, for two payments on account before 31 January and 31 July in the year of assessment where the amount of tax assessed exceeds that deducted by reference to a proportion specified in regulations.

41. Section 59B is key to the issues in the appeal. It provides:

59B.— Payment of income tax and capital gains tax.

(1) Subject to subsection (2) below, **the difference between**—

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

(b) **the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source, shall be payable by him** or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below but nothing in this subsection shall require the repayment of any income tax treated as deducted or paid by virtue of section 246D(1) of the principal Act, section 626 of ITEPA 2003 or section 399(2), 400(2), 414(1), 421(1) or 530(1) of ITTOIA 2005.

(2) The following, namely—

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

(b) any amount which, in respect of the year of assessment, is to be deducted at source under PAYE regulations in a subsequent year, or is a tax credit to which section 397(1) or 397A(2) of ITTOIA 2005 applies, shall be respectively deducted from and added to the aggregate mentioned in subsection (1)(b) above.

PAYE Regulations: Regulations 185 and 188

42. Regulation 185 deals with self-assessment (so is relevant to closure notice for 2010-11). Regulation 188 is relevant to discovery assessments (appeals for 2008-9 and 2009-10).

43. Regulation 185 provides:

185.— Adjusting total net tax deducted for purposes of sections 59A(1), 59B(1) and 59BA(2) TMA

(1) This regulation applies for the purpose of determining–

(a) the excess mentioned in section 59A(1) of TMA (payments on account of income tax: income tax assessed exceeds amount deducted at source),

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

(c) the difference mentioned in section 59BA(2) of TMA (payments of income tax and capital gains tax: difference between tax contained in simple assessment and aggregate of payments on account or deducted at source).

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

(3) Subtract from A any repayments of A which are made before the taxpayer's return and self-assessment is made under section 8 or 8A of TMA7 (personal return and trustee's return).

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

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

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

(b) only to a maximum of that amount.

(6) In this regulation–

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

"relevant tax year" means–

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

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

(c) in relation to section 59BA(2) of TMA the tax year for which the simple assessment referred to in that subsection is made;

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

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

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

"the taxpayer" means the person referred to in section 59A(1) of TMA or the person whose self-assessment is referred to in section 59B(1) of TMA or the person whose simple assessment is referred to in section 59BA(2) of TMA (as the case may be).

44. Regulation 188 provides:

188.— Assessments other than self-assessments

(1) In this regulation, "assessment" means an assessment other than one under section 9 of TMA (self-assessment).

(2) **The tax payable by the employee is–**

A − (B − C)

where

A is the tax payable under the assessment;

B is the total net tax deducted in relation to the employee's relevant payments during the tax year for which the assessment is made, adjusted as required by paragraph (3); and C is so much, if any, of B as is subsequently repaid

(3) For the purpose of determining the tax payable by the employee, and subject to paragraphs (4) and (5)–

(a) add to B any tax which–

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

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

(b) make any necessary adjustment to B in respect of any tax overpaid or remaining unpaid for any tax year; and

(c) make any necessary adjustment to B in respect of any amount to be recovered as if it were unpaid tax under section30(1) of TMA (recovery of overpayment of tax etc) to the extent that–

(i) HMRC took that amount into account in determining the employee's code, and

(ii) the total net tax deducted was in consequence greater than it would otherwise have been.

(4) No direction tax is to be included in calculating the amount of tax referred to in paragraph (3)(a).

(5) If a direction is made after the making of the assessment, the amount (if any) shown in the notice of assessment as a deduction from, or a credit against, the tax payable under the assessment is to be taken as reduced by so much of the direction tax as was included in calculating the amount of tax referred to in paragraph (3)(a).

(6) Instead of requiring payment by the employee, HMRC may take the tax payable by the employee into account in

determining the employee's code for a subsequent tax year.

> (7) In this regulation–
>
> "direction" means a direction made under regulation 72(5), regulation 72F or 81(4) in relation to the employee in respect of one or more tax periods falling within the tax year in question;
>
> "direction tax" means any amount of tax which is the subject of a direction;
>
> **"tax payable under the assessment" means the amount of tax shown in the assessment as payable without regard to any amount shown in the notice of assessment as a deduction from, or a credit against, the amount of tax payable.**

HMRC exercise 7A discretion

45. Turning back to how the above regulations affected Mr Hoey, the effect of Regulations 185(6) and 188(3) was that the amount of tax Mr Hoey was required to pay was reduced to reflect the PAYE tax which the end user was liable to pay. This is the amount which we refer to as the PAYE credit.

46. On 13 October 2017, HMRC wrote to Mr Hoey setting out its view that for the relevant tax years, Penfolds and Hamilton Trust were not within the territorial scope of PAYE and that it was therefore a possibility that s689 ITEPA might require the end user of his services to comply with the PAYE regulations and account for the tax on his employment income. The letter explained:

> "HMRC retain a discretion under section 684(7A)(b) of ITEPA 2003 not to require a person to comply with the PAYE regulations where it would not be appropriate for that person to do so.
>
> In the circumstances of your use of the tax arrangements, I have no reason to believe that the end-user of your services was aware of or party to the avoidance and I consider it inappropriate for the end-user to be required to comply with the PAYE regulations in relation to your employment income. As such, you remain liable to pay the tax due"

FTT Decision on PAYE and jurisdiction issues

47. In dealing with the issues raised in relation to that the s684(7A) discretion, the FTT considered whether it had jurisdiction 1) to consider whether HMRC had exercised the discretion legally, and 2) whether the FTT had jurisdiction to consider the application of the PAYE Regulations (which we understand to mean the question of whether a PAYE credit was due under Regulations 185 and 188).

48. The FTT noted (at [122]) that Regulation 185 was only expressed to apply to ss59A and 59B TMA; it did not accordingly apply for the purposes of ss8 and 9 TMA. It set out some of the parties' submissions (which we deal in more detail below) and then

concluded (at [128]) that the FTT did not have general jurisdiction to consider matters of public law and, in particular, the operation of the PAYE regulations. Nor was it a case where it was necessary to consider public law points in order to be able to consider those of the issues which were properly within its jurisdiction. It could not therefore deal with the issue of whether "HMRC exercised any discretion…under s684(7A) correctly, legally or reasonably". As to scope, and the appellant's argument that, in accordance with the principle of interpretation, the specific should override the general, and so the general 7A discretion had to give way to the specific "redirection regulations" (PAYE Regulations 72 etc.), it found the 7A discretion overlapped with those redirection regulations. There was therefore no conflict, and no need to apply the principle for the specific to override the general ([132]). There was nothing in the wide words to restrict the use of the 7A discretion to situations not covered by "redirection regulations" ([138]). HMRC had the discretion they said they had, and the FTT did not have jurisdiction over whether it was properly exercised ([139]).

49. Following the FTT's decision, holding that it lacked jurisdiction, Mr Hoey initiated judicial review proceedings on a protective basis. His application for judicial review was refused by Andrews J, as she then was, on 1 May 2020. Mr Hoey's appeal against that refusal, to the Court of Appeal, has been stayed by that court pending the outcome of the appeal before us.

Does the FTT have jurisdiction over Regulation 188/185?

50. The context in which this issue arises is as follows: Mr Hoey ultimately wishes to argue 1) the scope of the s684(7A)(b) discretion makes no difference to the application of Regulations 185 and 188, 2) even if it does, the legality of the exercise of that discretion may be determined even though it raises public law issues. This is on the basis that it goes directly to the issue raised in the appeal: the amount of tax payable by Mr Hoey. However, before Mr Hoey's case could reach those points, the FTT found it fell at a jurisdictional hurdle, that had been raised by HMRC. The FTT agreed with HMRC, that the question of whether Mr Hoey was entitled to a PAYE credit under Regulations 185 and 188, was not a matter falling within the FTT's jurisdiction on an appeal against closure notice or an appeal against a discovery assessment.

51. Mr Hoey's first ground is that the FTT erred in law to the extent it addressed that issue.

52. Mr Mullan's core submission, on behalf of Mr Hoey, was straightforward: the amount of tax a taxpayer has to pay is a fundamental question and one which lies at the centre of the FTT's function. Where, under the PAYE code, the primary liability falls on the employer, but the employee is assessed to for the same tax, the question of who, as between the employer and employee, must pay the tax is of considerable practical importance. Regulations 185 and 188 arrive at the amount a taxpayer must pay.

53. Ms Nathan QC, for HMRC, says this argument wrongly elides two distinct concepts: the establishment of the amounts in which a person is chargeable to income tax (comprised in the taxpayer's assessment) on the one hand, and the amounts that must be paid over to/collected by HMRC on the other (which is not comprised in the assessment). The question of whether a debt is due, in the amount sought, is one which is subject to challenge in enforcement proceedings. Section 59B TMA (which Regulation 185 is explicitly stated to be for the purposes of) is concerned with the collection of tax.

54. We deal first with Mr Mullan's submission regarding the central importance of a tax assessment stating the amount of tax the taxpayer must pay. Two authorities were advanced in support.

55. The first was *Hallamshire Industrial Finance Trust Ltd v IRC* [1979] 1 WLR 620. That was a decision of the High Court decision concerning whether the first instance tribunal (the Special Commissioners) had determined the s29 TMA 1970 assessments under appeal to them. The taxpayer argued the Special Commissioners had not, because they had just set out the income assessable to tax, not the amount of tax payable. It was common ground that the computation of tax actually payable in that case, which involved the application of the appropriate rate of tax to the income, was purely mathematical (at 623H). The Revenue argued that the assessment function could be discharged by merely stating the facts which would enable someone skilled in tax matters to compute the tax which would subsequently be demanded. The court (Browne-Wilkinson J as he then was) began (at 625F) by noting that "As everyone knows, the form of notice of assessment served by the revenue, is in every case the same: first, a statement of taxable income, then a statement of allowance, and finally a computation of the net tax payable".

56. The court rejected the Revenue's argument in no uncertain terms. If correct, it suggested the possibility of a taxpayer being liable to pay an amount the taxpayer had not been notified of before the tax had been demanded (and it noted that such demand would probably not be made until after the time for appealing against the assessment had expired). The majority of taxpayers, on receiving an assessment, looked only to the amount of tax payable "having neither the time nor ability – without professional advice – to discover whether that sums is correct". In Browne-Wilkinson J's judgment, the words of the statute would need to be very clear to force the court to conclude the Revenue view was correct.

57. The second authority was the Court of Appeal's decision in *R(Archer) v Revenue and Customs Comrs* [2017] EWCA Civ 1962. The taxpayer sought judicial review of decisions contained in an HMRC letter which had set out the taxpayer's indebtedness. This was on the basis that HMRC's earlier closure notices had failed to set out the amount of tax the revenue claimed was due. The taxpayer referred to the *Hallamshire* decision for support. HMRC had not therefore amended the taxpayer's returns pursuant

to the s28A(2)(b) TMA requirement (to make amendments to give effect to HMRC officer's conclusions in closure notice). The Administrative Court found in his favour on this point but dismissed his application for other reasons. On appeal to the Court of Appeal, the Court of Appeal agreed the Administrative Court was right to uphold the taxpayer's argument on the point. The judgment given by Lewison LJ (with whom Asplin and Longmore LJJ agreed) explained at [22]:

> "…The self-assessment that the taxpayer is required to file as part of his return must state the amount of tax for which the taxpayer is liable. One would naturally expect that an amendment to that assessment must likewise state the amended amount of tax for which he is liable…"

58. HMRC highlighted, as they did before us, that *Hallamshire* was decided before the introduction of the self-assessment regime and therefore at a time when all assessments were made by the Revenue. However, it is clear Lewison LJ did not consider *Hallamshire* should be limited in this way. At [26] he explained:

> "It is true that the self-assessment regime places the burden on the taxpayer, at least in the first instance, to work out the amount of tax for which he is liable and to state it in his return. It is also true that for some purposes, including time limits, an amendment to a self-assessment is not an assessment. But in functional terms an amended self-assessment is still a variety of assessment (even if preceded by the prefix "self"). Where it is HMRC that makes the amendment, I do not consider that the onus lies on the taxpayer to work out his liability all over again."

59. We agree *Hallamshire* and *Archer* establish that, where the Revenue makes an assessment (including where it amends a self-assessment), the assessment has to set out an amount of tax payable. However, that proposition must be viewed in the context of the facts and issues raised in those cases. Properly understood, both cases were about situations where further work needed to be carried out to ascertain an amount of tax payable. The underlying issue was who should do that work. Where assessments were made by the revenue, or by parity or reasoning, self-assessments were amended by the revenue, the judgment was that it was the revenue who should do that work. More fundamentally, the cases do not deal with the question of what, precisely, the amount of tax payable should be comprised of in any given case. In particular, they do not deal with the question of whether that amount should reflect any credit for PAYE that ought to have been deducted, but which was not, or for that matter, payments made on account. That question can only be answered by reference to considering the scope of s31 TMA, which gives rise to the FTT's jurisdiction, as informed by the return and self-assessment provisions in ss8 and 9 TMA.

60. The appellant's solicitors also drew our attention in their letter, subsequent to the hearing of 19 February 2021, to the Court of Appeal's decision in *HMRC v MCX Dunlin (UK) Ltd* [2021] EWCA Civ 186 which was handed down after Mr Hoey's hearing on 17 February 2021. It was suggested that Newey LJ's analysis (at [50] to [56] and in

particular at [55]) regarding what an appeal "against an assessment" could entail (which Baker and Underhill LJJ agreed with) was relevant to the appellant's argument that an appeal against an assessment includes an appeal against the amount of tax payable. We do not consider this case relevant to the point before us. The Court of Appeal's analysis concerned the composition of refunds made by HMRC as between whether those were entirely of Petroleum Revenue Tax ("PRT") under the Oil Taxation Act 1975 or whether the refunds represented a mixture of PRT and Advance Petroleum Revenue Tax (which was introduced by Finance Act 1982). The context for its analysis regarding what was comprised in an appeal against an assessment were the different provisions of the petroleum revenue taxation legislation particular to that case. The legislation there applied, with modifications, certain provisions of the TMA (listed in Schedule 2 para 1(1) of the Oil Taxation Act 1975). However, it did not apply the return and assessment sections 8 and 9 TMA. It is those provisions which primarily inform the scope of appeal in Mr Hoey's appeal.

61. We therefore reject Mr Mullan's primary argument, that by virtue of a principle that an assessment should make clear the amount, the applicability of the PAYE credit for amounts that ought to have been but were not deducted, is encompassed within an appeal against an assessment or closure notice amendment.

Question of Statutory interpretation

62. The question raised by this ground is essentially one of statutory interpretation. There is no disagreement that, if jurisdiction arises, then this must be found on the basis of appeal against closure notice amendment / discovery assessment provisions in s31 TMA 1970 (above at [38]). The scope of that turns on the construction of s8 and s9 TMA and specifically whether the references to income tax deducted at source (which, by virtue of s8(5), refers to income tax treated as deducted from any income) includes amounts treated as deducted under Regulations 185 and 188. That in turn involves looking at the scope of Regulations 185 and 188 and whether they have an effect which reaches into s8 and s9 TMA without recourse to s59B TMA.

63. Standing back, it appears to us there are two main issues of interpretation which are relevant to resolve:

> (1) *the relationship between s59B and the provisions in s8 and 9 TMA 1970*. Are the steps in s59B to be viewed as integral or parallel to arriving at the "tax payable" amount in the assessment? This point is entailed in the appellant's position insofar as it relies on the analysis of the FTT's decision in *Lancashire & Ors v HMRC* [2020] UKFTT 407 (TC) – which we come to discuss shortly. Or, as HMRC's position assumes, are the steps in s59B a separate sequential stage carried out after the assessment stage?

(2) *The relationship between ss8,9 and 31 TMA and Regulations 185 and 188* - The appellant argues, so far as Regulation 185 is concerned, that the deeming (that PAYE which ought to have been deducted is treated as deducted) is not restricted to the operation of s59B but is relevant to the assessment machinery and jurisdictional provisions set out in sections 8,9, and 31 TMA. Moreover, Regulation 188 is not even constrained by a cross-reference to s59B and is also clearly relevant to sections 8,9, and 31. HMRC say regulation 185 is only relevant for the purposes of s59B (which is a separate stage).

64. There are a number of cases, all at FTT level, which grapple with the construction of the above provisions and which rehearse much of the same arguments that were before us. Before dealing with those, we should address *Burton v* [2010] UKUT 252 (TCC), as an example of a case where the Upper Tribunal ("UT") engaged with similar issues, without any concern over whether it lacked jurisdiction. The issue there concerned whether the Revenue could still pursue an employee for tax where it was said the employer had not complied with the PAYE Regulations. The UT considered the relevant regulations (these were the predecessor regulations in the 1993 PAYE Regulations – Regulations 101A and 101). At [13], it described the net effect as being that, when determining the amount of income tax recoverable under self-assessment under s59B(1) TMA, the amount treated as deducted at source under PAYE was the amount that should have been deducted. That was so that an employee was not penalised if an employer failed to deduct the tax it ought to have. The regulations required there to be a difference between what the employer was liable to deduct, and what the employer did deduct. Crucially on the facts in that case, there was no such difference.

65. Mr Mullan, for the appellant, is correct to note, that the UT seems to have assumed that the FTT *did* have jurisdiction, in the context of an appeal against assessments and an appeal against amendment to self-assessments, to consider the effect of PAYE regulations giving a credit. However, as the point on jurisdiction was not specifically argued, we agree with Ms Nathan the case cannot be viewed as authoritative on this point.

66. We turn then to the FTT cases which are directly relevant, and which analyse, in varying degrees of detail, the legal issues which are before us. On the one hand *Gayen v HMRC* [2013] UFTT 127 (TC), *Gray v HMRC* [2017] UKFTT 0275 (TC), and *Lancashire* point in favour of the appellant's interpretation although there was no detailed discussion of jurisdiction in *Gayen* and *Gray* and accordingly, we do not mention those further. *Paul Szymusik v HMRC* [2020] UKFTT 00154 (TC) and *Philip Higgs and others v HMRC* [2020] UKFTT 117 (TC) support HMRC's interpretation.

67. *Szymusik*, dealt, amongst other matters, with the question of whether, if the taxpayer's employer should have deducted tax under PAYE when paying him salary,

that amount should be set against any liability to tax. Having considered the legislation, the FTT identified (at [92]) the uncertainty over the meaning of the words "income tax …contained in a person's self-assessment" in paragraph 59B(1) arising from the fact that s9(1) TMA spoke of, as the FTT put it, two assessments: the "tax chargeable" assessment and the "tax payable" assessment. It considered that s59B(1)(a) had to refer to the "tax chargeable" assessment because, if it referred to the "tax payable" assessment, deductions for "income deducted at source" would be double counted. In the FTT's judgment the TMA provisions: discovery assessment (s29), closure notice (s28A), appeal provisions (s31) and powers of the tribunal on appeal (s50(6)) embraced both the tax chargeable assessment and tax payable assessments.

68. At [104], the FTT alighted upon the same issue before us: whether "income tax treated as deducted" within s8(5) TMA includes "tax treated as deducted" within the meaning of regulation 185(6). In favour of the deemed deduction in that regulation being taken account of in s9 TMA was the fact that the amount payable under 9(1)(b) TMA would then correspond to the s59B(1) TMA amount. On the other hand, the FTT noted Regulation 185 applied only for the purposes of s59B and not more generally. That was in contrast to another deemed deduction section – section 710(6) ITEPA which was not so restricted. The FTT concluded (at [107]) "with some hesitation" that tax treated as deducted under Regulation 185 was not deductible for the purposes of s9 TMA. Instead, it was relevant to s59B, which the FTT considered was relevant to collection proceedings.

69. In summary, the FTT considered the scope of Regulation 185 was limited to s59B purposes (a section the FTT considered dealt with matters of collection) because of the way other deemed deductions provisions had been expressed. The credit envisaged by Regulation 185 was thus not deductible for the purposes of s9 TMA (it was not included under s8(5) TMA). In so finding, it appears to us that the FTT assumed s59B was a sequentially separate step that took place after assessment rather than a step that was integral to arriving at the "tax payable" amount in s9 TMA. The FTT also clearly thought Regulation 185 had limited scope. There was no discussion in relation to Regulation 188.

70. In *Higgs*, the FTT adopted HMRC's submissions as to why s8(5) TMA did not include the Regulation 185 and Regulation 188 PAYE regulation amounts.

71. Regarding Regulation 185, these were that:

> (1) The Regulation only applied to s59A and s59B.
>
> (2) Section 59A dealt with payments on account of income tax (logically that came after establishing liability).
>
> (3) Section 59B dealt with payments of income tax "in the case of *assessments…"*. The amount "to be paid" was different from the amount

> "chargeable" and amount "payable" in s8 and s9. This was supported by s684(5) ITEPA which preserved the employee's right of appeal to the tribunal irrespective of any provision in PAYE regulations. Those regulations did not disturb liability to tax, which had already been imposed by the time at which PAYE become relevant.

72. Regarding Regulation 188 HMRC's submissions were recorded as:

> (1) "A" in the formula is amount fixed a person's liability under s8 and 9 TMA
>
> (2) Regulation 188(7) expressly excluded from "tax payable under the assessment" deductions from / credits against amount payable.

73. In *Lancashire* the FTT again identified the question of statutory construction: the interpretation of "income tax treated as deducted from any income" in s9(1)(b) TMA. It subjected the question to a carefully considered and detailed analysis (at [171] onwards).

74. The FTT considered s9 drew a distinction between income tax which the taxpayer is chargeable (in principle liable for) and income tax that is payable (the income tax which the taxpayer actually has to hand over to HMRC) (at [161]). Although it did not refer to it in such terms, that conception very much resonates with the appellant's arguments regarding the principles it says should be taken from *Hallamshire* and *Archer*. It is also clear the FTT in *Lancashire* saw s59B as, in effect, a step which was nested within s9, but that it also served a function; that of *imposing* a payment obligation and of making further adjustments. It saw Regulation 185's role as further fleshing out the calculation of what was to be deducted at source.

75. The FTT noted the difficulty (at [165(2)]) that s59B(1)(a) did not distinguish between 9(1)(a) and 9(1)(b) but considered in the context of the overall provision the only sensible interpretation was that it referred to s9(1)(a). This was also a point the FTT in *Symusik* picked up on and resolved in the same way.

76. At [172], the FTT set out its views on why the cross reference in Regulation 185 to s59B did not affect ordinary meaning of "income tax treated as deducted" in s9(1)(b). The FTT noted there was no limitation to the term "treated as deducted" which could refer to any provision in tax legislation. So, the term was broad enough to catch income tax falling under Regulation 185(6). For a number of reasons, the FTT was not persuaded that, the fact Regulation 185 was stated to apply for purposes of s59B, and that 9(1)(b) did not refer to s59B, meant the term "income tax treated as deducted" in s9(1)(b) should not bear its natural and ordinary meaning:

> (1) The term was drawn widely; there was no cross reference to any provision whether under PAYE or otherwise.

(2) There was nothing which indicated a distinction was sought to be drawn between a 59B(1) deduction from tax chargeable and other deductions:

(a) In both cases under s59B the sums counted as "income tax which has been deducted" – they reduced the overall tax payable.

(b) The focus in 9(1)b) was on assessment of the amount the taxpayer actually had to pay to HMRC. That contrasted with the assessment required under 9(1)(a), which the FTT described as the assessment for the tax which the taxpayer "is chargeable or for which taxpayers are liable in principle".

(c) It accorded with the intention of what the taxpayer should take account of under the self-assessment tax code. The FTT explained "in effect s59B(1), s59B(2) and s59B(8) provide the absolute measure of "income tax deducted at source" which the taxpayer had to self-assess…"

(d) In light of the clear purpose of 9(1)(b) the greater specificity of those provisions (which we understand to mean s59B) as to "income tax deducted at source" did not indicate the 9(1)(b) assessment was made on a different or more limited basis.

(3) It would be very odd if significant matters such as availability and amount of tax credit were dealt with outside the scheme of assessment and appeals which was intended "to provide a comprehensive scheme for the calculation and payment of tax including an appeals process".

77. The FTT in *Lancashire* distinguished the UT's decision in *Walker v HMRC* [2016] UKUT 32 (TCC), which was a case that we were also referred to. That case concerned a Construction Industry Scheme deduction at source under Finance Act provisions which were accepted to be factored into the s8/s9 TMA calculation. The result of factual findings which the FTT made meant the figure the taxpayer was entitled to by way of repayment, while smaller than the one actually made to him (following his self-assessment under s9 TMA), was larger than the amount due to him on the amended self-assessment which HMRC had made. The FTT in *Walker* considered that s50(6) and (7) did not give it power to amend the assessment: it thought that where tax deducted at source exceeded the tax chargeable there was not any amount "charged". However, the UT (at [37]) considered a taxpayer could be "overcharged" within s50(6)(a) by reference to the amount "payable" by way of income tax in s9(1)(b). The FTT's reasoning, that the fact that effect to the repayable sum was given by s59B TMA, which was non justiciable (a view which HMRC rely on before us) was irrelevant:

> "39. It is, of course, correct that section 59B is not justiciable before the FTT, being concerned with matters of collection and enforcement. But that is beside the point. The appeal in the present case was against the conclusions of the closure notice and the issue is whether the FTT's

> findings of fact can be given effect by an amendment to the self-assessment return. The impact of such an amendment on the parties' respective rights and obligations under section 59B as a result of such an amendment is an entirely separate, and subsequent, matter."

78. The core of the UT's reasoning in *Walker* was that the FTT was wrong to assume the amount "repayable" was something which derived from s59B; the term "payable" in 9(1)(b) also encompassed amounts "repayable" by HMRC. As the UT said at [40], if a taxpayer receives less by way of repayment than the taxpayer is entitled to receive, the taxpayer can be described as having been overcharged. Also, it was a repayment of tax, and even if was not tax (in the sense that the amount on proper analysis not fall to be taxed), then 50(6)(a) referred simply to overcharge by self-assessment.

79. Our view is that *Walker* did not have anything to say, one way or the other, on the question of whether "treated as deducted" amounts captured PAYE credits. However, it is on the whole more supportive, in the assumptions it makes, of HMRC's conception of the structure of the legislation under which s59B is a sequential step which applies only once the assessment process is carried out, and one that is concerned with the amounts that are to be collected (see [44]). However, that support should not be overstated as there was no real argument, it appears, on the function of s59B, and in any case Mr Hoey's case does not rely on s59B being justiciable but on the PAYE credit being taken account of in s8/s9 TMA, an issue which *Walker* does not deal with.

80. It is also of note that, at [43] and in its conclusion at [47], it was accepted by the UT that no account was to be taken in the amendment of an amount of £6,040 that the taxpayer was originally repaid by HMRC. That reasoning is consistent with the assessment not being the same as a "bottom line" figure that a taxpayer actually has to pay over to HMRC, implying that that bottom line figure must be reckoned somewhere else. The UT's view of how the legislation operated is again, in that respect, more consistent with the HMRC's conception of how the legislation fits together than with the appellant's.

Discussion

81. In *Whitney v IRC* [1926] AC 37 Lord Dunedin described three stages in the imposition of tax: 1) liability, 2) assessment, 3) methods of recovery if the person taxed does not pay voluntarily. Lord Dunedin explained that liability did not depend on assessment as

> "…that ex hypothesi, had already been fixed. But assessment particularizes the exact sum which a person liable has to pay."

82. The parties' rival submissions amount, in essence, to a dispute about which stage the PAYE credit is relevant to. The appellant says it is in the assessment stage whereas HMRC say it is at the collection stage. However, while that may, in simple terms,

describe the consequence of the parties' submissions, neither party suggests that it supplants the need for a close analysis of the relevant statutory provisions to see at what stage the PAYE credit is taken account of, and whether at that point, it is a matter falling within the FTT's jurisdiction or that of another court.

83. Plainly, some matters are clearly envisaged to fall within the assessment stage, whereas some concern the collection of sums due, and accordingly do not fall within the FTT's jurisdiction relating to amendments to self-assessments and assessments. While PAYE is often, and uncontroversially, described as a collection mechanism, matters concerning PAYE can, and do, end up being litigated in the FTT. Having said that, many of such cases concerning PAYE income, arrive at the tribunal's door by virtue of a specific appeal jurisdiction accorded under the PAYE Regulations (*Rangers* for instance concerned appeals against determinations made under Regulation 80 of the PAYE Regulations in relation to which a specific appeal right is granted). The very structure and ordering of the TMA, discloses the difficulty of deciding which camp to assign the PAYE credit provisions to: the calculations in s59B are located in between the assessment provisions and the recovery (collection) provisions.

84. Part of Mr Hoey's case emphasised that it would be absurd if the legislation were construed in such a way so as to exclude the FTT from jurisdiction to decide the amount of tax to be paid (relying on *Autologic Holdings plc v IRC* [2005] 3 WLR 339 at [11] to [15], [62] and [84] to [85], and *R (oao Glencore Energy UK Ltd) v HMRC* [2017] EWCA Civ 1716 at [57] and [58]). Mr Mullan, on behalf of the appellant, also reminded us that Mr Hoey was refused permission to bring a judicial review, in which points regarding the construction of Regulations 185 and 188 were sought to be raised. Mr Mullan submits the FTT's interpretation, that it lacked jurisdiction, should not be countenanced as it denied Mr Hoey his right to access to the courts to determine his legal rights: a basic right fundamental to the rule of law: *(R (on the application of UNISON) v Lord Chancellor* [2017] 4 All ER 903 at [66].)

85. The above points do not, in our judgment, advance Mr Hoey's case. Both *Autologic* and *Glencore* dealt with the role of judicial review given the existence of a statutory system of tax appeals and in doing so described, in general terms, the function of establishing a taxpayer's liability. However, none of the passages relied on suggest that as a matter of statutory interpretation, which is ultimately what matters of jurisdiction come down to as far as the FTT is concerned, a more expansive view should be taken of the FTT's jurisdiction, when considering the precise boundaries of what is in the tribunals' remit.

86. There is also no issue regarding access to justice, simply the forum where justice on the particular issue is to be accessed. If the conclusion was that the FTT did not have

jurisdiction then there was no provision or authority[4] we were taken to which persuaded us Mr Hoey would not be able to raise the point by way of defence in any collection proceedings. He would not therefore be left without a remedy.

Our explanation of statutory provisions: Points to note about s8 /9/ s31 /s59B TMA and Regulations 185 and Regulation 188

87. With the benefit of the case-law, we return to the statutory provisions starting with s8 TMA. As noted in *Szymusik*, *Lancashire* and *Walker*, there are two components referred to in relation to assessment: a) amount chargeable, and b) amount payable.

88. Under s8(1AA) TMA the (b) "amount payable" amount is the difference between the amount chargeable and aggregate of income tax deducted at source. Under s8(5) TMA the amount deducted at source includes income tax treated as deducted from any income. Section 9 TMA on self-assessment echoes the self-assessment return provisions of s8 TMA. The self-assessment comprises a) the amount chargeable to income tax and b) the amount payable (i.e. the difference between para a) amount and aggregate of income tax deducted at source). Because the expansion in s8(5) TMA of "treated as deducted" also applying to s9 TMA, s9, in essence reflects what is in the return.

89. Some way later in TMA under the heading "Payment of income tax and capital gains tax", s59B specifies the amount payable by the taxpayer. That would suggest to us it is seeking to arrive at a figure which is different from the "tax payable" figure in s8(1) and s9(1)(b) payable amounts, otherwise what would be the point in it. While it is correct the function of this section is to impose an obligation to pay (s8 and s9 do envisage such obligation but do not actually impose a payment obligation) that could be achieved without any further calculation and simply stating the obligation to pay was in relation to the tax payable amount. On any view however the amount payable under s59B is explicitly different from the 8(1) and 9(1)(a) "payable amount" because it looks to see if there is a difference the s9 amount and payments on account under s59A and any income tax in respect of that year that has been deducted at source.

90. Under s 59B there is therefore a new concept of "amount of income tax…contained in a person's self-assessment". This is ambiguous. What does it cover? Tax pre – deductions at source or post deductions at source?

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[4] While Mr Mullan referred us to passages from *McCullough (Inspector of Taxes) v Ahluwalia* [2004] EWCA Civ 889 we did not consider the case to be on point. The county court would have no jurisdiction to challenge or question matters which fell to be determined in an appeal against assessments before the FTT or its predecessor bodies. But that would not present an obstacle if the conclusion was that the FTT lacked jurisdiction in relation to the PAYE credit in the context of such an appeal.

91. In agreement with the analysis of the FTT in *Szymusik*, and *Lancashire* and the UT in *Walker* we consider s59B(1)(a) must refer to the 8(1) and 9(1)(a) "tax chargeable" amount. Otherwise, the sum would reflect two lots of the same deduction for no reason: there would be a deduction at 8(1)/9(1)(a), but also again at s59B. By way of example, HMRC, in arguing that the reference to s9(1)(b) "deducted at source" serves a function which does not rely on PAYE deductions referred to various ITA deductions. If s59B(1)(a) took as its starting point that net 9(1)(b) figure there is nothing on the face of the legislation to exclude that deduction being taken account of again for no apparent reason.

92. Resolving this question, of whether "amount of tax…contained in a person's self-assessment" means the 9(1)(a) chargeable amount or the 9(1)(b) amount payable does not however take us any further on whether the PAYE credit is captured by the reference to "deducted at source".

93. Turning then to the disputed issues, the first question can be described in terms of whether Section 59B operates as a sequential step to the s8/s9 TMA provisions or as an integral or parallel step which is rolled up into the application of those provisions.

94. The appellant's position must entail that the s59B "difference" is not an additional step (except in so far as it concerns payments of account under s59A). Rather, s59B replicates the difference calculated in s8(1) and 9(1)(b) TMA. It might be said that that would not leave s59B without a purpose because it still factors in payments made on account under s59A. The section also fulfils a function in imposing the payment obligation. This is the role the FTT in *Lancashire* conceived of for s59B.

95. In our view the better view however is that s59B is a further sequential step:

> (1) This is consistent with the structure of TMA, which works through the provisions on assessment, then what HMRC can do with the assessment, and then the FTT powers. Section 59B sits in a separate section on payments, which comes after the parts on assessment and appeals, but before the section on collection and recovery.
>
> (2) There is no cross reference to s59B in ss8 and 9 as one might expect if s59B were to be incorporated or rolled up into the s8/s9 adjustments. In contrast s59B refers back to s8/9 concepts which suggests the steps in s8/s9 have already taken place.
>
> (3) Section 59B takes the assessment as a starting point which assumes the assessment function has already taken place.
>
> (4) That s59A is a further step, showing an actual amount payable "bottom line figure", is not the same as what is in the assessment, is consistent with the view taken by the UT in *Walker* although this point should not be

overstated as there was not any specific reasoning explaining that view (see [79] above).

(5) It is consistent with the reference to s59B(1) TMA in the explanatory notes to the Income Tax Act 2007 when describing what the calculation of income tax liability deals with. Those notes state under the heading "Chapter 3: calculation of income tax liability" that : "*The calculation does not deal with amounts of tax suffered (eg under PAYE or by way of deduction at source) as these are set off against a person's liability rather than deducted in arriving at it. See section 59B(1) of TMA*". This is supportive of our view, but its importance should not be overstated.

96. We acknowledge that an oddity in the sequential role of s59B described above is that it might be asked why s59B does not take as its starting point the tax payable 9(1)(b) amount. At least with regards to actual PAYE deductions (which HMRC say are taken account of here, as opposed to deemed ones), and various ITA deductions, the deductions made by 59B repeat the step of deduction. (There is no problem with the same amount being deducted twice over because those deductions are made from the same starting point). But equally, it could be said, that the drafting in s59B is odd to start off with in that it does not marry up explicitly to either the "tax chargeable amount" or the "tax payable amount" referred to in s8 / s9 TMA. So, no great significance should be attached to how the provisions might otherwise have been drafted.

Regulation 185 – only for s59B purposes or wider?

97. The next issue is the scope of the PAYE credit in Regulation 185. The cross reference in Regulation 185 clearly ties the provision to s59B – it explains in more detail what is meant by tax deducted at source (but does not throw any light on what is meant by "tax contained in self-assessment"). It includes in its steps "tax treated as deducted" which is the PAYE credit issue. "Direction tax" needs to be specifically excluded from the credit because it is a subset of tax that the employer should have deducted but did not but which nevertheless, because of such direction, the employee is on the hook for.

98. We agree with HMRC that the specific reference to s59B in Regulation 185 means it does not have a reach outside of s59B.

99. We acknowledge that the FTT in *Lancashire* did not consider that an issue for various reasons. However, none of these (at [172] – set out at [76] above) in our view persuade us the specific words referencing s59B may be ignored:

(1) The broad reference cannot capture provisions which are expressed not to fall within it such as Regulation 185 which is only for the purposes of s58B.

(2) points b) and c) take as their starting point the assumption that s8/s9 is about a "bottom line payable figure". That assumes the question in issue. Following our analysis above that s59B is a sequential step, we do not agree s8/s9 stipulate a "bottom line payable figure".

(3) The oddity point pre-judges the question of statutory construction as to where jurisdiction over the PAYE credit lies. While from a policy viewpoint we can see the desirability of the issue being litigated in the FTT, we must be guided by the words of the statute.

100.Mr Mullan submits that the heading to Part 9 to PAYE regulations is "Assessment and self-assessment". That, he submits, is consistent with his interpretation that Regulation 185 has a wider reach beyond s59B. In our view that is inconclusive. The part also contains regulations dealing with changes to the PAYE code regarding recovery and repayment. Those provisions also refer to s59B and, for the reasons above, we consider s59B to be sequential to s8/s9. Also, the heading to the Part is equally consistent with regulations which are consequential on assessment rather than specifically geared towards the content of the assessment.

101.The appellant also argues the whole point of Regulations 185 and 188 is that an employee does not have to worry about whether tax has been paid over to HMRC. But it is not clear to us that the employee does have to worry about this. The employee just needs to know whether sums were deducted or not. If they are not told sums are deducted, then they would assume none were deducted. If the employee thought there was nevertheless an obligation on the part of the employer to deduct, the employee could defend enforcement and argue for the PAYE credit in the county court.

Regulation 188

102. Regulation 188 (1) and (2) highlights there are two different notions of tax payable – that referred to under A: "tax payable under the assessment" and the end result of A-(B-C) which is the tax payable by the employee. The PAYE credit in issue here is added to "B" – showing it is something which is not considered to be part of the tax payable under the assessment.

103.Regulation 188 does not say it is for the purposes of a particular section but that may simply reflect the variety of assessments that may be made that are not self-assessments (or that such assessments which are not self-assessments are not referred to elsewhere by section number but are described by reference to not being self-assessment assessments). Regulation 188 does not refer to s59B because, apart from stipulating the due date for payment, 59B does not deal with assessments which are not self-assessments ("non-SA assessments").

104.Regulation 188 is functionally similar to Regulation 185. It fulfils a similar adjustment function to the tax payable amount in a non-SA assessment. It similarly

takes the act of assessment as a given. It appears in the same part as Regulation 185 in the PAYE regulations. We see no reason to make a distinction between Regulation 188 and Regulation 185, and to say that, despite Regulation 185 not affecting s9 self-assessments, that Regulation 188 has reach into the tax payable amount under a non-SA assessment.

105.As to the wide general wording of the deeming, regarding tax deducted at source, in sections 8 and 9, it might be argued why then does the reference to tax treated as deducted not exclude the tax treated as deducted under Reg 185? The answer is that it does not need to. Regulation 185 is restricted to the purpose of 59B. The adjustments in s59B take place at a later stage to s9(1)(b) /s8. So, as at the stage where s8/9 TMA is considered, there is no Regulation 185 deemed deduction that has at that point been established and therefore no need for it to be excluded at that stage.

106.As mentioned above, HMRC point out the reference in s8(5) to tax "treated as deducted" has a clear function without needing to encompass PAYE treated as deducted – HMRC gave the example of two provisions in the Income Tax (Trading and Other Income) Act 2005: s414 in the chapter imposing a tax charge for stock dividend income, and s530 in the chapter imposing a tax charge to gains from contracts of life insurance, under which a person liable to tax was treated as having paid income.

107.We conclude the PAYE credits under Regulations 185 do not affect the amount of tax payable with which sections 8 and 9 are concerned. Similarly, we conclude Regulation 188 does not affect the amount of tax payable with which an assessment under s29 TMA is concerned. As those self-assessment and assessment provisions are the only relevant sources of the FTT's jurisdiction, the effect of the PAYE credit is not something which falls within the FTT's jurisdiction.

108.In the course of the hearing, HMRC explained actual PAYE deductions *were* factored into the tax payable figures in the self-assessment. We agree with the appellant that has the apparently odd result that actual PAYE deductions are in the FTT's jurisdiction but deemed ones are not. However, in the end this does not persuade us the interpretation we have adopted is wrong. As is clear from the fact that the s59A amounts of payments made on account of tax, are factored in under s59B, the amount which the taxpayer is ultimately obliged to pay over to HMRC is not necessarily the same as that which is set out in the assessment. Once that link is broken, meaning that some amounts are taken account of in the assessment and some outside of that, and that accordingly some issues are litigated in the FTT and others by way of defence to enforcement proceedings, the apparent oddity becomes simply a reflection of where the legislation has drawn the dividing lines on jurisdiction. Ultimately what falls within the FTT jurisdiction is a matter of statutory interpretation. Our view, for the reasons given, is that the PAYE credit does not fall within the FTT's jurisdiction. The attractive simplicity of the FTT being a "one stop shop" for all issues concerning the amount a taxpayer should pay over to HMRC does not alter that. As the facts of *HMRC v Cotter*

[2013] UKSC 69, which Ms Nathan referred us to, illustrate, complex issues (in that case, where employment loss relief was accounted for, and in which year), may well arise outside of FTT proceedings if that is what the limitations of the statutory jurisdiction of the FTT dictates. There is no reason to suppose the amount of the PAYE credit cannot be litigated in collection proceedings.

Jurisdiction to address exercise of HMRC's discretion under s684(7A)(b) ITEPA

109.The conclusion above, that the consideration of the PAYE credit was not within the FTT's jurisdiction, disposes of the appeal in respect of the PAYE credit and jurisdiction issues. However, on the basis we heard full argument on the remaining issues, and in case we are wrong in our above conclusion, we will go on to deal with those.

110.The FTT's starting point was that it did not have jurisdiction to consider matters of public law, and the operation of the PAYE regulations, and also that consideration of such issues was not necessary for the matters within its jurisdiction. So, the FTT could not consider whether the 7A discretion was exercised correctly, legally or reasonably ([128]). It went on to express the obiter view that the 7A discretion was not restricted as Mr Hoey argued. It operated in the way HMRC maintained it did ([139]).

111.By way of preliminary observation, although we refer throughout to a 7A discretion, the wording of the provision is not a conventional grant of power in that it says that nothing in the regulations should be regarded as preventing certain matters. Nothing appears to turn on this point because 7A circumscribes the limits of the power, however it does appear to imply the source of the power arises somewhere else.

Effect of exercise of 684(7A)(b) on availability of Regulation 185 and Regulation 188 PAYE credit

112.The appellant's primary argument is that the exercise of the 684(7A)(b) discretion to relieve the end user of its liability to account for PAYE tax has, as a matter of legal construction, no effect on the appellant's liability to pay tax. HMRC say the reasons Mr Hoey relies on fail to appreciate that the 7A discretion relieves the end user of the *liability to deduct*. That in turn means the credit provisions in Regulation 185 and Regulation 188 have no application as they are premised on the employer /payer being liable to deduct an amount. The PAYE credit in those regulations is not an absolute right but is qualified, not only by the "re-direction regulations" (Regulation 72 etc. (see [34]), but also the application of the discretion under 684(7A).

113.On the assumption we are wrong on the issue of whether the FTT had jurisdiction over the PAYE credit, we consider this question of statutory interpretation is within our jurisdiction. It is not an argument the FTT addressed, and although that is, in itself, a

source of complaint by the appellant, he is content not to press that point as a separate ground on the basis we will consider the issue.

114.The appellant argues the 7A discretion has no effect for a number of reasons.

> (1) The liability on the end user stems from s710 ITEPA. That is not in the PAYE Regulations so the discretion cannot switch such liability off.
>
> (2) Under the scheme of legislation, only one person is liable to account (there is no choice unless specifically prescribed by the redirection regulations, Regulations 72,72F, 81). If no such direction is made, then the employee can treat PAYE tax as having been paid by the employer. 7A refers to "…requiring the payer to comply with the regulations". That relieves the *payer* from obligation to comply with regulations; it cannot alter the application of the PAYE regulations to another person. The 7A discretion cannot be used to impose regulations on others.
>
> (3) While Regulations 185 and 188, exclude "direction tax" that exclusion does not refer to the exercise of discretion under s684(7A)(b).

115.Our view on these is as follows:

> (1) As HMRC point out, s710 is expressly subject to PAYE regulations, so must also envisage any 7A disapplication of those. (Mr Mullan's point in reply, that if the regulations are switched off the words "in accordance with PAYE regulations" in s710 have nothing to bite on, does not look at s710 in conjunction with 7A; the clear legislative intent is that s710 incorporates whatever is said to apply under the PAYE Regulations. That must also take account however that those regulations may be disapplied as regards a particular payer under 7A).
>
> (2) The observation is correct as far as it goes. The discretion can of course only switch off the PAYE regulation obligations on the payer. But, it does not answer the question of what, if any, impact that has on Mr Hoey's position. To the extent the underlying point is whether such consequence means 7A *ought not* to be interpreted as allowing the deduction obligation to be switched off, we come on to that shortly.
>
> (3) If 7A can switch off the liability to deduct in the first place, then there is no need to clarify that credit should not be given, because the sum will already be accounted for.

116.There is also no real question that the primary liability to tax is Mr Hoey's. That is not to say the obligation to pay that liability may fall on someone else. This is described by Andrews J in *Hoey (JR permission refusal)* and also by the Court of Appeal in *McCarthy v McCarthy and Stone plc* [2007] EWCA Civ 664. The issue is who should

pay it, and in particular whether Mr Hoey is entitled to the PAYE credit, in view of the disapplication under 7A of the employer's obligation to deduct tax.

117.Mr Hoey also argues that the reference in Regulation 185 / Regulation 188 to tax the employer/payer "was liable to deduct" shows there is a distinction drawn between that and amounts the employer/payer is "liable to pay" HMRC (which is what 7A is concerned with). In particular the reference to "was liable to deduct" captures what the payer was liable to deduct at the time payments made to employee. Thus, if the 7A direction forgives the amount the employer was liable to pay HMRC, that has no effect on the amount the employer was liable to deduct at the time the payment was made.

118.HMRC's counter-argument emphasises the breadth of the 7A discretion. It refers to relieving the payer's compliance with any regulation – therefore it can relieve the payer of the obligation to deduct in the first place (by disapplying Regulation 62) thus cutting off Regulation 185 and Regulation 188 at the pass as it were. The argument has prompted us to reflect on the precise scope of the 7A discretion, as it applies to a case such as this, where the direction was made *after* the point in time when the obligation to make the deduction had already arisen. We can well see that if the obligation to deduct were relieved, *before* the liability to deduct has occurred, Regulation 185 and Regulation 188, which envisage that there was an obligation to deduct tax, clearly have nothing to bite on. No PAYE credit under those regulations can then arise. But if the 7A disapplication is made *after* the deduction has been made, Regulation 185 and Regulation 188, and the credit they give rise to, will already have crystallised. That then leads to the question of whether the 7A disapplication must also be regarded as undoing that credit, or in other words rewriting the state of affairs that existed, such that Regulation 185 and Regulation 188 are not to be regarded as ever having operated.

119.We consider 7A cannot be construed in that way for the following reasons:

> (1) The plain reading of the language is that it has prospective effect. (This in essence is the point that was made by the FTT in *Lancashire* at [254] and [255] of its decision).
>
> (2) So construed, the direction results in adverse retrospective effects. Those adverse effects do not of course fall on the subject of the direction: where the deduction obligation is removed after the event, the employer, or person treated as employer for PAYE purposes will be relieved. It is the employee who suffers from the removal of the deduction obligation after it has arisen. Tax that, under the law as it stood at the time, ought to have been deducted was not. Tax, which therefore the employee was not expecting to be liable to pay for, becomes liable. That is not through a direction made on the employee, with notice, and satisifying certain pre-conditions. If HMRC are right, it is as a result of a direction to the person, who in the first instance had been liable to pay the tax over.This is not of course a point about liability

at the earnings stage being imposed retrospectively. Rather it concerns liability at the "who is liable – given the PAYE system – to pay the tax" stage being altered after the liability accrued. But the broader point of objection is nevertheless that a person's liability position under the law as it stood is later altered adversely.

(3) The statutory scheme makes no provision for notice, and imposes no conditions – in contrast to the direction regulations. Those show that where legislation alters the default PAYE framework, it does so on a conditioned basis and with protections. The employee direction provisions by their nature (and drafting) operate after the event –they provide for pre-conditions and appeals. While they do not necessarily support the view that a 7A discretion cannot have prospective effect (because 7A operates to remove deduction liability and therefore does not require an expectation to be made to the PAYE credit regulations) they show that when the "who should pay the tax" position is altered after payment, conditions and protections are put in place around that.

(4) If 7A were to have this retrospective effect one would expect clear words. In fact, the statutory language is consistent with prospective effect.

(5) Even if 7A could apply retrospectively one would expect to see that Regulation 185 and Regulation 188 would explain that do they not apply where the obligation to deduct has subsequently been relieved by exercise of the 7A discretion.

120. Therefore, if we were wrong in finding against Mr Hoey that the FTT lacked jurisdiction to consider the PAYE credit, we consider that, given the scope of the 7A discretion and the fact it only applies prospectively with no indication it can overturn the effect of obligations which have already been incurred, Mr Hoey would be entitled to the PAYE credit as the discretion would be ineffective to remove the PAYE liability from the end-users *after* those liabilities had been incurred.

121. HMRC rely on the Court of Appeal's decision in *McCarthy v McCarthy and Stone* to emphasise that PAYE does not impose tax liability. We agree it does show that. The case concerned a restitution counterclaim by an employer against an employee, for reimbursement of tax and NICs the employer had paid. The employee argued a payment the employer had made to the Revenue did not discharge the employee's liability even though it was for the employee's benefit. The employee relied on various PAYE regulations (68 and 72) to advance the argument the liability was not his. The Court of Appeal (at [42]) confirmed it was ITEPA which imposed liability on the employee not the PAYE regulations. Referring to Part VI and 59A and 59B of the TMA the Court concluded liability was imposed on a taxpayer in respect of income in excess of that from which tax had been deducted at source – the matter was put beyond doubt by s59B

that the employee was liable and the sums "payable by" the taxpayer were recoverable by the normal assessment procedures. The court rejected (at [45]) the submission that s59B was about calculation of liability not imposition – the court agreed it provided the mechanics of recovering the sums due in respect of the liabilities imposed by ITEPA but that what it did not show was that an employee was not liable for tax on his employment income.

122.Thus we note that all the court was saying was that, for restitution purposes, the employee could not say the sum of money the employer paid to HMRC was not a sum in respect of the employee's tax. Here, no sums were paid over by employer/payer (the end user). In his reply Mr Mullan clarified he was not arguing that Mr Hoey was not liable to tax– he was just saying Mr Hoey was entitled to the tax credit.

123.In the light of this it may be viewed as surprising if Mr Hoey could escape that liability. However, that would overlook the payer's obligation to deduct income tax, and assume the outcome of the very point in issue. That is, whether that obligation to deduct can be switched off by 7A. It also overlooks the fact that unless the position is altered by a direction under Regulation 72 etc., the tax need not go unpaid but may be pursued from the payer.

124.The above arguments show a confusion that can arise because there are two sorts of liability referred to. The first is the liability to the income tax charge (there was no real dispute that this fell on Mr Hoey). The second emerges from a collection stage which imposes obligations on the employer/payer which gives rise to questions, in respect of the employee's liability, regarding *who* should pay the employee's liability. That is why HMRC's reliance on the preservation of the right of appeal vis a vis the employee's liability not being disturbed by PAYE regulations (s684(5) ITEPA: at [26] above) does not take the matter further. It confirms the employee can always argue about the first sort of liability. But that does not address or purport to address the question regarding the second sense in which liability to pay arises.

125.It might also be argued that any retrospective effect on Mr Hoey's access to a PAYE credit should not be viewed as prejudicing him, or at least not in a way that should elicit concern: the way the scheme was organised was so that no tax on a large part of Mr Hoey's remuneration was payable; it just happened that following the *Rangers* case, tax did become payable. However, the point about retrospection is a broader one. It is not tied to Mr Hoey or those in a similar position but arises from the wording of the provision.

126.HMRC say it would be bizarre if the 7A provision was limited temporally. But that assumes the power is meant to have that sort of wide scope which is the point in issue. The scope of the power is a matter of construction. None of this means it is not possible to provide that the 7A discretion should apply even after deductions have been made.

However, in our view, clear words would be needed in the legislation to achieve that effect.

On the assumption the 7A discretion does affect the availability of the Regulation 185, Regulation 188 PAYE credit, what is its scope?

127.Assuming we are wrong in our above conclusion, and that the availability of the PAYE credit under Regulations 185 and 188 was prevented by the exercise of the 7A discretion, the appellant's next line of challenge is that HMRC were not able to use the power, because the way they used it, fell outside its proper scope.

128. If it had become necessary to consider this question, we agree it would be one that was open to us to consider. This is on the basis that the question of whether the 7A discretion applies would (assuming we were wrong on the initial question on jurisdiction, and the interpretation of the effect of 7A) affect the amount of the assessment. It is important to emphasise that the issue of scope involved here entails one of statutory interpretation rather than the reasonableness or rationality of the HMRC officer's exercise of any discretion. It amounts to saying that the situation in which HMRC have purportedly used the power, is one where, as a matter of statutory construction, HMRC could never consider it necessary or appropriate to relieve the payer. If that is right the discretion was never available for HMRC to exercise in the first place.

129.The appellant argues 7A's scope cannot be as wide as HMRC argue because: 1) it would frustrate the carefully constructed statutory scheme providing for directions transferring liability where this is intended, 2) the principle of statutory interpretation that the general should give way to the specific, and 3) it offends the principle of legality; that requires a clear legal basis (such as the PAYE Regulations) before HMRC can levy a charge. Tax cannot be levied by administrative discretion. Mr Mullan also highlighted the legislative background to 7A which was introduced in Finance Act 2003 ("FA2003"). The explanatory notes (for clause 144 of the Finance Bill 2003) explained that the clause complemented the work of the Tax Law Rewrite project to rewrite the PAYE Regulations and that "it modernises the powers for making PAYE regulations and so will enable the rewritten regulations to reflect current practices". Regarding the 7A discretion, the note said:

> "The new Item 7A makes clear that the PAYE regulations may exclude certain payments from PAYE. For example, employers are not required to operate PAYE on certain payments to employees for business expenses. The new Subsection (7A), confirms that the Inland Revenue can agree to different tax collection arrangements being set up that reflect the particular circumstances of a payer. Or alternatively that the payer does not have to follow PAYE regulations, where these would be unnecessary or inappropriate. Currently there are different arrangements covering casual employment and students, for example"

130. Thus, Mr Mullan argues, the power was concerned to reflect the practices then current. It was intended to deal with minor unfairness around the edges, administrative convenience, and not substantive liability. Moreover, the vires for Regulation 72 was also introduced at the same time. That pointed towards the 7A discretion not having the same effect.

131.In our view, the arguments on frustration of the statutory scheme, the general giving way to the specific, and the legislative background all lend support to the interpretation taken above that 7A does not have the retrospective effect which we have described. The re-direction regulations are applicable, as observed above, and as HMRC in fact pointed out, once a payment has been made. If 7A has the scope HMRC says it does it appears the effect of such re-direction regulations transferring liability could be achieved without any of the notice and further conditions entailed in the re-direction regulations.

132.However, if it is accepted that 7A does have such retrospective effect, then there is nothing in the appellant's arguments which suggests that 7A cannot have the broad scope suggested. The discretion envisages HMRC can, if the officer considers it necessary or appropriate, disapply the PAYE regulations. No other limitation is placed on that. There is no issue of constitutional objection. There would be a clear basis upon which the employee was being made liable, namely the relevant ITEPA provisions, and the lifting envisaged by 7A of the PAYE regulations, subject to the conditions Parliament has set out in 7A.

133.If it had become necessary to decide this issue, the appellant's ground would therefore have failed.

The Discovery Assessment Validity Issue

134.The FTT held the discovery assessments that had been raised for 2008/9 and 2009/10 were valid under s29 TMA. Mr Hoey argues the FTT was wrong to do so. He submits it erred in law in holding or being satisfied that:

> (1) there was a discovery (s29(1) TMA).
>
> (2) the insufficiency of tax was attributable to an error as to how his liability ought to have been calculated which was based on the practice generally prevailing at the time (s29(2) TMA).
>
> (3) an HMRC officer, given the relevant information the appellants had provided, would not reasonably have been aware, by the time the enquiry window for the return had closed, of the insufficiency to tax (s29(5).

135.We deal with each of these points in turn. The relevant legislation is in s29 TMA which provides:

> "29 Assessment where loss of tax discovered
>
> (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
>
> (a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) that any relief which has been given is or has become excessive,
>
> the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.
>
> (2) Where—
>
> (a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and
>
> (b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed, the taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made...
>
> …

136.Under subsection (4) a discovery assessment cannot be made unless one of two conditions is satisfied, the one relevant here is subsection (5) which provides:

> "at the time when an officer of the Board—
>
> (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment….
>
> the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above."

(1) Discovery

The FTT's findings

137.The FTT made various findings about HMRC's process leading up to the issue of the assessments in the section of its decision at [61] to [79]. It heard evidence from Andy Finch, a senior HMRC officer who had been working for a number of years on contractor loan schemes, and Lesley Stopp, the HMRC officer who led one of the teams

responsible for carrying the work forward ([61] and [62]). The FTT described the information received. These were: individual tax returns, P11Ds and P35s from Employers ([66]). It set out that Miss Stopp, and other senior HMRC officers developed a methodology for processing the information to ensure a consistency of approach among the various HMRC teams. This took the form of standard working instructions ("SWIs") with the process divided into three stages: the first (SWI 1) established the loan figure, the second (SWI 2) calculated the amount of any insufficiency of tax, and the third (SWI 3) covered the making the discovery assessment ([71] and [72])).

138.The FTT found that for the purposes of s29, the discovery was:

> "therefore made by the officer handling the SWI 2 process because this [was] the point at which a calculation showed an insufficiency in respect of the individual taxpayer." ([73])

139.Regarding 2008-9, it found the discovery of insufficiency was made on 11 February 2013. For 2009-10 the discovery was made on 5 March 2014 ([93]). At [94], the FTT found that: "The "discovery" of an insufficiency of tax was made by an HMRC officer working through the SWI 2 process."

140.At [96] The FTT, having referred to [37] of *Charlton v HMRC [2012] UKUT 770 (TCC),* which we come on to shortly, explained that there was a need for precise calculation to identify that there was an insufficiency in the case of the particular contractor. In a few cases the contractor had returned the loans as income, but that fact would not be known without carrying out a detailed calculation.

Parties' submissions and Discussion:

141.The appellant submits the FTT erred in finding the discovery was made by an "officer carrying out the SWI 2 process". That did not constitute a proper finding of discovery as it did not identify a particular officer as making the discovery. The FTT also erred in suggesting the "need for a precise calculation to identify there was insufficiency of tax" (at [96]). It was enough to identify an insufficiency. That did not need the quantum to be identified (if it did, that would put HMRC's practice of issuing protective assessments in difficulty). HMRC submit there was no error in the FTT's finding.

142.We can deal with the legal principles briefly as they were not in contention. Starting with *Charlton,* at the passage cited by the FTT*:*

> 37. In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

143.The requirements regarding discovery were considered further by the Court of Appeal in *HMRC v Tooth* [2019] EWCA Civ 826*:*

> "61. The requirement for the conclusion to have "newly appeared" is implicit in the statutory language "discover". The discovery must be of one of the matters set out in (a) to (c) of section 29(1). In the present case the officer must have newly discovered that an assessment to tax is insufficient. It is his or her new conclusion that the assessment is insufficient which can trigger a discovery assessment. A discovery assessment is not validly triggered because the officer has found a new reason for contending that an assessment is insufficient …"

144. In *Anderson v HMRC* [2018] UKUT 159 (TCC) the Upper Tribunal (at [28]) having reviewed the authorities elaborated on the subjective element of the test as follows:

> "The officer must believe that the information available to him points in the direction of there being an insufficiency of tax." That formulation, in our judgment, acknowledges both that the discovery must be something more than suspicion of an insufficiency of tax and that it need not go so far as a conclusion that an insufficiency of tax is more probable than not."

145.In essence, the appellant argues that the FTT, in requiring something (quantification) that was not required, did not make a proper finding of a discovery – the implication being that if the discovery was made, it was made by someone else and it was a discovery that was made earlier on.

146.We agree with HMRC that this argument rests on a mischaracterisation of the FTT's decision. The FTT was not proceeding on the assumption that the officer needed to quantify the tax in order for a discovery of insufficiency to be made. It was saying that in circumstances of this case, the discovery was not made at SWI 1, when the loan figure was established, but only at SWI 2. This, as it explained, was because it had to be ruled out that the return had been made on a certain basis (namely that the contractor had returned the loans as income), and that work entailed a calculation. In other words, the "precise calculation", in the particular circumstances of this case allowed the officer to identify that there was an insufficiency. That is different from the FTT saying that, as a matter of legal principle, the discovery could not be made until the tax had been quantified.

147.To the extent there is any separate criticism embedded in the appellant's argument regarding that no officer was identified by name, then there is nothing in that. The FTT identified that an officer – the one carrying out the SWI 2 - made the discovery. That is sufficient to comply with the legislation. No challenge is made to that finding based on the evidence and it was open to the FTT to find the officer had the requisite state of mind.

148.There is also no difficulty arising from the point the appellant makes in the alternative. The appellant argues that even if the quantum did need to be identified, the FTT erred in finding that an unidentified officer, carrying out a mechanised calculation in which there was no discretion, had discovered anything. At most there was an unlawful delegation of calculation by another officer who in fact made discovery. By way of support Mr Mullan referred to *Burford v Durkin HMIT* [1991] STC 7.

149.In that case there was an issue over who, as between two Revenue officers, the one making the decision to assess, and the one who signed the assessment had made an assessment (under Regulation 12(1) of the income Tax (Subcontractor in the Construction Industry Regulations) 1975). That provision conferred a discretion on a Revenue inspector to make an assessment of the amount the contractor was liable to pay under those Regulations. The Court of Appeal endorsed the view that only the official upon whom a discretion was conferred by the statute could exercise it. But once the discretion was exercised the official could delegate "purely ministerial tasks" which flowed from the discretion to someone else. If that was done the carrying out of the task was treated as being carried out by the officer who exercised the discretion.

150.However, we do not consider those principles are relevant here. The issue of whether a discovery was made entails considering whether an officer had a particular state of mind: namely that the insufficiency newly appeared to him or her. If such an officer has that state of mind, then there is a discovery. There is no discretion conferred, giving rise to the question of whether a function was capable of delegation. The fact that here, the state of mind newly appeared to an officer by virtue of a process the officer was told to carry out, does not make it any the less a valid discovery, or a discovery which was made on the part of someone else.

2) Failure to include income the result of error attributable to Generally Accepted Practice (s29(2))

151.The FTT did not deal with this issue as it considered the appellant had conceded the point for the reasons it explained (at [104 to [106]]). It recorded that the appellant accepted HMRC's view that the ground could only succeed if the only basis for raising the discovery assessment was that the Supreme Court's decision in *Rangers*, issued on 5 July 2017, that the redirection of payments from the employers to the trusts constituted taxable earnings, applied. Noting that that decision, and the preceding Court of Session decision in the litigation of 4 November 2015, where HMRC had also been successful, were both decisions which were issued after Mr Hoey filed the relevant returns and after HMRC had issued the discovery assessments, the FTT considered those decisions could not have affected the generally prevailing practice at the time the returns were made. In addition, the discovery assessments had also been raised on the basis HMRC could tax the amount of loans under the TOAA charge. The *Rangers* decision was therefore not the only basis on which the discovery assessments were issued.

152.Before us, the appellant argues the FTT was wrong to consider Mr Hoey had conceded the point. All that had been accepted was that if HMRC could justify the assessment on an alternative basis (namely that the TOAA code applied to impose a charge) then the arguments in relation to the generally accepted practice regarding the earnings charge would not be in point. Mr Mullan submits the appellant did not concede, that a basis of assessment, which was in fact found to be wrong, deprived the appellant of his generally prevailing practice defence (the TOAA charge basis of assessment was found to be wrong as the FTT found the income for TOAA purpose was nil).

153.HMRC say the FTT was right to dismiss the ground as it did, and that the FTT correctly depicted the concession the appellant made. It was consistent, HMRC submit, with what the appellant had said in his skeleton before the FTT and with the transcript references of the discussion which took place.

154.The generally prevailing practice had to be established in relation to both the earnings and the TOAA charge. Even if the TOAA charge fell away, because of the FTT's conclusion on nil income, the conclusion that there was an insufficiency of tax could be upheld for reasons different to those upon which HMRC relied in issuing the discovery assessment.

155. We agree with HMRC that the appellant's skeleton argument and the transcript references show the FTT, in dealing with the concession, had simply reflected the terms of the concession that had been put to it. The argument in the appellant's skeleton that the return had been made in accordance with the practice generally prevailing was prefaced with the words "So far as an assessment based on [The Supreme Court's decision in *Rangers*] is concerned…". The transcript showed Mr Mullan addressed the point as follows:

> "My learned friend says that we can only succeed on this if we can show that Rangers is the only basis of having an assessment to tax. I am happy to accept that; I think that must follow."

156.Judge Gillett's decision granting permission to appeal, in explaining why he considered a concession had been made, referred to the written copy of the appellant's closing submissions, which stated: "The Appellant accepts that HMRC are correct in asserting that this ground can only succeed if the only basis of assessment is that *RFC 2012* applied. It is the Appellant's submission that that is the case."

157.In our view, it is important to recognise the distinction between: 1) a basis upon which an assessment is made by HMRC, and 2) the basis on which the assessment is upheld by the tribunal. The oral and written submissions did not make clear which of these bases was meant. It is now clear the appellant had only intended the concession to cover the latter situation. That, as Mr Mullan pointed out would make more sense as, if the matter was considered further, it would be readily apparent the basis professed by

HMRC covered the TOAA charge (so the uncertainty conditioning the concession could only have ever been about whether the FTT would uphold the TOAA charge). However, in the context of the oral and later written submissions specifically made to it on the concession, it was open to the FTT to take what was said at face value and not have to unpick whether that made sense from the appellant's point of view. We cannot see that the FTT erred in law in not dealing with the issue on generally prevailing practice because it misinterpreted the concession that was put to it. The appellant's defence accordingly turned on whether it was accepted that the *Rangers* clarification, that payments into the trust were earnings, was the *only* basis for the assessment HMRC made. If there was another basis, as the FTT found there was, then the appellant's concession applied disposing of the ground.

158.In case we are wrong on the FTT's treatment of the appellant's concession, and as we heard full argument on the point, we go on however to deal with the substantive ground of appeal on the issue.

159.Mr Hoey argues the FTT erred in finding that the failure to return income on the basis of the analysis in *Rangers* was an error resulting from the generally accepted practice at the time. *Rangers* did not reflect the settled view of the law. *Dextra Accessories Ltd & Ors v Inspector of Taxes* [2002] STC (SCD) 413 and *Sempra Metals Ltd v HMRC* [2008] STC (SCD) 1062) found that arrangements, such as the appellant's, did not result in a tax charge. The revenue did not appeal these decisions at the time. There was no tax charge at the relevant time under the law as understood according to those cases on payments into the EBT (the step which gave rise to the loss of tax here). Consistent with that, later legislation (part 7A ITEPA and Schedule 24 FA 2003) was introduced on the basis that contributions to EBT were not emoluments. Also, recommendations made by the *Morse Loan Charge Review*, which were accepted by the government, and which had noted the leading cases at the time had decided against HMRC's position had resulted in retrospective amendment of law through Finance Act 2020.

160.HMRC highlight that it is for the appellant to establish the generally accepted practice defence. He failed to do so regarding TOAA, where no error was identified, and failed to adduce evidence to show an established accepted practice per *HMRC v Household Agents* [2007] EWHC 1684 (Ch). Even in relation to the employment income charge, Mr Hoey was unable to show that the asserted practice was accepted by HMRC, in other words that HMRC accepted that payments to, and loans from, EBTs were not taxable earnings. HMRC say the *Morse review* excerpt actually supports HMRC's non-acceptance of the asserted practice.

161.Turning then to the legal principles we were referred to: In *Household Agents* at [58] Henderson J, as he then was, noted the burden was on the taxpayer to establish both the operative mistake in the return and the practice generally prevailing at the relevant time. In that case, the taxpayer's submission alleged "the profession's view"

without any supporting evidence, or evidence to support that HMRC took the same view. Henderson J then explained:

> "Without attempting to give an exhaustive definition, it seems to me that a practice may be so described only if it is relatively long-established, readily ascertainable by interested parties, and accepted by HMRC and taxpayers' advisers alike: compare the decision of the Special Commissioners (Dr A N Brice and Mr John Walters QC) in Rafferty v HMRC [2005] STC (SCD) 484 at paragraph 114."

162. In *Rafferty* the Special Commissioners agreed "that a practice generally prevailing had to be a practice, or agreement, or acceptance over a long period whereby the Revenue agreed or accepted a certain treatment of sums in particular circumstances".

163.Mr Mullan's response emphasises that the court's description in *Household Agents* is just an example of one type of generally accepted practice. He submits that, in Mr Hoey's case, the practice derived from the decision of the courts coupled with the practice of HMRC to abide by decisions of the courts even though HMRC were not happy with the decision.

Discussion: s29(2) Generally Accepted Practice

164. The relevant point in time to ascertain whether there was a practice generally prevailing, regarding the non-taxability of the treatment of payments into an EBT, was when the returns were made: (the FTT said at [57] these were filed no later than the statutory time limits so the relevant dates are 31 January 2010 for 2008/9 and 31 January 2011 for 2009/10).

165.The *Morse Independent Loan Charge Review* was published in December 2019. The appellant referred us to the following in the review:

> "At the time of the 2011 legislation being enacted the courts had not supported HMRC's view about the taxable nature of the loan schemes. Indeed the leading cases from the time had consistently been decided against HMRC's position."

166.We were also referred to excerpts to the government's response to the review. That stated (at 2.10):

> "HMRC have always maintained these schemes did not work, and tax was due. The legislation introduced in 2011 put the matter beyond doubt…"

167.In our view, all this confirms is that there is a dispute, which post-dates the relevant time we need to consider, around the position that was being maintained by HMRC. It does not tell us what the position was at the relevant time. For the appellant's purposes, it does not provide the necessary evidence for them to meet their burden. In so far as

the report is relevant, it lends support to the idea that HMRC had a view which was different to that set out by the court decisions referred to.

168.The appellant's argument does not however rest on evidence but on:1) the state of the law at the time, based on *Sempra* and *Dextra,* 2) the assumption that HMRC will abide by the court's decisions even if the case is against HMRC's position.

169.Regarding *Sempra* and *Dextra,* HMRC highlight *Sempra* was settled before HMRC could appeal (as recorded in Judge Poon's dissenting judgment in the FTT's decision in *Rangers* at [210]). In any case HMRC say no authority is advanced for the proposition that, because a case goes against a party and the party does not appeal, the party is content with the outcome such that it forms part of the generally prevailing practice. HMRC litigated *Sempra* after the loss in *Dextra*. The position HMRC adopted in *Rangers* showed that at no point had HMRC accepted *Sempra* and *Dextra.*

170. In our judgment, the appellant's case falls at the first hurdle regarding the state of the law. As Ms Nathan, for HMRC, pointed out, both *Sempra* and *Dextra* were first instance decisions which did not create a precedent. Although those decisions would have accordingly been of persuasive value, there could not be said to be a settled view of the law. The further point the appellant makes which is that it ought to be assumed that HMRC will abide with the law is consistent with Henderson J's point that the practice also needs to be accepted by HMRC. However, there was no evidence we were referred to, suggesting that HMRC did accept the persuasive value of *Sempra* and *Dextra* for other taxpayers' cases. In fact, the subsequent conduct in litigation points to HMRC not accepting that those cases were of persuasive value. Thus, there was no foundation in the case-law, or on the evidence, for a practice generally prevailing.

171.In conclusion, the appellant's ground on this issue fails. That is because there was no error of law in the FTT finding that the appellant had conceded the point. However, for the reasons set out above, even if the FTT was wrong in its interpretation of the concession, there was no error of law in the FTT not accepting the s29(2) TMA defence would have been satisfied.

3) S29(5) TMA– awareness of hypothetical HMRC officer

172.The issue in relation to this ground, is whether, at the time the enquiry windows shut for 2008-9 and 2009-10, an HMRC officer (who, as established in the relevant case-law is a hypothetical inspector) could not reasonably have been expected to be aware of the insufficiency.

173.The FTT concluded, in HMRC's favour, that the condition in s29(5) TMA was met. The appellant argues the FTT erred in law in so concluding. He submits the only conclusion the FTT could have drawn, in view of the information in the returns and, the information whose existence and relevance could be inferred from the returns, was

that the hypothetical inspector would have been aware of the insufficiency of tax such that the condition in s29(5) was not satisfied. The discovery assessment was therefore invalid.

174. The relevant legal principles are conveniently summarised by reference to the authorities in Patten LJ's judgment in *Sanderson v HMRC* [2016] EWCA Civ 19 at [17]. The FTT set these out fully at [108] of its decision. From those it is clear: 1) the officer is a hypothetical officer, 2) that officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law, 3) where the law is complex, even adequate disclosure by the taxpayer may not make it reasonable for the officer to have discovered the insufficiency on the basis of the information disclosed at the time, 4) what the hypothetical officer must have been reasonably expected to be aware of is an actual insufficiency (the test is concerned not with what the officer reasonably could have been expected to do, but with what the officer could have reasonably been expected to be aware of), and 5) the test falls to be determined on the basis of the types of available information specified in 29(6) TMA. Those are the only sources of information to be taken into account.

175. There is little dispute about the core of these principles, although each party emphasises different aspects of them. So, for their part HMRC emphasise that s29(5) is concerned with the quality of the taxpayer's disclosure and the focus on that alerting the officer to an insufficiency. Thus, at [25] of *Sanderson*, Patten LJ described the purpose of the condition as being "to test the adequacy of the taxpayer's disclosure, not to prescribe the circumstances which would justify the real officer in exercising the s29(1) power".

176.For his part, the appellant highlights the discussion around the bar at which the awareness of insufficiency is set. Patten LJ discussed the differing approaches taken to this in the case-law, referring to judgments of the Chancellor and Moses LJ in the Court of Appeal's decision in *HMRC v Lansdowne Partners LP* [2012] STC 544 (at [21] onwards). There the Chancellor explained that the inspector was not required to resolve points of law: "it was enough that the information made available to [the hypothetical inspector] justifies the amendment to the tax return [the inspector] then seeks to make. Any disputes of fact or law can then be resolved by the usual processes". Moses LJ made the same point and went on to state:

> "the question is whether the taxpayer has provided sufficient information to an officer, with such understanding as [the officer] might reasonably be expected to have, to justify the exercise of the power to raise the assessment to make good the insufficiency."

177.Patten LJ (at [23] of *Sanderson*) viewed *Lansdowne* as confirming:

> "the officer was not required to resolve (or even be able to assess) every question of law (particularly in complex cases) but that where, as Moses

> LJ expressed it, the points were not complex or difficult he was required to apply his knowledge of the law to the facts disclosed and to form a view as to whether an insufficiency existed. That is a matter of judgment rather than the application of any particular standard of proof.

178.We turn then to how the FTT applied those principles to the facts and the specific information regarded as having been made available to HMRC by virtue of s29(6) TMA.

179.That subsection defines what is considered information available to an HMRC officer. In summary, as relevant to Mr Hoey's case this was: the information in his tax return and accompanying documents, information contained in documents produced for the purposes of the enquiry or "… information the existence of which, and the relevance of which, as regards the situation mentioned in subsection (1) above [*the insufficiency of tax*]"… "could reasonably be expected to be inferred" by an HMRC officer from information in the above mentioned categories (i.e. the return, accompanying documents, enquiry documents).

180. The FTT made findings at [50] to [60] of its decision setting out the contents of the returns. For both years, the returns showed the amount of salary paid by the employer plus a taxable benefit of the interest free loans. In the "white space" area for box 19 it was explained the figures in box 15 of the employment page related to interest free sterling loans provided by the EBT and that the loans were repayable on demand. For the 2009-10 return there was also a scheme reference number, in box 14, under the DOTAS regulations for the Hamilton scheme and the Penfolds scheme.

181.The appellant argues the relevant information included the existence of loans and, for 2009/10, DOTAS scheme reference numbers ("SRNs"). Regarding the information whose existence and relevance "could reasonably be expected to be inferred" that was: a) the loan was interest free and repayable on demand, b) the P11D disclosed details of the loan, c) the existence of EBT, d) that the employment with was with the Isle of Man company, e) that the EBT loaned an amount which was more than the employment earnings and f) the 2009/10 DOTAs disclosure. HMRC's internal note "Spotlight 5" of 5 August 2010 which indicated HMRC's belief that, at the time funds were allocated to the employee or their beneficiaries, that PAYE and NICs were due.

182.The DOTAS disclosure which was before the FTT (but not recorded by FTT Decision) was as follows.

183.The title given was "The use of Isle of Man EBT and loans as a remuneration structure". The summary of proposal or arrangements was:

> "An Isle of Man company is established which will provide contractors (employed by the Isle of Man company) to deliver IT, financial and specifical project consultancy services to companies in the UK and

> Europe. The Isle of Man company establishes an employee benefit trust and benefits, in particular loans are awarded to employees."

184. The explanation given "for each element in the proposal or arrangements from which the expected tax advantage arises" was:

> - An Isle of Man company is established which will be resident in the Isle of Man for tax purposes and will not trade in the UK
> - The Isle of Man company will employ contractors to deliver IT, financial and specific project consultancy services for clients in the UK and Europe
> - Employees will receive a salary equivalent to approximately 25% of the contracted sum direct from the client.
> - PAYE and NIC will be operated in respect of any salary paid in respect of services in the UK
> - The company will make payments out of the contractual sums into an EBT establishment in the Isle of Man
> - The EBT will provide benefits such as loans to the employees

185. The FTT rejected the appellants' argument that the combination of the existence of the SRNs (for 2009-10), the Spotlight 5 note and the returns should have been sufficient to alert the officer to an insufficiency of tax (at [114] to [116]). It did this by reference to Patten LJ's statement that the purpose of the statutory provision concerned adequacy of disclosure. The FTT thought they were "factors which indicate that something might be wrong and that perhaps the hypothetical officer should make further enquiries". However, the provision was not concerned with what the officer could reasonably have been expected to do but with what the officer could reasonably have been expected to be aware of. The inference the officer should perhaps have carried out further enquiries was not enough.

186. The appellant argues the FTT's conclusion, that the information was not enough to identify an insufficiency of tax was unsustainable. He submits it is impossible to identify what further information was required for 2009-10 (this was the year with DOTAS disclosure). For 2008-9 he accepts the position is less clear but submits any inspector of reasonable competence would have realised the appellant was obtaining a loan from an EBT and, that on HMRC's analysis, this resulted in a liability to tax by reference to the amount of the loan.

187. HMRC reiterated the issue concerned the quality of the disclosure the taxpayer made emphasising that the disclosures for both years did not indicate that the purported loans, when made, would be non-repayable That was something which was highly relevant to the tax analysis. Nor was that point addressed in the DOTAS disclosure for 2009-10. As regards payments into the trust, it was important to remember that, at the relevant time, the *Rangers* analysis on "redirection" was not known; there were multiple

potential tax bases. At the time the arguments around taxability tended to focus on the chargeability of the payments *out of* the trust under a *Ramsey* analysis rather than on the payments *into* the trust. The case-law confirmed the hypothetical officer was not required to determine complex points of law.

Discussion on s29(5)

188.The appellant's ground is principally, a challenge to the way in which the FTT applied the relevant legal principles to the materials before it. However, Mr Mullan's point in essence also suggests that the FTT misdirected itself by applying too high a threshold of awareness. The question was whether there was enough information to justify making an assessment and if HMRC thought the schemes did not work then that was enough.

189.We consider the FTT directed itself as to the correct principles and reached a decision which it was open to it to reach. The FTT set out at length the summary of the relevant legal principles. Ultimately as the authorities point out, the level of awareness is a matter of judgment. (In passing we note that it is not clear that the FTT's reference (at [114]) to a "possible insufficiency" of tax reflected the precise way the submission had been put, or the legal principles the FTT had discussed. To the extent it did not, there was no disadvantage to the appellant in so far as it would be easier for the appellant to show the officer should reasonably have been aware of a *possible* insufficiency as compared to an *actual* insufficiency.)

190.We conclude, that for both years, it was open to the FTT to find the 29(5) condition was met. The information regarded as made available was such that the officer could not have been reasonably expected, to be aware of the insufficiency so as to justify raising an assessment.

191.Regarding the appellant's disclosure of facts, these only went as far as saying there was an interest free loan in relation to which tax was charged. (As Ms Nathan submitted, given tax was assessed on the benefit of the loan, the view might very well have been taken that there was thus no insufficiency). The appellant's response, that this was irrelevant to the taxability of *contribution to* the EBT does not help. At the relevant time the reasoning and outcome in *Rangers* was not known.

192.Both parties pointed out the apparent inconsistency of the position maintained regarding 29(2) with the position on 29(5). In particular, the appellant highlighted the government's response to the *Morse Review* and the statements there (at 2.10) that HMRC had always maintained the schemes did not work and tax was due. But the fact the appellant had not discharged the burden to show there was a generally prevailing practice that payments into the EBT were taxable does not mean HMRC must be taken to have adopted a position that all such cases involving EBTs were taxable. As a generic statement it says nothing about the level of information that would have needed to have

been provided to reach the level of awareness justifying the making of an assessment. (In other words, the absence of a generally prevailing practice confirming the non-taxability of certain sums might very well be *consistent with* a position that those sums are taxable. But it does not *require* the view that assessment in respect of such sums is justified).

193.To the extent the Revenue were maintaining the chargeability of tax on sums going into the EBT, that depended on characterising what was paid in as remuneration which would be dependent on the facts. It did not follow that because the sums were paid into an EBT that those were necessarily remuneration. Also, the relevant legal position supporting a tax charge, at that time, whether on payments in under a redirection argument, or whether on payments out, was not established to any degree of certainty.

194.The Spotlight statement does not add anything to the analysis. It refers to "allocation to the employee or their beneficiary". It is not clear from the summary of the scheme that this step of allocation occurred – the disclosure referred to an EBT (which could have been an EBT fund for the benefit of a class of persons that went beyond the employee and their beneficiary) and the EBT then providing benefits.

195.Regarding the point that the FTT's decision was irreconcilable with [82] of *Charlton* regarding DOTAS disclosures, we note that part of the judgement is concerned with whether the existence and relevance of the DOTAS disclosure could be inferred from the SRN disclosure and therefore the contents of the disclosure. Here, there is no indication the FTT did not consider the contents of the form, even if it did not recite it in its decision. The FTT's reasoning was that the s29(5) condition was met for 2009-10 despite that form. Although in *Charlton* the tribunal explained it was not necessary to explain precisely how a scheme works for any claimed tax treatment to arise (at [89]), or that there was any overriding requirement to explain how the scheme worked (at [93]), it is clear each case will turn on its facts and an evaluation of the particular disclosures made in conjunction with the skills and abilities attributed to the officer.

196.We consider the FTT's judgment on whether the condition had been met was well within the bounds of what was open to it given the particular information put forward.

197.There was no error of law and this ground fails.

TOAA code issues: HMRC's cross-appeal and appellant's grounds

Overview of cross-appeal and grounds

198.HMRC's cross appeal concerns the FTT's treatment of the applicability of the TOAA code. In broad summary, that imposes a charge where: a relevant transfer of assets is made by a UK resident to a person abroad such that income becomes payable

to that person abroad, the UK resident has "power to enjoy" the income, and the income would be chargeable to income tax if received by the individual in the UK. The charge does not apply where a taxpayer can make out a defence based on the motives for the transaction, in broad terms, where there was no tax avoidance motive.

199.The FTT (at [141] to [142]) accepted the creation of the employment contracts between Mr Hoey and respectively Penfolds/Hamilton Trust, constituted a "transfer of assets" by Mr Hoey, a UK resident to Penfolds/Hamilton Trust. (The term "assets" includes "rights" (s717(1) ITA 2007) and "transfer" is defined to include the "creation of rights" (s716(2) ITA)). Penfolds/Hamiton Trust were not resident in the UK, and were therefore "persons abroad" for the purposes of the TOAA code.

200.The FTT did not consider it was required to decide on the applicability of the TOAA charge, because of the concession which Mr Hoey had made regarding the tax liability under the employment income charge. HMRC say that was an error of law on the FTT's part. The nature of the TOAA charge was that it was an *alternative* charge. There was still a live issue remaining between the parties for determination. This issue is HMRC's **Cross-Appeal Ground 1**.

201.The FTT went on to deal with the TOAA charge issues on an *obiter* basis. In short, the FTT upheld the charge but held the quantum of the income payable to the person abroad was nil. In essence that was because, in the light of the earning income charge concession Mr Hoey had made, the FTT considered the additions *to the* EBT were the redirected salary of Mr Hoey. When those salary payments out were deducted from the payments *received* from the End Users the result was nil. The FTT also considered the motive defence did not apply; while one of the two necessary conditions for that defence to apply were made out, the other was not. It accepted the appellant's further argument that TOAA infringed his EU law rights but considered the restriction on his rights was justified and proportionate. It therefore rejected his argument that the TOAA restriction on free movement of capital was unlawful under EU law.

202.HMRC say the FTT made a number of errors in finding the income was nil **(Cross-Appeal Ground 2)**. In addition, HMRC submits it ought to have accepted there was an additional reason for the motive defence not applying and also that the "arms' length bargain" test in s737(5) was not satisfied **(Cross-Appeal Ground 3)**. HMRC also say the FTT made several errors of law in holding that on the facts of the case the TOAA infringed the free movement of capital **(Cross-Appeal Ground 4)**. For his part, Mr Hoey appeals against the FTT's findings that the motive defence in s737 did not apply, and the finding the TOAA provision did not unlawfully restrict the free movement of capital.

203.We deal with the parties' respective grounds of appeal at the relevant stage of the analysis.

Cross-Appeal Ground 1:

204.HMRC argue the FTT was wrong to considering that it was not necessary to deal with the TOAA charge in order to dispose of the appeal. They emphasise s743(4) ITA, the mechanism for relieving potential double taxation, operates to give priority to a charge under the TOAA provisions. If, as was submitted, the TOAA charge arose upon Mr Hoey entering into the employment contract with Penfold/Hamilton, then that was prior to when the employment income tax charge arose. If the TOAA charge applied, the effect of Mr Hoey's employment charge would be disapplied by s727(4) ITA. The applicability of the TOAA charge remained a live issue between the parties and the FTT ought to have considered it necessary to determine it.

205.Mr Hoey's arguments, as set out in his written response to HMRC's appeal, are simply that the FTT found the income was nil, and that even if the TOAA charge applied he would still be entitled to the PAYE credit. However, neither of these arguments, which go to the materiality of any error, address whether there was an error of law in the first place.

206. We consider there was an error, for the reasons HMRC give which means we have discretion to set aside and remake the FTT's decision. We note the FTT dealt with the TOAA issues anyway, holding ultimately that while the charge applied, the income was nil, and that even though it infringed EU law it did not do so unlawfully. We consider the appropriate way to deal with such error would be for us to remake the decision but without changing its substance, and only so as reflect that the issues the FTT determined were not on an obiter basis. Should we agree, however with either of the parties' other grounds that the FTT made errors in this part of its decision we will of course need to consider whether to set aside the decision and remake some or all of its substance.

HMRC Cross-Appeal Ground 2

207.This ground centres around the income Penfold/Hamilton received for the purposes of the TOAA provisions, and whether 1) deductions of intermediary's fees from the amounts Penfold/Hamilton received, and 2) the payments Penfold/Hamilton made into the EBTs, were not properly deductible. HMRC argue these amounts were not deductible as they were not *wholly and exclusively* for the purposes of Pensfold/Hamilton's trade, the payments being made for other purposes.

208.The FTT's reasoning (at [162] to [169]) was as follows. The parties were agreed the "income" for TOAA purposes was the profits of Penfolds / Hamilton, the "person abroad". There was however no evidence such as a profit and loss account. Such evidence as there was, suggested that fees were received from the intermediary for Mr Hoey's services. The fees Pensfolds/Hamilton received were net of the fees payable to the promoters and facilitators and the FTT's assumption was the fees payable to the promoters and facilitators were in fact paid by Mr Hoey. That meant there was no issue,

as HMRC had argued, that the fees were not deductible because of any duality of purpose.

209.Thus, Penfold/Hamilton's profit was the net fees, less salaries (these were the small amounts of salary paid at national minimum wage level), and less payments into the trusts. The small salary paid was clearly deductible. On an analysis of *Rangers,* the payments into the Trusts were "nothing more or less than" additional payments of salary and fell "properly" to be deducted. That meant, the FTT concluded, the income was nil.

210.HMRC's grounds in summary are that i) the FTT applied the wrong test, ii) it wrongly found the appellant had met the burden on it to show the deductions were wholly and exclusively for the trade, and iii) it wrongly made findings in the absence of evidence. In particular, the FTT wrongly relied on facts from the "Statement of Common Facts and Issues" document. That was only relevant for the purposes of making a Rule 18 lead case direction and should not have been treated as a statement of agreed findings of fact.

i)Did the FTT apply the wrong test?

211.HMRC say the FTT's analysis fell short because after finding the sums paid to the EBT were remuneration the FTT failed to then consider whether the sums were remuneration which was wholly and exclusively for the purposes of the payer's trade (s34 Income Tax (Trading and Other Income) Act 2005; s54 Corporation tax Act 2009).

212.The key legal propositions concerning whether sums are "wholly and exclusively for the purposes of" the payer's trade are not in dispute. The ones concerning the general approach were helpfully summarised in the Upper Tribunal's decision in *Scotts Atlantic Management Limited v HMRC* [2015[UKUT 0066 (at [47] onwards). For our purposes it is sufficient to note the following:

> (1) The "wholly and exclusively" issue is to be determined by the object of the taxpayer in incurring the expense.
>
> (2) The question of what the taxpayer's object was is one of fact to be assessed by the FTT observing a number of principles;
>
> > (a) The FTT needs to look into the taxpayer's mind at the moment the expenditure is made (save in cases which speak for themselves).
> >
> > (b) The object of the expenditure should be distinguished from its effect. If the sole object of the expenditure was the promotion of the business, the expenditure is deductible, even though it necessarily involves other consequences. The FTT must not conclude that merely because there was an effect, that effect was an object. However, some results "are so inevitably and

inextricably involved in particular activities that they cannot but be said to be a purpose of the activity" and as a result the taxpayer's conscious motive is not decisive.

(c) The way in which the expense is incurred is not determinative but may be one of the circumstances to be taken into account in determining its purpose.

213.Where the payment has duality of purpose (i.e. the expenses are partly for a trade purpose and partly for a non-trade purpose) it is well established that those expenses are not deductible (*Vodafone Cellular v Shaw* [1997] STC 734 and *Interfish Ltd v HMRC* [2014] EWCA Civ 876). A purpose to avoid tax may constitute such a non-trade purpose (*Scotts Atlantic*). However, the UT in *Scotts Atlantic* also noted (at [55]) that the mere fact a choice to achieve an end which is exclusively for the benefit of the trade may be influenced or indeed wholly determined by the consequences of each choice does not necessarily mean there is duality of purpose.

214.The authority underpinning HMRC's submission, that the FTT missed a crucial step in its analysis, is the High Court's decision is *Copeman (Inspector of Taxes) v William Flood & Sons ltd* [1941] 1 KB 202. The facts concerned remuneration paid to family member directors which did not reflect the directors' duties in respect of the trade. The first instance tribunal said the salary was deductible; the salary amount was an internal matter for the company to decide. The High Court's decision, which was applied in the context of payments to another scheme involving an EBT (*Always Sheet Metal v HMRC* [2017] UKFTT 198), makes clear that it does not follow from the fact that sums are paid as remuneration that they wholly and exclusively for the purposes of the trade.

215.That must be an uncontroversial proposition. There are plainly other situations where a person could be employed by the trade, but the costs of employment are not wholly and exclusively for the trade, where for instance the role is for the personal benefit of the director as opposed to business benefit of the trade. Equally, and perhaps more commonplace employees will be employed wholly and exclusively for the trade. But whether that is the case is a question of fact.

216.Returning to the FTT Decision, the crucial question to determine was whether the sums paid were wholly and exclusively for the purposes of the trade and thus to determine what Penfolds/Hamilton's object was for paying the sums. It is correct the FTT, having concluded the payment was remuneration, did not deal with the issue of whether the sums paid to the EBT were wholly and exclusively on Mr Hoey's behalf, as clearly as it should have done. However, reading the relevant section of its decision as a whole, it appears to us, that the FTT was apprised of the duality issue, that it considered it in relation to the EBT contributions, but that it concluded it presented no concern. At [164] the FTT recorded and dealt with HMRC's point regarding duality of purpose in relation to the promotor fees. When it then referred shortly afterwards at

[166] to the amounts of salary (the minimum wage amounts) being "valid" deductions that must we think mean deductions which the FTT considered were not excluded by virtue of having a duality of purpose. The FTT then, regarding the payments into the trusts, referred to an excerpt from Lord Hodge's judgment in *Rangers* (which explained the redirection principle) to indicate [the payments'] "true nature", concluding the payments "were nothing more or less than additional payments of salary" (emphasis added). The reference to "more or less" indicates the FTT ruled out the payments being something other than salary. But the reference to "additional" is consistent with the FTT considering that such salary bore the same character as the other type of salary, in relation to which there was no apparent concern around those not being "valid" deductions. At [168] the FTT concluded "they therefore properly fall to be deducted."

217.HMRC highlight the lack of any evidence put forward by Mr Hoey as to the nature of trade, but as Mr Mullan points out, the "wholly and exclusively" question only arises if a trade is assumed. It did not appear to be in issue between the parties that for TOAA purposes, income was to be measured on the basis that Penfold and Hamilton were carrying on a trade. HMRC, in any event make the fair supposition that the trade was provision of services (through deployment of their employees) to end users in the UK. On that basis, it appears entirely consistent that the payments to the trust were for remuneration from Penfold /Hamilton for work performed for the end users. It is not irrational either given the other remuneration paid to the employee was deductible for the purposes of such trade. As Mr Mullan says, this was not a situation similar to that in *Copeland* where the money paid was over the odds and for personal use or something else. In fact, we observe, given the nature of the financial service end users and the type of IT work Mr Hoey was carrying out for them that it might be considered surprising if he was content to provide those services for minimum wage. Viewing the additional payments to the trust as remuneration would be consistent with Mr Hoey commanding more than minimum wage by way of remuneration for the work he carried out.

ii) No evidence /Insufficiency of evidence for finding?

218.HMRC say the FTT erred in failing to recognise the burden of proof on the issue rested with Mr Hoey, and in failing to hold that Mr Hoey had not discharged it. There was no evidence to reach the conclusion the payments were wholly and exclusively for the purposes of trade. The finding was unsustainable in view of the evidence at least of a duality of purpose regarding payments into the EBT. The finding was inconsistent with other findings made.

219. Again, as Mr Mullan points out however, the "wholly and exclusively issue" only arises on an assumption that Penfold/Hamilton were carrying on a trade. We consider, there was at least some evidence before the FTT, on that assumption, capable of supporting the FTT's conclusion the EBT sums were properly deductible and to meet the burden which the appellant accepts lay on him. The FTT heard oral evidence from trustee, Andy Parr, which covered the operation of Hamilton Trust's activities including

that it was set up to employ contractors and provide their services to third parties, and that its purposes included remunerating and rewarding those contractors during their employment. It also heard evidence from Matt Hall, who was employed by the firm who devised the Penfold arrangements. In addition, there was documentary evidence: this included contracts between the employer and intermediaries, or between the intermediaries, employee information and trust information guides, statements in trust documents and documentation relating to the set-up of the trust referring to the purpose of incentivising and motivating employees. While not direct evidence they would, when considered cumulatively, and with the oral evidence, at least enable the FTT to infer that the nature of Penfold's and Hamilton's trade was supplying contractors such as Mr Hoey to end users and that the payments into the trust were wholly and exclusively for the purpose of remunerating Mr Hoey for his employment. That is sufficient to answer the ground insofar the challenge raised is that the impugned finding was one that was made without any evidence.

220.HMRC go further to say there was ample evidence before the FTT of a tax avoidance or non-trade purpose as regards the EBT payments. They rely on various excerpts from the oral and written evidence of Mr Hoey and the witnesses called on his behalf, as well the evidence of HMRC's officer, Mr Finch, as to the higher fees charged for the arrangements and also evidence and statements in the documentary evidence including marketing materials.

221.Having considered these, we can see how they may arguably have sustained an inference that at least one of Penfold's / Hamilton's motives in making the payments was to avoid tax. However, in order to identify that the FTT erred in law, HMRC must go further and show the FTT was unreasonable in making the finding it did in the light of that evidence, in other words that the FTT's conclusion was one that was not reasonably open to it. We are not satisfied the evidence HMRC points to crosses that threshold.

222.Many of the points go to the tax-driven nature of the arrangements as a whole: for instance, Mr Hall's evidence, the FTT's finding that the company was inserted into the arrangements for tax avoidance reasons (at [153]) or the awareness of tax issues or tax-related motives of others, in particular Mr Hoey.

223.The relevance of the evidence of Mr Parr given in cross-examination, which HMRC suggest means he accepted the purpose of the arrangements was to facilitate the avoidance of tax, to *Hamilton's* purpose in making payments to the trust during the years under appeal is questionable. The particular context in which Mr Parr accepted moneys were to be to be used by the employee in order to avoid tax liability relate to so-called "loan-cleansing" arrangements which took place in 2011/12 and whose purpose (as described at [26] of the FTT Decision) was to reduce the amount of loans in a way that would not attract tax. The particular arrangements, as described earlier in the cross-examination, involved borrowing from a third party, lending to employees to

use the proceeds to repay the employee's EBT loans and the transfer of the acquisition of the creditor rights.

224.Similarly, the point made regarding Mr Parr's evidence in cross-examination regarding him simply following the directions of the enforcer without consideration must be viewed in the context of his wider evidence where he accepted that he would have had to have approved the provision of employee information to the enforcer and the funds the trust had received. Arrangements whereby Hamilton sanctioned the payments to the trust in respect of the employee on the basis that the enforcer would then implement that with directions as to the specific amounts required to be added to the trust and whereby the employer then gave little further consideration to such directions are not inconsistent with those payments being redirected salary of the employee (which as such would not require Hamilton's further consideration).

225.Regarding the marketing material referred to, this describes the relevant website (Probiz) as "the natural home for contractors looking for return without risk". Under the heading "so if you are contractor concerned about any of the following" there are a number of bullet points one of which is "keeping enough of what you earn" but other bullets also mentioned are "current problems of umbrella and composite companies" and "running your own service company". The text continues "Probiz contracts provides a perfect solution for you to take home more money and remove the risk". Again, to the extent it is relevant, it speaks to the arrangements as a whole. To the extent it is relevant to Penfold's /Hamilton's motive, it is consistent with the payments to the trust being viewed, from Penfold's /Hamilton's perspective, as part of the remuneration intended for the employee.

226.The particular question for determination is what was Penfold / Hamilton's object in making the payments – why did it make the payment? Ultimately, the points HMRC raise, regarding Penfold/Hamilton being an instrument of tax avoidance, do not require a finding that Penfold/Hamilton's object in making the EBT purpose was tax avoidance. They may be relevant to the question or why Penfold / Hamilton was set up, or what their role was in the arrangements. But those are not the questions in issue.

227.HMRC must show, that on the evidence before the FTT, the FTT could not have reasonably reached any finding other than that there was a duality of purpose. We are not persuaded the evidence they have pointed to does that.

228.While both parties made submissions regarding the extent to which Mr Hoey needed to meet the burden of proof on the question of whether the payments were wholly and exclusively for the purposes of the trade, we do not consider the issue of burden of proof takes the matter any further and do not deal with those. The ultimate question was whether there was sufficient evidence for the FTT to reach the conclusion it did on the issue and whether that was a finding that it was open it to reach on the

evidence. We consider there was sufficient evidence, and it was so open to the FTT to conclude as it did.

229.Certainly, as regards the question of fees, there was an inconsistency between the answers Mr Parr gave in cross-examination which suggested the fees in respect of services to end users were received (by Hamilton at least), gross rather than net of intermediary fees. However, we agree with the appellant that even if the facts in the "Common Statement of Agreed Facts and Issues" were not formally agreed facts that could, without more, be transposed into the tribunal's findings of fact, the document nevertheless had some evidential value and that it was therefore open to the FTT to conclude as it did in the light of that. The FTT might, usefully, in the circumstances, have elaborated on its reasoning for preferring what was said in the document rather than on the basis of Mr Parr's evidence but no ground is raised in relation to sufficiency of reasons, so we need say no more about this.

230.Before moving on from this ground, we should note that Mr Hoey took issue with the late stage at which the issue of whether the payments to the trust were wholly and exclusively for the purposes of the trust was raised. We do not regard that as a live point before us: the time to deal with that was at the FTT and in the written submissions handed up during the course of the FTT hearing. We were not referred to anything which suggested any such objection was made and thus of any error on the FTT's part in proceeding to deal with the point.

HMRC Cross-Appeal Ground 3 – motive test – FTT wrong to reject additional reasons for why motive test not satisfied – only reasonable conclusion on facts was that neither limb of motive defence could be relied on

231.Section 737 of ITA provides an individual is not liable to income tax under the TOAA chapter for the tax year by reference to the relevant transactions if the individual satisfies an HMRC officer that "Condition A is met", or if it is not that "Condition B" is met. The section goes on to prescribe those conditions as follows:

> "(3) Condition A is that it would not be reasonable to draw the conclusion, from all the circumstances of the case, that the purpose of avoiding liability to taxation was the purpose, or one of the purposes, for which the relevant transactions or any of them were effected.
>
> (4) Condition B is that—
>
> (a) all the relevant transactions were genuine commercial transactions (see section 738), and
>
> (b) it would not be reasonable to draw the conclusion, from all the circumstances of the case, that any one or more of those transactions was more than incidentally designed for the purpose of avoiding liability to taxation.

> (5) In determining the purposes for which the relevant transactions or any of them were effected, the intentions and purposes of any person within subsection (6) are to be taken into account.
>
> (6) A person is within this subsection if, whether or not for consideration, the person—
>
> (a) designs or effects, or
>
> (b) provides advice in relation to,
>
> the relevant transactions or any of them."

232.The FTT Decision dealt with this issue at [145] to [169] concluding, in summary, the defence was not available. Condition A was not met. Nor was Condition B (although the transactions were commercial, Condition B(b) (the transactions not more than incidentally designed for purpose of avoiding tax) was not satisfied).

233.The FTT did not specifically identify what "relevant transactions" were in issue. Section 715 ITA defines a relevant transaction as "a) a relevant transfer, or b) an associated operation" both terms then being further defined in ITA. Nevertheless, for the purposes of establishing whether Condition A or B were met all that was necessary for the s737 defence to be unavailable was that any one of such transactions to fail the relevant test. In respect of the various aspects of the motive s737 defence neither party, as part of their challenge against the conditions in relation to which the FTT found against them, takes issue with the scope of the relevant transactions under consideration. (So, HMRC do not say the FTT excluded transactions from scope which it ought to have done, and the appellant does not say the FTT considered transactions which were not in scope). We therefore assess the FTT's reasoning purely on the basis of the points raised.

234.Regarding the issue before it the FTT made the following findings of fact:

> "15. Mr Hoey had previously, in around 2004, supplied his services to End Users via a personal service company but had found the complexities of running his own company too much for him to deal with. He had therefore engaged the services of an intermediary, Dynamic Management Solutions Ltd ("DMS"), and, in 2007-08, they had introduced him to Penfolds, at which time he entered into employment with Penfolds. In September 2009 Penfolds suggested he should transfer his employment to Hamilton Trust, a Guernsey based trust company, which he duly did.
>
> 16. DMS, and a subsequent intermediary, Cascade, were Mr Hoey's prime points of contact throughout this process. He trusted them totally. If they recommended a course of action then he believed that that course of action would be in his best interests. He submitted his time sheets to them and they in turn submitted invoices to the End Users. Mr Hoey had

> very little to do with the other parties to the arrangements although he clearly signed the various documents which were sent to him.
>
> 17. Various publicity material which had been produced by Penfolds and Hamilton, and which described the benefits of these schemes, was presented to the tribunal. Mr Hoey could not remember if he had read this material thoroughly but if he had he did not understand the implications of what was being suggested to him.
>
> 18. His motivation in entering into these schemes was solely to avoid the complexities of running his own company or his own business. When considering whether or not to enter the schemes he simply compared the post-tax cash he would receive under his existing arrangements, via a UK umbrella company, and the post-tax cash he would receive under the Penfolds arrangement. The cash which he would receive under the Penfolds arrangement was slightly better than he was currently receiving but Mr Hoey did not really understand that this was because he would be paid in a way which was designed to avoid paying UK tax on a large part of his earnings.
>
> 19. Importantly I note that Mr Hoey did not receive the full benefit of the absence of UK tax on his earnings because the fees chargeable by the various intermediaries were between 10% and 18% of his income, compared to the 1% which might be charged by a simple UK based umbrella company. A substantial part of the hoped for benefit of avoiding UK tax was therefore absorbed by the fees being charged by the promoters and facilitators of the scheme."

235. At [22] the FTT found the contractors in the schemes did not expect to be required to repay the loans at any time. While the FTT did not make finding specifically regarding Mr Hoey's understanding, it obviously considered he was in the same position as other contractors and we note that Mr Hoey conceded in cross-examination that he did not consider the loans repayable.

236. Regarding Condition A, the FTT concluded from Mr Hoey's evidence that his motive was purely the avoidance of complexities of running his own company or his own consultancy. His motivation was not related to tax avoidance ([147]). The FTT acknowledged the legislation looked more broadly to the motives of anyone who "designs or effects or provides advice in relation to the relevant transactions of any of them". The FTT considered it needed to interpret the statutory provisions by reference to their purpose. In that regard the judge stated:

> "152. However, in this case, I cannot believe that Parliament intended that taxpayers should be able to set up off-shore employers who would make contributions to a trust which would then make loans to the employee, who did not expect to be required to repay the loans, and who would then be taxed on the notional benefit of receiving an interest-free

> loan rather than on the benefit of receiving the moneys in a form which was taxable as income.
>
> 153. I therefore regard the basic structure, of Contractors being employed by an umbrella company which then provides their services to the End Users, as being a perfectly reasonable commercial transaction. However, I regard the insertion of additional transactions, being the setting up of an umbrella company offshore, which makes payments to a trust, which then makes interest free loans to the Contractors, with the expectation that those loans are never repaid, as constituting tax avoidance.
>
> 154. I am not required to ignore those transactions in my analysis but, using a purposive analysis, I find that their purpose was the avoidance of tax in a way which Parliament did not intend."

237.While HMRC do not dispute the outcome that Condition A was not met, they say the FTT made *Edwards v Bairstow* errors of law in finding facts that were inconsistent with the evidence before it.

238.In particular, HMRC submit the FTT disregarded Mr Hoey's own evidence (which the FTT failed to record) that reduction of liability to tax was a motivation. It overlooked evidence that Mr Hoey was a serial user of mass-marketed avoidance schemes between 2004 to 2012. HMRC also say Mr Hoey's lack of understanding was implausible in the light of the evidence: the FTT failed to take recognise the significance of: the fee differential charged (10% to 18% of the various intermediaries vs the 1% for a UK based umbrella company) which reflected the tax advantages, that Mr Hoey was giving up a lot of earnings for loans that were in principle repayable, the DOTAS disclosures regarding the scheme in his tax returns, and that Mr Hoey entered into the "loan cleansing" arrangements subsequently.

239.At the hearing we asked for further detail regarding what comparison could be made between Mr Hoey's "take home" pay as between the arrangements he entered into and a UK umbrella company in an effort to better understand the economics of the intended operation of the scheme. While this generated a lot of detailed correspondence and further submissions the calculations provided do not in the end assist us on the issue before us. They were also not calculations available to the FTT. The key point, that emerged from HMRC submissions, is that as there was no direct evidence on the amount of gross fees charged to end users for Mr Hoey's services or in relation to fees charged by intermediaries in relation to his participation in the arrangements, it was not possible to say with any certainty exactly what tax savings Mr Hoey achieved.

240.Returning to HMRC's points on the evidence that was before the FTT, it is important in our view, in evaluating these, to see them in the context of Mr Hoey's evidence as a whole. The evidence HMRC point to regarding his motivation was that use of a Personal Service Company, in the long term, "would have created a large tax liability" which he would have needed to meet so he was looking for a "different

solution". But the FTT also heard evidence regarding Mr Hoey's concern regarding the complexities of running his own company or his own business and in the end found that to be his sole motivation. We have, as invited to do so, considered the transcripts of the cross-examination. It is plain from those that Mr Hoey was cross-examined thoroughly, robustly, and at length. Regarding the findings on Mr Hoey's awareness, standing back, the FTT obviously did not see any conflict between the arrangements he signed up to and his stated awareness and motivation; it essentially accepted Mr Hoey's evidence to the effect that he was preoccupied with meeting his day-to-day work for the end users and was focussed on maintaining his work with them, and signed what was put in front of him. We cannot rule out that another FTT might well have taken a more sceptical view, but that is not enough for HMRC to succeed in their challenge. The matters HMRC refer to might well justify the view that Mr Hoey ought to have understood what was going on, but they do not go as far as requiring a finding that he had a tax avoidance motive. We consider it was at least open to the FTT to find as it did. We therefore reject this ground of HMRC's cross-appeal.

241.Mr Hoey, in elaborating on his ground of appeal that the FTT was wrong to find the motive defence did not apply, submits the FTT was wrong to hold that 737(5) (allowing the purpose of designers /advisers to be taken into account) meant the question was "whether any of the arrangements fall within the definition of tax avoidance". That, submits the appellant, shows the FTT failed to recognise a subjective purpose test was required rather than an objective one. There was also no person designing arrangements or acting on behalf of Mr Hoey whose purposes were to be taken into account.

242.We agree these points lack merit in essence for the reasons HMRC advanced. The FTT took into account motives of those who designed or effected or provided advice (it specifically directed itself on this at [148]). It was obvious from the context, the purpose of the interposed steps (at [156]) was a reference to purpose of persons who designed and effected the DOTAS schemes ([150] referred to Mr Hoey's advisers).

Condition B s737(4)

243.The FTT held (at [159]) the transactions were effected in the course of a trade being carried on by Penfolds/Hamilton and were transactions which "might have been entered into between persons not connected with each other, since they were in fact entered into between unconnected parties". (The finding did not affect the outcome, because as discussed above, it went on to find that Condition B(b) was satisfied because the interposition of a non-resident employer, a trust, and the making of loans from the trust were "more than incidentally designed for the purpose of avoiding liability to taxation").

244.HMRC argue the FTT erred in finding that even if the transactions were effected in course of trade they were not effected for <u>its purposes</u>. Also, the FTT erred in its

approach to the "arms' length" test assuming that because there was no connection between the parties the bargain was at arm's length. The FTT's reasoning in *Nader and others v HMRC* [2018] UKFTT 294 (TC), with regard to similarly worded IHT provisions, made clear that the lack of connection did not mean there was an arm's length bargain.

245.The appellant did not address us on either of these points beyond a general argument regarding the motive defence in his Respondent's notice to HMRC's cross-appeal that it was not open to HMRC to challenge the FTT's findings of fact on this issue.

246.By way of preliminary observation neither of these points appear to have been raised as specific issues in the parties' skeletons so it is perhaps not surprising the FTT dealt with the point cursorily. However, both the points go to the FTT's application of the relevant legal test in circumstances where there was no indication the parties had agreed that it was not necessary to deal with these aspects of the legal tests. There is nothing to suggest the FTT considered 1) whether the transactions were effected for the relevant parties' purposes 2) whether the transactions were at arms' length (we agree it does not follow that because parties are not connected that that inevitably means the transaction is at arm's length). These omissions amount to straightforward errors of law.

247.For his part, Mr Hoey appeals against the FTT's conclusion that Condition B was not fulfilled in any event because paragraph b) of Condition B was not satisfied. Mr Hoey's notice of appeal argues the FTT erred in concluding that the arrangements amounted to tax avoidance in respect of its approach to ascertaining Parliamentary intention (specifically at [152] of the FTT Decision : see passage beginning "Parliament intended that…" at [236] above).

248.However, Mr Hoey did not then elaborate in his written or oral submissions in what respect the FTT's approach to establishing Parliament's intention was incorrect. We are unable therefore to consider that the FTT made an error of law.

249.Although we have identified an error of law in the FTT's analysis for the first part, (a) of Condition B (as appears in s737(4) (a)), we do not consider that such error alone should result in us setting aside the FTT Decision. Given what we have decided above the FTT's conclusion regarding Condition B(b) remains unchallenged. The conclusion remains that Mr Hoey did not escape liability for any charge. Setting aside and remaking or remitting the decision in respect of Condition B(a), even if it led to a different result on that provision, would not affect the overall outcome that the motive defence was not available.

HMRC's Cross-appeal Ground 4 –FTT erred in concluding TOAA breached Free Movement of Capital

250.Under this Ground, HMRC submits the FTT made several errors of law in holding, on the facts of the case, that the TOAA legislation infringed the free movement of capital.

251.The appellant also raises his own grounds of appeal and points by way of response to HMRC's cross-appeal in relation to the FTT's reasoning. We deal with these at the appropriate point as we go through the issues.

252.The FTT found at [174] that the case was concerned primarily with the transfer of assets to a person abroad which it considered fell within the ambit of the free movement of capital (Article 63 of the Treaty on the Functioning of the European Union ("TFEU")).

1) No EU law freedoms engaged?

253. HMRC's first sub-ground is that there was no restriction on free movement of capital capable of falling within Article 63 TFEU. In brief, this is because there is no "movement of capital". The "asset" which engages the TOAA provisions, namely the entering into an employment contract, does not involve a "movement of capital" for EU law purposes. Any other potential movements, even if they are movements of capital are not relevantly restricted by the TOAA code. The free movement of capital provisions are not therefore engaged.

Correct perspective: purpose of legislation or facts of case?

254.Before dealing with that issue, there is a higher level disagreement between the parties to resolve as to the correct approach to take on whether EU freedoms are restricted. The appellant approaches it from the perspective of the legislation, the TOAA code as it applies generally. He highlights that the UT in *Fisher v HMRC* [2020] UKUT 62 (TCC) ("*Fisher UT*") has held the TOAA code to be incompatible with EU law. In contrast, HMRC say one needs to look at who is relying on EU law rights and how the TOAA charge arises on the particular facts of the case.

255.In support of his position, the appellant relies on *Gallaher Ltd v HMRC* [2019] UKFTT 207 (TC) at [56] to [66], and the CJEU's decision in *Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowejw Bydgoszczy* Case C-190/12. *Gallaher Ltd.* has since been heard on appeal in the UT with the UT deciding to refer a number of matters to the CJEU. Neither party considers however that our decision need await the CJEU's. We consider that correct taking account of the propositions that each party relied on the case for.

256.In our view HMRC's approach is the correct one. The passage the appellant relies on in *Gallaher FTT* ([56] to [66]) is a section where the FTT discusses which of the freedoms as between freedom of establishment and freedom to move capital needed to be considered. The recourse to the purpose of the legislation was in the context of deciding which, as between two possible freedoms, was to take priority. This was in a situation where the relevant case-law (which we consider further below) drew a distinction on the one hand between legislation concerning groups, where establishment was the exclusive freedom, and on the other where the national legislation applied more widely, where both freedom of establishment and free movement of capital could be considered. The FTT's decision, which in any case can only be of persuasive value, does not lay down a wider proposition that the starting point is the legislation rather the factual circumstances of the case.

257.For the same reason the appellant's reliance on the CJEU's decision and Advocate-General's opinion in *Emerging Markets* ([23]-[25] of the CJEU decision and [10]-[23] of the Advocate General's opinion) also does not help his position. The extracts relied on show the court's recourse to the purposes of the legislation was regarding whether free movement of capital, or freedom of establishment was in issue. The Advocate General examined the subject matter of the legislation to determine *which* freedom was applicable ruling out freedom to provide services (because the relevant legislation was not about conditions of access for the relevant funds but the tax treatment of revenue from such funds).

258.Neither case therefore stands for the proposition that an EU freedom can be taken to apply irrespective of the facts of the case.

259.We note that the significance of the relevant facts of the case means it is not sufficient to reason that, because in *Fisher UT* the TOAA code was found to be incompatible with EU law, that necessarily means Mr Hoey is not liable to a TOAA charge. As HMRC pointed out, *Fisher UT* endorsed (at [211]) the conclusion at [689] *Fisher v HMRC* [2014] UKFTT 804 (TC) ("*Fisher FTT"*) that the TOAA should not be disapplied entirely. There was no need to adopt a conforming construction or to disapply legislation where the situation does not fall within scope of EU law (per *ICI v Colmer* (Case C-264-96) at [34])).

Movement of capital?

260.Turning then to the facts of Mr Hoey's case, the next question is whether, having regard to those, HMRC are correct to say there was no movement of capital that was restricted.

261.Article 63 of TFEU provides:

> "…all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."

262.Annex 1 to Directive 88/361 ("the Nomenclature") indicates movements covered by the Treaty provision. However, as set out at the start of the annex and as confirmed in *FII 1* (Case C-446/04) at [179]), this is not an exhaustive list.

263.Firstly, HMRC submit there was not even any movement of capital. The appellant's argument in response is that, given the range of capital movements to which TOAA applies, there can be no question that the FTT was correct to find that free movement of capital was in point. But that point is premised on the view that the starting point is the purpose of the legislation, not the particular facts, and as we have said above, we do not agree the authorities advanced support that premise.

264.HMRC submit the relevant trigger for TOAA, (which the FTT found and which the appellant did not dispute before it (at [143])) was Mr Hoey's entering into a contract of employment, together with his ability to enjoy the income of the offshore employers i.e. Penfolds/Hamilton. Even though Article 63 is widely drawn, that, HMRC submits is not something which amounts to a movement of capital.

265.The entry into the employment contract, while an "asset" for TOAA purposes is not capital for EU law purposes. Moreover, argue HMRC, none of the other potential movements amount to ones which are relevantly restricted. HMRC rely on the Court of Appeal's judgment in *R(aoo Shiner and another) v HMRC* [2011] EWCA Civ 892 (per Mummery LJ at [50]) for the proposition that there has to be a *relevant* movement of capital before Article 63 can be in point. None of variously, the payments from end users to the employer, the additions to the trust, or what HMRC say are the purported loans to the employee are potentially inhibited by TOAA. They are not "relevant movements" because on the facts they do not give rise to the charge under the TOAA.

266.In *Shiner* the legislation in issue prevented UK resident partners in foreign partnerships from claiming exemption from income tax on their partnership income from foreign partnerships. The taxpayer sought a declaration that the legislation was incompatible with Article 56 TEC (the predecessor to Article 63 TFEU). The only capital movement relied on was the payment of £10 into an interest in possession trust. The Court of Appeal accepted HMRC's argument that that movement was not a movement of capital as it had nothing to do with the funding of the foreign partnership.

267.We note that, as confirmed in *Shiner*, the fact that there needs to be a restriction on the movement of capital does not appear to be in contention. The appellant's argument, that in that case the court reached its decision because there was no restriction on the particular facts as regards the payment of £10, does not alter the point of principle that was applied.

268.Mr Mullan also relies on the CJEU's decision in *Trustees of the BT Pension Scheme v HMRC* (Case C-628/15) where the court rejected the UK's argument that there was no relevant capital movement. That was a case where the FID (foreign income dividend) credit legislation operated in a way which restricted free movement of capital. The issue was whether, BT pension trustees, who were based in the UK could complain about that when they were investing in UK companies (albeit ones who had foreign income sources). The UK had argued the situations that the legislation was concerned with were unrelated to trade between member states. It also argued the relevant factors relating to the case were confined to factors within the UK. However the CJEU disagreed (at [42]). In our view, the approach taken in *BT Pension Scheme* simply confirms the need to examine not just the legislation but the factors relating to the case.

269.There can be no real dispute that the TOAA legislation is capable of restricting movements of capital. However, the definitional gap HMRC point to is that the TOAA can catch things as "assets" which are not regarded for EU law purposes as capital: the entering into the employment contract. At the hearing, the appellant pointed out the overly broad effect this interpretation would have. Anyone employed by a foreign employer would be caught. That consequence must show HMRC's interpretation was not one that was intended. However, if that is the effect then it is one that follows from the High Court's decision in *IRC v Brackett* [1986] STC 521 which established that entering into an employment contract created rights. Under the TOAA definition of "asset", rights and the creation of such rights are caught. The appellant did not argue that *Brackett* was wrongly decided on that point. Also, if the TOAA code did apply in principle to straightforward foreign employment contracts there appears to be no reason why liability under TOAA would ever arise as the employee would escape liability under s737 ITA.

270.We agree with HMRC that the entering into the employment contract does not constitute "capital" for the purpose of Article 63. It is not mentioned in the Nomenclature. Although that is not exhaustive, having regard to the type of things which are mentioned there (which include a heading at XI for "Personal Capital Movements" covering such general matters as loans, gift and endowments, and specific matters such as dowries, and settlement of debts by immigrants in their previous country of residence), the omission of such a generic category such an employment contracts is conspicuous. Insofar it is the entering into the employment contract that engages the TOAA charge in relation to the facts relevant to the appellant, no breach of Article 63 arises because that step does not involve a movement of capital for the purposes of Article 63.

271.The appellant submits, contrary to HMRC's position, that in any case there are various other movements of capital (the transfer from the employer to trust, the loan to the employee by the trustees, or the payment from the end users to the employers) in respect of Mr Hoey's services are restricted by the TOAA code.

Are 1) Additions to EBT 2) Loans out of EBT relevantly restricted?

272.To understand the parties' arguments regarding those first two transactions it is necessary to go back to the terms of the TOAA code to understand that the code refers not just to transfers of assets but also to "associated operations" and how those fit in with the individual subject to the charge having "power to enjoy" the income of the person abroad as a result of transfer or associated operation(s). The key to the charge, the appellant submits, is the "power to enjoy" which in turn depends on the additional trust payments and payments out by way of loan constituting associated operations. Those associated operations are, says the appellant relevantly restricted. HMRC disagree. They maintain that while these are mechanisms giving rise to the power to enjoy and part of the arrangements, it is the entry into the arrangements by the employment contract and the right to be remunerated under the contract that engage the TOAA referring to s721, and 723 ITA.

273.Under s716 ITA a transfer is a "relevant transfer" it is "a) a transfer of assets, and (b) as a result of i) the transfer, ii) one or more associated operations…income becomes payable to a person abroad". Section 719 defines "associated operation", "in relation to any transfer of assets" as an operation of any kind effected by any person "in relation to – a) any of the assets transferred b) any assets directly or indirectly representing any of the assets transferred…". Section 721 provides that income is treated as arising to the individual caught by s720 if "the individual has power…to enjoy income of a person abroad as a result of" a relevant transfer, associated operation(s) or a combination of the two. Whether a person is treated as having "power to enjoy income of a person abroad" depends on fulfilling any of the five conditions A-E set out at s723 ITA.

274.At the hearing before us the appellant disputed that any of the conditions were met. For present purposes the conditions in contention are A, C and D:

(1) Condition A is that:

> "the income is in fact so dealt with by any person as to be calculated at some time to enure for the benefit of the individual, whether in the form of income or not".

(2) Condition C is that:

> "the individual receives or is entitled to receive at any time any benefit provided or to be provided out of the income or related money."

(3) Condition D is that:

> "the individual may become entitled to the beneficial enjoyment of the income if one or more powers are exercised or successively exercised."

275. Mr Hoey argues Condition A was not met because the money stayed in the company. Conditions C and D were not met because the income of the employer (in so far as HMRC said it was greater than nil, because the payments to the trust were not wholly and exclusively deductible) was imaginary income which did not exist and

therefore could not give rise to the provision of benefits or be beneficially enjoyed. HMRC explained, in its written reply, that conditions A, C and D in s723 ITA were met. For Condition A, the income of the offshore employer was "in fact dealt with so as to be calculated at some time to enure for the benefit of the individual". This was because the appellant received the minimum wage salary and he could receive a loan. Regarding Condition C the fee income received by the employer was paid to the appellant as salary and was contributed to the EBT from which payments could be and were made to him. As for Condition D, the appellant could and did receive loans once the EBT so resolved[5].

276.The FTT did not engage with any of these issues (it is not clear to what extent they were put before for it for resolution). There is no ground of appeal before us that the FTT was wrong (to the extent it engaged with the TOAA issue) to assume Mr Hoey did have a power to enjoy. We therefore proceed on the basis that one or other of the conditions A to D was fulfilled and the TOAA code did therefore apply.

277.The question of what elements in Mr Hoey's arrangements gave rise to a power to enjoy, and the relevant sense in which that concept is understood according to domestic case-law, is however relevant to the EU law arguments concerning whether those elements are restricted by the TOAA code (see [267] above).

278.In *Fisher UT* the UT (at [99]) endorsed the FTT's conclusion in that case (at [238]) to the effect that the relevant authorities meant that that "associated operations" were relevant only if it 1) meant that, as a result, new income arose to the person abroad, or 2) it gave rise to a new "power to enjoy". (This flowed from the wording of the legislation, when applied across from the substantively similar predecessor provisions, which referred to the associated operations being "**in relation to** any transfer of assets" (s719) and being ones the individual had power to enjoy "**as a result of**…" (s720)).

279. In the light of that, for the associated operation to be relevant to the charge, it would need to be established that i) new income arose to the employer or ii) the associated operation gave rise to a new power to enjoy.

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[5] Although the appellant raised a procedural objection to the UT considering these points submitting they were out of scope of HMRC's reply, which was restricted to a reply on the EU law arguments concerning TOAA we consider it was in scope: it was relevant to the EU law issue because it was relevant to the touchpoint between the EU law freedoms and domestic legislation restriction as those arose on the facts; it replied to points the appellant had raised in that context concerning "power to enjoy" and "associated operations".

280.HMRC rely on these principles to seek to sidestep the EU law arguments by arguing the payments into the trust and the loans, even if capital movements, were not capital movements which the TOAA restricted. The steps after the redirection of Mr Hoey's remuneration were irrelevant. They did not mean that new income arose to the employer, or a new "power to enjoy" that income arose, which was not in existence before.

281. The difficulty in this position however is revealed by the way HMRC have described those steps as nevertheless being "mechanisms giving rise to the power to enjoy and part of the arrangements". Their argument also appears to us to be at odds with the stance they took before the FTT where it was argued the steps were "associated operations" and that as a result of the relevant transfer (the entry into the employment contract) and those associated operations, Mr Hoey had power to enjoy the income which arose to Penfolds/ Hamilton. Moreover, the position is also difficult to reconcile with the FTT's consideration of these steps (as set out at [153] of its decision), when considering the motive defence. That suggests it must have considered them as relevant transactions (s737 refers to "relevant transactions" defined as the relevant transfer, associated operations, or a combination of those). No challenge regarding error of law is made in that respect (see [233] above).

282.Given the assumptions the FTT made as to what constituted relevant transactions, we consider we should proceed on the basis that the additions to the EBT and loans made from it were associated operations which had met either the new income or new power to enjoy tests. As to whether these transactions are restricted by the TOAA, the new income, and new power to enjoy tests, only serve to confirm that transactions which are associated operations are intimately connected with the operation of the TOAA charge. As already mentioned, associated operations also feature in the motive defence (as they are "relevant transactions"). The motive defence in turn governs the ultimate scope of the TOAA charge. The issue of what constitutes associated operations may also be relevant to the quantum of the charge (as illustrated by the facts in *Fisher* – see [97] onwards of *Fisher UT*). We therefore agree with the appellant that HMRC takes too narrow a view regarding the restrictions imposed by the TOAA. As regards the capital movements involved, namely the additions to the EBT, and payments from it, those movements do therefore, in our view, need to be analysed further.

Mr Hoey able to rely on payment from end user to offshore employer?

283.In addition, Mr Hoey relies on the principle in the CJEU's decision in *Felixstowe Dock and Railway Co Ltd and others v HMRC* (Case C-80/12) for the proposition that he can complain about infringement of EU law rights, because he can rely on the restriction of his employer's rights or the end users' rights. The payments from the end users to the employer could in principle be capital movements. *Felixstowe* concerned a claim for corporation tax relief involving a loss surrender treatment which differed depending on whether a so-called link company was resident in the UK or another

member state. The claimant had not exercised freedom of establishment, but its tax position was adversely affected. The court's reasoning was that the legislation would inhibit the establishment of a link company in another member state, and that to make the freedom effective, claimants, who were worse off as a result, ought to be able to invoke rights even though they had not exercised such rights themselves.

284.For that principle to apply however there must be a restriction on the person whose exercise of freedom is being relied on such that the restriction then affects the tax position of the person who has not exercised such rights. We agree with HMRC that the appellant's difficulty is in identifying the restriction on the end user's or the employer's free movement of capital. It has not been identified in what way for instance the end user's free movement of capital (the payment from it to the employer) was inhibited by the TOAA charge. Similarly, as regards the offshore employer's provision of services to the end user (even if that is treated as a movement of capital) it has not been identified how any such right is restricted by the TOAA code.

2) No infringement of Article 63 free movement of capital because the movements are an unavoidable consequence of the restriction of another EU law freedom?

285.HMRC argue that even if the TOAA provisions did produce a restrictive effect on movements of capital, these restrictive effects are unavoidable consequences of other freedoms. While free movement of capital under Article 63 applies to third countries, the other freedoms do not. CJEU case-law establishes that the freedom under Article 63 should not be interpreted to indirectly expand the benefits of freedoms that only apply as between Member States.

286.That risk was expressed in *Test Claimants in the FII Group Litigation* (Case C-35/11), which concerned UK legislation on the tax treatment of foreign dividends, as follows:

> "[100] Since the Treaty does not extend freedom of establishment to third countries, it is important to ensure that the interpretation of article 63(1) TFEU as regards relations with third countries does not enable economic operators who do not fall within the limits of the territorial scope of freedom of establishment to profit from that freedom."

287. However, in the particular circumstances of that case, the court concluded there was no such risk in relation to subversion of freedom of establishment. That was because the legislation did not "…relate to the conditions for access of a company from that member state to the market in a third country or of a company from a third country to the market in that member state". The relevance of such risk and also the circumstances when such risk did not arise was confirmed again in the *Emerging Markets* case.

288.No real dispute can arise, in our view, regarding the existence of the principle HMRC advance. The point of difference between the parties is on whether the analysis, regarding which of two possible rights should apply, stops once the purpose of the legislation is considered, as the appellant argues, or whether one must go on to consider the facts as HMRC argue. Thus, the appellant submits, given the clear purpose of TOAA concerns transfers of capital, that is enough to conclude free movement of capital is engaged.

289.The backdrop to *FII* was a case law distinction between holdings giving decisive influence, where the relevant freedom was establishment, and where the holdings did not, where free movement of capital was relevant. The legislation did not distinguish between situations where the member state company held a controlling stake in the third country company. The question arose whether the member state company could complain that such legislation was inconsistent with free movement of capital.

290.The court's recourse to the purpose of the legislation, arose in the particular context explained as follows:

> "95. It was thus that, in para 37 of its judgment in FII (No 1), the court established that the cases chosen as test cases in the proceedings before the referring court concerned United Kingdom-resident companies which received dividends from companies established in other member states that were wholly owned by them. As the nature of the interest in question would confer on the holder definite influence over the decisions of the company paying the dividends and allow it to determine the company's activities, the court held that the Treaty provisions on freedom of establishment would apply in those test cases.
>
> 96. However, in a context such as that at issue in the main proceedings which relates to the tax treatment of dividends originating in a third country, it is sufficient to examine the purpose of national legislation in order to determine whether the tax treatment of such dividends falls within the scope of the Treaty provisions on the free movement of capital."

291. The wording of [96] and its reference to "sufficient" suggests to us that recourse to purpose was the endpoint in that particular case as the legislation there was not to do with market access but the tax treatment of dividends. The tax treatment of foreign source dividends (even though it applied where the recipient member state company had decisive influence and therefore engaged freedom of establishment) did not affect market access. So, the CJEU was not laying down any general principle that it was unnecessary to look at the factual circumstances but saying in that case, it was enough to look at the legislation.

292.The court had explained earlier, citing a number of its previous decisions, at [94], that where the purpose of the legislation could not determine which freedom was

predominant (there freedom of establishment and free movement of capital with respect to movements between member states) "the court takes account of the facts of the cases in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within one or other of those provisions".

293.As regards the TOAA's purposes it is clearly, as HMRC point out, capable of applying to all sorts of different situations and transactions which may engage other freedoms apart from free movement of capital. This is demonstrated by its very wide definition of assets, so as to include the creation of rights which in turn means it may apply to matters, such as entering into employment contracts, which do not amount to capital. Recourse to the TOAA's purpose does not resolve the question in the way the tax treatment of dividends purpose did in *FII.*

294.It is therefore necessary to look at the factual circumstances in which the relevant capital movements are said to be restricted. These narrow down to the payments into the EBT and loans out of it to consider whether it is justified to examine them under Article 63 or not (because in so doing it enables Mr Hoey to profit from a freedom which would not apply because of such freedom's limitations regarding third countries).

295. HMRC highlight the income derived from Mr Hoey's activities under the terms of his contract of employment with the third country employer. The freedom that would have been in point (if his employer was not a third country entity) would either be freedom to receive services (Article 56), or in respect of the remuneration for providing his services as a worker, the free movement of workers (Article 45). (Article 45 provides that: "1. Freedom of movement of workers shall be secured within the Union. 2. Such freedom shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment"). Allowing Mr Hoey to rely on Article 63 would indirectly, and contrary to the Treaty, permit those who do not fall within the territorial scope of such freedoms to access the internal market.

296.Viewed in the abstract, we can see how it might be argued that a situation where an employee decides to invest his or her remuneration in a third country entity, or where a third country entity (the EBT) makes a cross border loan to a person in a Member State are just what was intended to fall within Article 63. But that would not reflect the facts here. Mr Hoey's concession entails that the additions to the trust are part of his remuneration. The interest free loans made to him were also a form of benefit arising to him through his employment status. We consider any infringements would thus fall under the scope of the protection of free movement of workers under Article 45 TFEU, which also includes the protection of rights to receive remuneration. But, because there is no restriction, as HMRC point out, on Mr Hoey's right to receive remuneration based on his nationality, that Article does not apply.

297.We consider that means, although on the face of it there are movements of capital within the arrangements Mr Hoey entered into which are restricted by the TOAA, they do not justify an independent examination of the Article 63 free movement of capital.

298.The result of the above is that we disagree that the facts of this appeal engage any EU law arguments regarding the TOAA charge. The entry into the employment contract is not a movement of capital. The payment from the end-users to Penfold/ Hamilton, while a movement of capital, is not restricted by the TOAA code and does not enable Mr Hoey to complain about those rights under the free movement of capital. The additions to the EBT and loans therefrom, while on their face capital movements restricted by the TOAA code, do not justify an independent examination of Article 63 because they result from the exercise of other rights.

299.For that reason, HMRC's cross-appeal on the EU law points is allowed. It follows our analysis above that the FTT was wrong to conclude, at [178] of its decision, that the TOAA restricted Mr Hoey's freedom to transfer capital. We will therefore set aside the FTT decision and remake it so as to incorporate our reasoning above and so as to conclude that there was no restriction on the facts of the case which justified an examination of the free movement of capital.

Whether HMRC require permission to run an EU law abuse rights argument

300.It is convenient to mention at this point that shortly before the hearing before us, an issue arose as to whether HMRC needed permission to advance a ground relating to the doctrine of abuse of rights under EU law, and if they did, whether such permission should be granted. The appellant objected to HMRC raising arguments on abuse of process emphasising that the issue was only raised for the first time in HMRC's skeleton argument before the UT. HMRC's response is that the point cannot be regarded as new when the issue before the UT is whether domestic legislation infringes free movement of capital. They maintain it was a point that was raised before the FTT.

301.We note HMRC's references in its FTT skeleton to "wholly artificial arrangements" and "out of scope" come right at the end of its EU law analysis. The references were relied on at the point when it discussed the proposition that a conforming interpretation was not necessary where the situation was not in scope of EU law. Similarly, that is the context in which it was discussed in HMRC's note on TOAA which was provided to the FTT. HMRC refer to the FTT's finding at [182] but the FTT made that in the context of considering arguments concerning whether any infringement was justified or proportional, not regarding whether EU rights were not engaged in the first place due to the abuse of rights. None of the points raised address use of the EU case-law on abuse of rights, as a means of saying EU law was not engaged *before* any analysis of justification, proportionality or conforming interpretation.

302.We therefore reject HMRC's argument that the point (in the way it is now argued as relevant at an earlier stage in the analysis) was raised in advance. We also do not consider that it was, in that respect, a point available in reply as part of the case that the appellant is unable to rely on EU law freedoms. The FTT found there was clearly a restriction on Mr Hoey's freedom to transfer capital. We note HMRC raised a number of points in its grounds of appeal as to why that was incorrect. If abuse of rights was sought to be put forward as another reason why that conclusion was correct then permission to add it as a new ground ought properly to have been applied for.

303.To the extent, however, that the doctrine of abuse of rights was relevant in the later stages of the EU law analysis (regarding justification and proportionality), we cannot see that the appellant has been prejudiced. The appellant said very little in its grounds of appeal regarding those later stages and by outlining its position HMRC were in essence disclosing in advance what they might otherwise have left to a reply. We therefore consider we could have engaged with the abuse of rights arguments, if it had become necessary, but only in so far as relevant to the issue of whether any restriction on free movement of capital rights was justified or proportionate.

3) Even if Art 63 engaged was any restriction justified, suitable and proportionate. Can the motive defence be construed in a way that conforms to EU law?

304.The remaining sections of our decision proceed on the premise that we are wrong in the above conclusions, and that one or more variously of, the entering into the employment contract, additions to the EBT, the loan from the EBT, and movements between the end user and the offshore employer, are relevantly restricted by the TOAA provisions, and do not engage other freedoms with the effect that Mr Hoey's free movement of capital rights are infringed.

305.*The FTT's analysis*: The FTT considered there was a restriction on Mr Hoey's freedom to transfer his capital (his contract of employment in that the TOAA was triggered where this was to a company in third country but not if the company was resident in the UK ([178]). It then considered whether the aim (preventing the transfer of UK taxable income abroad by transferring the assets which gives rise to that income) was justified ([180]). Referring to the CJEU's discussion of what constituted "wholly artificial arrangements" in *XGmbh v Finanzamt Stuttgart – Korperschaften* (Case C-135/17), the FTT concluded, although it did not say so in terms, that Mr Hoey's arrangements were such arrangements. Thus, while the TOAA legislation did infringe free movement of capital, it was "a reasonable and proportionate response to achieve its objectives of preventing the transfer of income abroad from the UK" ([183]).

306.The appellant submits the FTT was wrong to find (at [182]) that the TOAA provision did not unlawfully restrict free movement of capital. He submits the issues of justification and proportionality were dealt with in *Fisher UT*. The UT confirmed the charge under the TOAA code is inconsistent with EU law. The need to take a

conforming interpretation means the motive defence (s737 ITA) must be read widely so that it applies unless the arrangements are "wholly artificial" in the EU law sense. Mr Hoey's arrangements were not. Accordingly, Mr Hoey submits, he falls within that conforming interpretation and can avail himself of EU law.

307.HMRC argue that, insofar as TOAA applies to the facts of this appeal, the TOAA provisions are targeted anti-avoidance provisions. Their purpose is to prevent UK resident individuals avoiding liability to income tax by means of a relevant transfer where the motive defence is not satisfied. They are justified by the public interest in preventing the avoidance of tax and do not go further than is strictly necessary to achieve their purpose. They are justified and proportionate because they include a motive defence that is capable of being construed as thwarting only "wholly artificial arrangements". Even if they are not, they are capable of being construed in conformity with EU law such that charge on Mr Hoey under the TOAA provisions is not disapplied.

308.It appears to us both parties accept that tax avoidance may in principle provide a justification and that the concept of tax avoidance has a particular meaning under European law. But they differ as to the extent of what is caught by the definition, and on whether Mr Hoey's facts fall within such definition.

309.In the context of Freedom of Establishment, the European court in *Cadbury Schweppes* (Case C-196/04) (at [55]) explained:

> "the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory."

310.The CJEU in *X Gmbh* clarified the concept of "wholly artificial arrangement" was not limited to establishment of a company which did not reflect economic reality (e.g letterbox companies). The FTT referred (at [181]) to *X Gmbh* where the CJEU held:

> "[84] … in the context of the free movement of capital, the concept of 'wholly artificial arrangements' cannot necessarily be limited to merely the indications referred to in paragraphs 67 and 68 of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:544), that the establishment of a company does not reflect economic reality, since the artificial creation of the conditions required in order to escape taxation in a Member State improperly or enjoy a tax advantage in that Member State improperly can take several forms as regards cross-border movements of capital. Indeed, those indications may also amount to evidence of the existence of a wholly artificial arrangement for the purposes of applying the rules on the free movement of capital, in particular when it proves necessary to assess the commercial justification of acquiring shares in a company that does not pursue any economic activities of its own. **However, that**

> **concept is also capable of covering, in the context of the free movement of capital, any scheme which has as its primary objective or one of its primary objectives the artificial transfer of profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.**" (FTT's emphasis)

311. The appellant's arguments appear to simply apply the formulation in *XGmbh.* That is too narrow a view. From the court's reasoning it is plain that, because capital movements may take many forms, the concept of wholly artificial arrangements might encompass "any scheme which has as its primary objective or one of its primary objectives the artificial transfer of profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate". That formulation was clearly one example (and we note the UT in *Fisher* described it on those terms (at [178]).

312. HMRC submit that in the context of Free Movement of Capital (where against their view – entering into employment contract is a movement of capital) it must follow that any scheme which has as its primary or one of its primary objectives the artificial transfer of the source of employment income from a Member State to third country with a low tax rate is abusive in the relevant sense.

313. They say the authorities make clear taxpayers cannot rely on treaty freedoms where wholly artificial arrangements are involved i.e. where domestic rules are abused for wholly artificial purposes. (As explained above at [303] we deal with this point in the context of justification rather than earlier on in the analysis). HMRC highlight that a scheme that seeks to circumvent national law (here the UK's employment income tax provisions) is considered abusive under the European case-law.

314. We consider however that HMRC formulate the EU concept of wholly artificial arrangements too broadly. Their formulation misses out further constraints to the concept implicit in the court's definition: the artificial arrangements must seek to achieve the effect that the activity in the member state is taxed in the third country at a lower rate. In other words, it is not enough that there are artificial arrangements which happen to involve a third country which has lower tax rates.

315. For their proposition HMRC rely on *Cadbury Schweppes* (at [55]) *XGmbH* ([80] – [84]) and *Itelcar Automoveis de Aluger Lida v Fazenda Publica* (Case C-282/12) (at [34] - [35]). Each of the cases relied on echo the idea that measures restricting free movement of capital may be justified where the legislation "specifically targets wholly artificial arrangements which do not reflect economic reality and the sole purpose of which is to avoid the tax normally payable on the profits generated by activities carried out on the national territory" (*Itelcar* [34])). The context in each makes it clear the artificiality contemplated is one which purports to make out that the relevant activity, otherwise taxable in the member state, is taxed at a lower rate somewhere else. The reference to "transfer" in *XGmbH* is also consistent with that idea of an inter-state

movement. The cases are therefore not talking about tax avoidance generally but a particular kind of tax avoidance.

316.Thus, in *Cadbury Schweppes* where the factual context was the UK's Controlled Foreign Corporation (CFC) legislation it was the incorporation of CFCs in third countries with lower tax rates which was material. In *Itelcar* the national rule at issue concerned the arbitrary transfer of taxable revenues from that member state to a third country, which meant the profits were not taxed in the state in which the profits had been generated. *XGmbH* concerned legislation which attributed to a member state company, income of the third country company, in which the member state company held a shareholding, in proportion to that shareholding irrespective of whether a distribution had been made. HMRC also refers to *N Luxembourg1 and others* (Case C 115/16) (at [109]) but it is notable the reference to "designed to circumvent the application of the legislation of the Member State concerned" is prefaced with the explanation "Whilst the pursuit by a taxpayer of the tax regime most favourable for him cannot, as such, set up a general presumption of fraud or abuse…"[emphasis added].

317. As the approach in *X GmBH* makes clear, artificiality may take different forms. What is objectionable is where someone seeks to escape a member state's taxation by being taxed lower in a third country, but where that does not reflect that the economic location of the activity takes place in the member state. Moreover, if the artificial arrangements concept was just about avoiding national taxes per se, it is difficult to see why the case-law would need to refer to transfers to jurisdictions with *low* tax rates.

318.HMRC emphasise the above cases refer to abuse of EU law rights and part of the wider doctrine of abuse of rights. It is correct that *Cadbury-Schweppes* (at [64]) does cite *Halifax and Others* (Case C-255/02) [74] and [75] - there the court sets out the conditions: these concern the accrual of tax advantage that would be contrary to the purposes of the provision (there the VAT Sixth Directive) and the need for objective factors showing the essential aim is to obtain a tax advantage as opposed to there being some other explanation. The foundation for those conditions follows however from what the court said earlier at [69] that the application of community legislation cannot be used to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (referring to *Emsland-Starke* at [51]). So, the wider point is one about not allowing European legislation to be used for purposes which run contrary to the purposes underlying the European legislation.

319.In summary we would have concluded, if it became necessary, that the definition of wholly artificial transactions is thus wider than transfers of company profits (because capital movements are varied) but not as wide as HMRC suggest.

320.Before applying the above to the facts there is a prior question as to whether the TOAA legislation does target such artificiality. As is clear from *Fisher UT* it does not. That is because the means by which one escapes liability – the motive defence - catches arrangements which are not artificial in the EU law sense. The restriction is not therefore justified and must be read in a conforming way so as to allow, where a person is within scope of EU law, the motive defence to apply unless the person engaged in wholly artificial arrangements as that term is understood in EU law. The relevance of looking at the facts is that, if on the facts, Mr Hoey's case were to fall within the EU definition of wholly artificial arrangements, then even if such a conforming interpretation were taken it would not help him.

Mr Hoey's facts artificial in EU law sense?

321.HMRC say the FTT clearly found the arrangements fell within this definition of artificial (which is also termed abusive). In addition to the findings, HMRC refer to the fact it is accepted the arrangements were similar to the arrangements described by Lord Hodge in *Rangers* as "a tax avoidance scheme". Mr Hoey entered into a tax avoidance scheme designed to circumvent the UK's employment income tax provisions.

322.In any case Mr Hoey argues this was not a wholly artificial in that there was a genuine operation in the Isle of Man and Guernsey, genuine transactions and no transfer of profits. All the profits were taxed in the UK.

323.While HMRC rely on the FTT's findings at [153], [160] and [182] to support the case the arrangements were wholly artificial none of these, individually or taken would support the EU law definition we have described above.

324. All the FTT stated, at [182], was that:

> "It seems to me, therefore, in the context of this very recent case, that "the artificial transfer of profits made by way of activities carried out in the [UK] to third countries with a low tax rate" is very much the sort of anti-avoidance objective which the CJEU might have in mind".

325.FTT [182] is not, therefore in terms, a finding but an acknowledgement of the broader test in *XGmbH*. To the extent, when read in context with the conclusion in [183], it is thought that the FTT considered that broader test was fulfilled, as regards Mr Hoey's facts, then we fail to see what basis there would be for that in the underlying findings of fact. That, in itself tends to reinforce the view the FTT was making a generic statement about the TOAA legislation rather than saying anything specifically about the particular facts of Mr Hoey's case. (While the appellant, in his written grounds, challenges the finding as inconsistent with the finding that Penfold/Hamilton had nil income for TOAA purposes, we do not consider there is such an inconsistency. A transaction which was determined to have the consequence of nil income would not preclude a finding regarding the objective of the transaction.)

326.As regards the avoidance of employment tax, FTT [153] does not explain what it is about setting the umbrella company offshore which avoids tax (as Mr Hoey points out that company did deduct tax on some of the earnings). Moreover, there is no finding the tax rates were lower. The payment into a trust, which then makes interest free loans, with the expectation those are not paid does not explain how any offshore element involving a jurisdiction with lower taxes was relevant. Similarly, the finding at FTT [160] that some of the transactions: the interposition of a non-resident employer, a trust, and the making of the loans from the trust, were "more than incidentally designed for the purpose of avoiding liability to taxation" does not account for the relevance of the offshore elements exploiting lower tax rates in a third country.

327.To the extent that the EU law definition of wholly artificial arrangements can be extended, as HMRC argue, to artificial arrangements involving employment source income, such extension by analogy would also have to incorporate the narrower basis of the exception for artificial arrangements we have described. *Rangers* might show how the arrangements could be viewed domestically as a tax avoidance scheme, but that would not mean it necessarily fell within the EU law definition of wholly artificial arrangements.

328.If it became necessary to consider whether any restriction was justified we would therefore conclude the FTT erred in law in finding the restrictions were justified and that the decision be set aside and remade on the basis of the reasoning set out above.

Appellant's further points

329.In view of this, it would not have been necessary to deal with the appellant's point, that the burden lay on HMRC to establish that the transaction was wholly artificial and also that it was not open to HMRC to refer to the transactions being wholly artificial as this was not pleaded. But if it were, we would not have considered it necessary to deal with these points. The appropriate time to take these points was before the FTT made its determination. Moreover, no error of law regarding these points was alleged in the grounds before the UT.

330.The appellant's written grounds criticise the FTT for failing to address the issue of proportionality separately from question of justification. On this, while HMRC accept these questions are separate matters they submit this does not mean that the FTT needed to address them separately. It was clear the FTT found the provisions both justified and proportionate. This point was not pursued in oral submissions and we do not consider it further.

Disapplication vs conforming construction?

331.Again, this part of our decision is only relevant to the extent we are wrong in our view that there was no relevant restriction of the free movement of capital.

332.As we explained above (see [259]), we disagree with the appellant that *Fisher UT* confirms that the TOAA must be disapplied across the board. The effect of *Fisher UT* is fact-sensitive in that the motive defence is available to someone within scope of EU law who is not carrying out wholly artificial arrangements in the sense described in the case-law.

333.However, assuming we got this far in the analysis, and agreed the TOAA restricted Mr Hoey's free movement of capital, then we would have held the TOAA restricted the capital movements in a way which was not justified, and which required a conforming construction to be taken. That would entail applying the motive defence so as to apply, except where there were wholly artificial arrangements in the EU law sense. For the reasons explained above, we do not consider the facts found by the FTT to establish that Mr Hoey's arrangements were artificial in that sense. So, he did not fall within EU law exception to the motive defence. Thus, the TOAA charge, interpreted to take account of free movement of capital, would not apply to him.

Summary of conclusions

334.We summarise the conclusions reached insofar as is necessary for the purposes of disposing of the appeal and cross appeal.

335.In respect of Mr Hoey's appeal, we conclude the FTT did not err in law in deciding:

(1) Mr Hoey's entitlement to a PAYE credit under PAYE Regulation 185 and Regulation 188 was not within its jurisdiction.

(2) The discovery assessments were valid.

(3) Regarding the TOAA charge, that a) the motive defence was not available b) the TOAA charge was not unlawful under EU law.

336.The appellant's appeal is therefore dismissed.

337.In respect of HMRC's cross-appeal, concerning the TOAA charge, we conclude:

(1) The FTT erred in law:

(a) In concluding it was not necessary for it to deal with the TOAA charge issue;

(b) In its analysis of the motive defence (Condition B(a) – whether the relevant transactions were genuine commercial transactions); and

(c) In concluding the TOAA charge restricted free movement of capital.

(2) The FTT did not err in law:

(a) In concluding the quantum of the income of the "person abroad" was nil.

(b) In analysing the facts regarding Condition A of the motive defence, in particular in finding that Mr Hoey's motivation was not related to tax avoidance.

338.HMRC's cross-appeal in relation to the TOAA issues is therefore allowed in part. It is allowed in relation to Cross-Appeal Grounds 1, 3 (in part), and 4 and dismissed in relation to Cross-Appeal Grounds 2 and 3 (in part).

339.As we have identified errors of law in the FTT Decision we can, and consider we should, set it aside. However, taking account that the errors do not undermine the underlying findings of fact made, we consider we should remake the decision rather than remit it to the FTT. Taking account that the underlying facts remain intact, and that the error regarding Condition B(b) of the motive defence is immaterial to the outcome, we consider the remade decision should reflect the FTT decision but with the following changes. The part of the FTT Decision dealing with the domestic application of the TOAA charge is not to be regarded as obiter (see [206] above). The part of the FTT decision dealing with the EU law arguments in relation to TOAA issues (paragraphs [170] to [183]) is replaced so as to incorporate our reasoning that the TOAA did not infringe EU law because the free movement of capital was not engaged on the facts of the case (as set out at [253] to [298]).

340.The outcome, for Mr Hoey, is that the appeals against the discovery assessments for 2008-9 (in the amount of £40,437.15) and for 2009-10 (for £2,334,20) and the amendments to his 2010-11 self-assessment (for £36,810.20), which HMRC made, are dismissed. If he wishes to challenge the amount of tax which he should pay by virtue of any entitlement to a PAYE credit under Regulations 185 and 188 that must be argued elsewhere.

341.The TOAA charge basis of assessment remains, as the FTT concluded, at nil. Mr Hoey's argument that the charge unlawfully breached EU free movement of capital rights is rejected.

Disposition

342.The appellant's appeal is dismissed. HMRC's cross-appeal is allowed in part. The overall result is that the appellant's appeals against the discovery assessments for 2008-9 and 2009-10 and the appeal against the closure notice for 2010-11 are dismissed.

Signed on Original

MR JUSTICE ADAM JOHNSON

JUDGE SWAMI RAGHAVAN

RELEASE DATE: 12 April 2021