[2021] UKUT 0281 (TCC)

Appeal number: UT/2020/0052

INCOME TAX – tax scheme relating to film distribution rights – whether non-trade business of exploiting films – taxation of Minimum Annual Payments under scheme and whether taxpayer entitled to such payments – whether loan interest payments deductible – whether statutory conditions for discovery assessments satisfied – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THOMAS WILLIAM GOOD **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE MICHAEL GREEN
JUDGE THOMAS SCOTT

Sitting in public by way of video hearing treated as taking place in London on 27 to 29 April 2021 with further written submissions from the parties received on 29 September 2021

Rupert Baldry QC, instructed by Ian Walker Tax LLP, for the Appellant

Aparna Nathan QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Mr Thomas Good ("Mr Good") appeals against the decision of the First-tier Tribunal (the "FTT") reported at [2020] UKFTT 0025 (TC) (the "Decision"). The FTT determined that Mr Good was liable to income tax on certain payments received under a scheme for the exploitation of film rights in which he had participated, that he could not deduct from those receipts interest payments and other expenses for income tax purposes and that he was not entitled to reduce his taxable income with brought forward losses. The FTT also decided that the discovery assessments issued by HMRC to Mr Good were not invalid on the grounds of staleness, and that they otherwise satisfied the relevant statutory conditions.

2. Mr Good appeals against all of these decisions.

Procedural history

3. Before the FTT, Mr James Ryan was also an appellant and the Decision dealt with Mr Ryan's appeal in the same way. Mr Ryan withdrew his appeal from the Decision on 14 April 2021, and we do not deal in this decision with any issues relating to Mr Ryan.

4. Permission to appeal against the Decision was granted by the FTT as regards some issues and by this Tribunal as regards others. As we describe below, not all of the grounds for which permission was granted were pursued before us.

5. On 13 April 2021 there was a case management hearing lasting a day. At that hearing, the appellants made late applications for directions (1) ordering HMRC to disclose various documents relating to the film scheme which had not been sought by the appellants before the FTT and (2) vacating the scheduled hearing date and staying the appeal behind the decision of the Supreme Court in *HMRC v Tooth*. Judge Scott refused both applications.

6. On 11 May 2021 we issued directions permitting the parties to make further submissions in relation to the relevance to the issues arising in the appeal of the decisions in (1) *Bostan Khan v HMRC* [2021] EWCA Civ 624 ("*Khan*"), released on 30 April 2021 (2) *HMRC v Tooth* [2021] UKSC 17 ("*Tooth*"), released on 14 May 2021 and (3) *Ingenious Games LLP and Ors v HMRC* [2021] EWCA Civ 1180 ("*Ingenious Games*"), released on 4 August 2021. Further submissions were received from the parties on 29 September 2021, which we have taken into account in reaching our decision.

Background

7. In the tax year 2007/08 ("Year One") Mr Good entered into a scheme (the "Scheme") designed by Scion Structured Products Ltd ("Scion").

8. The FTT summarised the aim of the Scheme and its intended operation as follows, at [14]-[25] of the Decision:

> 14. The Scheme was a tax avoidance scheme. It was disclosed to the Respondents by way of a completed AAG [the relevant form] on 27 April 2007. This summarised the arrangements as follows:
>
> "A trade, set up through which an individual will enter into a series of transactions to purchase, enhance, exploit and sell film distribution rights worldwide. The individual undertaking the trade will incur expenditure on purchasing discrete film distribution rights with the intention of selling or exploiting those rights in return for the right to participate in the proceeds of the exploitation of the same discrete film distribution rights."
>
> 15. The Explanation on the AAG says as follows:
>
> "2. Additional financing is offered in order to assist in the funding of the purchase price of the discrete film distribution rights by way of a loan which is full recourse as to interest and limited recourse as to capital repayments.
>
> 3. In the early years of the trade it is anticipated that a loss will be incurred as a result of the incurral of expenditure (and a lack of income) which will be available for sideways loss relief."
>
> 16. The Respondents gave it a Scheme Reference Number ('SRN') (07541980) on 28 September 2009.
>
> 17. The essential steps of the Scheme are set out in HMRC's Amended Combined Statement of Case.
>
> 18. But, in broad terms, the Scheme involved a film studio selling the distribution rights to a film to a Scion film rights company. That film rights company would then sell or license the film rights to investors, amongst whom were the Appellants.
>
> 19. The Appellants would then ostensibly be trading in the buying, selling and exploitation of film rights.
>
> 20. In general, a Scheme user was required to contribute 21% of the cost of the film distribution rights, with the remaining 79% being provided by way of a loan from a Scion lender for a six year term.
>
> 21. That loan would be made available by a Scion lender on limited recourse terms (that is, limited recourse as to capital but full recourse as to interest): 'the Loan'.
>
> 22. The terms of the sale of the film rights would be for a share of profits supported by a 'Minimum Annual Payment' ('MAP') sufficient to meet the interest obligations under the Loan.
>
> 23. The Registration Agreement provides that the participant shall 'irrevocably agree' that the participant 'acknowledges' their understanding that 'you will be required to enter into security arrangements with the Lender pursuant to which you will grant in favour of the Lender a charge and an assignment of, inter alia, your right, title

> and interest in part or all of the sale proceeds payable to you from exploitation of the Film Rights acquired'.
>
> 24. An investor would sell the film rights in return for a share of the revenues arising from the exploitation of the film rights. An investor would use a proportion of the sale proceeds to repay the Loan and would retain approximately 45% of the revenues, leaving the investor with a trading profit.
>
> 25. As to the tax benefits, it was anticipated that the loss resulting from the fees and expenditure on the film rights acquisition would be available for sideways loss relief and that the interest on the loan would be deductible.

9. The film rights were acquired under an Acquisition Agreement which required a lump sum to be paid for them. Those film rights were then sold pursuant to a Distribution Agreement for a consideration comprising a fixed element (the Minimum Annual Payments (MAPs)) and an entitlement to a variable element calculated by reference to gross receipts from the relevant film. The income tax loss was intended to arise in the first year by virtue of the difference between the total cost of acquiring the rights and the value of the consideration received under the Distribution Agreement (calculated in accordance with Generally Accepted Accounting Principles).

10. HMRC denied the purported trading loss and sideways loss relief. Eventually, Mr Good conceded that he was not carrying on a trade and he abandoned his claims for sideways loss relief. So, the appeal before the FTT did not have to determine the effectiveness of the Scheme to produce the intended tax loss.

11. However, HMRC also issued discovery assessments against Mr Good for the three years 2010/11, 2011/12 and 2012/13, for a total of about £180,000. The effect of those assessments was to subject Mr Good to income tax on the MAPs payable under the Scheme for those years, and to deny him a deduction in respect of the loan interest payments due under the Scheme for those years.

12. Before the FTT, Mr Good appealed in relation to his liability to income tax on the MAPs, the deductibility of the interest payments and certain other expenses, and the procedural validity of the discovery assessments.

Issues determined by the FTT

13. The FTT reached the following conclusions relevant to this appeal:

> (1) The discovery assessments issued to Mr Good were not procedurally invalid on grounds of staleness.
>
> (2) The requirement was satisfied that in order for the discovery assessments to have been validly issued, an HMRC officer could not have been reasonably expected to have been aware of an insufficiency of tax for that year before the end of the period in which an enquiry into that return could be opened.

(3) The Scheme arrangements amounted to a non-trade business involving the exploitation of film rights within section 609 Income Tax (Trading and Other Income) Act 2005 ("ITTOIA").

(4) The MAPs were income from that non-trade business to which Mr Good was entitled, so that he was liable to income tax on the payments under section 611 ITTOIA.

(5) The loan interest payments made by Mr Good were not deductible expenses of his non-trade business.

(6) Other expenses claimed as deductions by Mr Good were not deductible expenses because they were not incurred wholly and exclusively for the purposes of generating the income from the Scheme.

(7) The loss realised by Mr Good in Year One could not be carried forward as a non-trade miscellaneous loss to be set against the tax due on the MAPs.

(8) If the MAPs had not been taxable under section 609 ITTOIA, they would have been liable to income tax as miscellaneous income under section 687 ITTOIA.

14. Mr Good appeals against each of these decisions. We now consider the issues in the same order as the FTT.

Discovery Assessments: relevant legislation

15. For the periods relevant to the discovery assessments issued to Mr Good, the ordinary time limit for issuing assessments was set out in section 34(1) Taxes Management Act 1970 ("TMA"). This provided that "[s]ubject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax … may be made at any time not more than four years after the end of the year of assessment to which it relates"[1].

16. HMRC have powers to issue what is called a discovery assessment. The position was described by the Supreme Court in *Tooth* as follows:

> [1]…Broadly speaking, if the Revenue are not content with the accuracy of the self-assessment to income tax (and capital gains tax) in a taxpayer's tax return, the Revenue may open an enquiry into the return and amend the assessment. The enquiry must be opened within one year of the filing of a timely return (and slightly longer if the return is late), although it need not be completed within that period. But if the Revenue find out ("discover") that an assessment is or has become insufficient, then subject to satisfying one or the other of two conditions, they may make a fresh assessment (a "discovery assessment") in the amount

[1] At [76], the Decision incorrectly sets out a prior version of section 34(1), which contained a time limit of five years before it was amended by the Finance Act 2008, section 118(1), Schedule 39 Paragraphs 17(1) and (3).

which they think will be sufficient to make good to the Crown the loss of tax.

17. The circumstances in which HMRC may issue a discovery assessment are set out in section 29 TMA, which, so far as material, stated as follows:

> **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) ...
>
> (b) that an assessment to tax is or has become insufficient, or
>
> (c) ...
>
> 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) ...
>
> (3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above -
>
> (a) ...
>
> (b) ...
>
> unless one of the two conditions mentioned below is fulfilled.
>
> (4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.
>
> (5) The second condition is that 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; or
>
> (b) informed the taxpayer that he had completed his enquiries into that return,
>
> 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.
>
> (6) For the purposes of subsection (5) above, information is made available to an officer of the Board if -
>
> (a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;
>
> (b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in

> which he made the return, or in any accounts, statements or documents accompanying any such claim;
>
> (c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer; or
>
> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above -
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
>
> (ii) are notified in writing by the taxpayer to an officer of the Board.
>
> …
>
> (8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

Issue One: Were the Discovery Assessments Stale?

18. Following the decision of the Upper Tribunal in *HMRC v Charlton* [2012] UKUT 770 (TCC), there developed in case law "the idea that a discovery can lose its quality as such if there is a delay [in issuing an assessment] after it is made and, as it has been put in some cases, it becomes stale"[2].

19. Before the FTT and in this appeal, Mr Good argued that each of the discovery assessments issued to him had become stale, and therefore invalid, because of the time delay between the discoveries (the dates of which were in dispute between the parties) and the issue of the relevant assessments.

20. The decision of the Supreme Court in *Tooth* was released after the hearing in this appeal. The Court concluded that there was no notion of staleness inherent in the statutory regime, stating at [76]:

> 76. In our judgment, contrary to the latter part of para 37 in the decision in *Charlton*, there is no place for the idea that a discovery which qualifies as such should cease to do so by the passage of time. That is unsustainable as a matter of ordinary language and, further, to import such a notion of staleness would conflict with the statutory scheme. That sets out a series of limitation periods for the making of assessments to tax, each of them expressed in positive terms that an assessment "may be made at any time" up to the stated time limit.

21. In his further submissions, Mr Baldry stated, quite rightly, that in light of the decision in *Tooth* the appeal on this ground was no longer pursued.

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[2] *Tooth* at [64].

22. The appeal on Issue One is therefore dismissed.

Issue Two: Section 29(5) TMA

23. Where, as in this appeal, the taxpayer has delivered a tax return, section 29(3) provides that HMRC may not issue a discovery assessment unless either the condition in section 29(4) or the condition in section 29(5) is fulfilled. It was and is common ground that section 29(4) is not in point, so that HMRC must show that the condition in section 29(5) was satisfied as regards each of the discovery assessments issued to Mr Good[3].

24. On the facts of this appeal, this means that HMRC must show that, at the time when the enquiry window into the relevant year closed, a hypothetical HMRC officer could not reasonably have been expected to be aware of the insufficiency of tax for that year, on the basis of the information made available to the hypothetical officer (as defined in section 29(6)) before that time.

25. Mr Baldry's skeleton argument appealed against the FTT's decisions that the condition in section 29(5) was satisfied in respect of each of the discovery assessments under appeal. However, he stated in oral submissions that this argument was not being pursued in relation to the 2010/11 discovery assessment[4] We have therefore considered this ground only in relation to the 2011/12 and 2012/13 assessments.

Section 29(5) and (6) TMA

26. There are a number of decisions relating to the interpretation of section 29(5). The most important are *Hankinson v HMRC* [2011] EWCA Civ 1566, *HMRC v Lansdowne Partners Ltd Partnership* [2011] EWCA Civ 1578 and *Sanderson v HMRC* [2016] EWCA Civ 19 ("*Sanderson*"). The principles to be derived from the authorities were helpfully summarised by the Upper Tribunal in *Beagles v HMRC* [2018] UKUT 380 (TCC), in which the Tribunal referred predominantly to the decision of the Court of Appeal in *Sanderson* and the leading judgment of Patten LJ. The principles to be derived were summarised as follows, at [100] of the decision:

> (1) The test in s 29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the

[3] The burden of establishing this, to the ordinary civil standard of the balance of probabilities, rests on HMRC: *HMRC v Household Estate Agents Ltd* [2007] EWHC 1684 (Ch) at [48], applied in *Burgess v HMRC* [2015] UKUT 578 (TCC).

[4] Mr Baldry's subsequent further written submissions stated, without any explanation, that the FTT's decision in relation to section 29(5) was challenged for all relevant years under appeal. If that was not a mistake, we consider that such a challenge in relation to the 2010/11 tax year cannot now be made in light of Mr Baldry's clear and unequivocal concession on this point during the hearing and Ms Nathan's stated reliance on that concession.

characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.

(2) The test requires the court or tribunal to identify the information that is treated by s 29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.

(3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [23]).

We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.

(4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, *Sanderson* [23], *Lansdowne* [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, *Lansdowne* [69]; Patten LJ, *Sanderson* [17](3)).

(5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s 29(6) (Auld LJ, *Langham v Veltema* [33]–[34]; Patten LJ, *Sanderson* [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, *Lansdowne* [69]) but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, *Langham v Veltema* [33]; Patten LJ, *Sanderson* [35]).

(6) As can be seen from the discussion in *Sanderson* (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in *Lansdowne* [70]). The information made available must 'justify' raising the additional assessment (Moses LJ, *Lansdowne* [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in *Lansdowne* [2010] EWHC 2582 (Ch), [2011] STC 372, at [48]).

27. In *Tooth*, the Supreme Court also clarified[5] that there is no concept of corporate or collective knowledge on the part of HMRC applicable in respect of the hypothetical officer in section 29(5).

28. We have applied these principles in our consideration of the section 29(5) issue in relation to the 2011/12 and 2012/13 discovery assessments.

29. It is first necessary to establish what information has been "made available" to the hypothetical HMRC officer by the relevant date. Section 29(6) provides that

[5] *Tooth* [68].

information is made available if (broadly) it is supplied by the taxpayer to HMRC in his return for that year or another document provided to HMRC, or:

> (d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above -
>
> (i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or
>
> (ii) are notified in writing by the taxpayer to an officer of the Board.

30. In *Charlton*, the Upper Tribunal expressed the following view, with which we agree:

> 78. The correct construction of s 29(6)(d)(i) is that it is not necessary that the hypothetical officer should be able to infer the information; an inference of the existence and relevance of the information is all that is necessary. However, the apparent breadth of the provision is cut down by the need, firstly, for any inference to be reasonably drawn; secondly that the inference of relevance has to be related to the insufficiency of tax, and cannot be a general inference of something that might, or might not, shed light upon the taxpayer's affairs; and thirdly, the inference can be drawn only from the return etc provided by the taxpayer.
>
> 79. As we have described, the balance provided by s 29 depends on protection being provided only to those taxpayers who make honest, complete and timely disclosure. That balance would be upset by construing s 29(6)(d)(i) too widely. Inference is not a substitute for disclosure, and courts and tribunals will have regard to that fundamental purpose of s 29 when applying the test of reasonableness.

Section 29(5): the FTT's decision

31. The validity of the 2011/12 discovery assessment is dealt with at FTT [132]-[148]. Much of the discussion concerns staleness. As regards the condition in section 29(5), the FTT records that the enquiry window for that year closed on 7 January 2014: [132]. That is therefore the relevant date by reference to which the condition must be considered.

32. The validity of the 2012/13 assessment is dealt with at [149]-[155], although only the final paragraph concerns section 29(5). The enquiry window for that year closed on 27 November 2014: [149].

33. In his submissions regarding section 29(5), Mr Baldry did not seek to draw any material distinction between the position for the 2011/12 and 2012/13 assessments, and nor will we[6].

34. Beginning with Mr Good's 2007/08 return, the FTT had recorded the following findings, at [9(1)]:

[6] The Grounds of Appeal describe the section 29(5) arguments for the two years in question as "essentially the same".

(a) His 2007/8 return was filed online on 4 July 2008. The return, including the self-employment pages, were prepared for Mr Good by S4 Financial plc and he approved the return for submission;

(b) The self-employment page of his return stated that he was engaged in the business of "Trading in Film Rights", which had started on 25 March 2008, with his books made up to 5 April 2008;

(c) He claimed a turnover of £102,029 in this self-employment, with total expenses of £1,990,367, being £1,901,784 as cost of goods, £88,563 as accountancy, legal and other fees, and £20 bank, credit card and other financial charges;

(d) The turnover of £102,029 was taken from a 'Profit and Loss Account' sent to him from Scion, described as 'Right to Future Income' (page 946 of the bundle);

(e) The £1,901,784 as cost of goods was taken from a 'Profit and Loss Account' sent to him from Scion, described as 'Direct Costs: Revaluation of Debtors' (ibid.);

(f) He claimed to have realised a net trading loss in 2007/8 of £1,888,225, with the same sum as a net business loss for tax purposes;

(g) He sought to set-off loss of £1,238,721 from 2007/8 against other income for 2007/8;

(h) He sought to carry back £649,504 to previous year(s) and set-off against income (or capital gains);

(i) Box 101 said:

> "Please note losses of £649,505 are claimed under s 72 ITA 2007 to be set against early years (sic). This sum should extinguish all income for 2004/5, 2005/6, and 2006/7 and result in a refund due for earlier years of £235,701.60.
>
> The balance of losses remaining of £1,238,721 is therefore being claimed against income of the same year (i.e., 2007/8) under s 64 ITA 2007.

(j) No information was given in the 'White Space' in Box 16 of the Tax Calculation Summary;

(k) An (in-time) enquiry was opened on 24 September 2008;

(l) A letter was sent to S4 Financial plc, on that same date, indicating that the enquiry was being opened, and attaching an 'Information Request;

(m) On 14 October 2008, Mr Good's advisers provided HMRC with some, but not all, of the Scheme documentation, including the Business Plan (but not including the Registration Pack referred to in that plan); the Acquisition Agreements, short form assignments, Distribution Agreements; Deeds of Security Assignment; Assignment, Notice of Assignment and Payment direction;

(n) The 'loan documents' referred to in Point 4 of that letter were not provided, and were requested on 1 December 2008, as was the Registration Pack referred to in the Business Plan;

(o) The loan documents were sent on 26 January 2009;

(p) Officer Stack took over responsibility for the enquiry on 8 April 2009;

(q) The Closure Notice under appeal was issued by Mr Stack on 9 September 2010, pursuant to an application made by Mr Good on 2 March 2010, and a closure direction of the Tribunal (Judge Poole and Ms Johnson) released on 18 May 2010;

(r) The Closure Notice disallowed the trading loss claimed;

(s) Mr Good now concedes that no 'sideways' relief will be available for any loss that may be determined to have arisen to Mr Good in 2007/8, although Mr Good has indicated that he "may seek to roll the loss forward to be used against future profits";

(t) The Closure Notice was appealed by virtue of a letter dated 1 October 2010.

35. By 7 January 2014, Mr Good had filed his return for the year 2011/12 electronically, on 7 January 2013. Box 14 of the self-employment pages included a figure for "turnover" of £136,529, and a figure of £140,250 was included in Box 24 of the self-employment pages as an expense comprising "interest on bank and other loans". The return included a Tax Avoidance Scheme reference number for the Scion scheme, and identified the expected year of a tax advantage as 2007/08[7].

36. The FTT refers at different points in its decision to three other issues of potential relevance to the information "made available". First, in July 2012 a process began of attempted Alternative Dispute Resolution ("ADR") in relation to the Scheme between HMRC and Scheme users, which in due course included Mr Good amongst 102 taxpayers[8]. Second, HMRC had not been provided with or shown any record that indicated what MAPs had actually been paid (or notionally paid) to Mr Good[9]: Third, the FTT found as a fact that the 2011/12 return did not have with it, when filed, a Profit and Loss statement as an attachment[10].

37. At [141] the FTT referred in relation to 2011/12 to documents and information made available to Officer Old of HMRC before he made the discovery assessment for 2010/11. Unfortunately, the FTT's discussion and analysis elides the two issues of staleness and section 29(5), which is unhelpful. The threshold for a discovery by an actual HMRC officer is quite different to the sufficiency of information made available to a hypothetical officer. The issues of fact and law to be determined are therefore materially different. In any event, the FTT found as follows in relation to the information supplied to HMRC by 20 November 2012, when the enquiry window closed for the 2010/11 assessment:

[7] FTT [9(3)].

[8] FTT [68].

[9] FTT [66].

[10] FTT [139].

(1) By then, HMRC had received documents about the Scheme and information provided at a meeting between Mr Good and HMRC on 16 June 2009.

(2) Mr Good's 2010/11 return included the Scheme DOTAS number, which would have allowed HMRC to cross-reference the AAG1 form.

(3) The AAG1 Form would not have been sufficient to alert a hypothetical officer to an insufficiency of tax. It did not refer to the MAPs at all and said nothing about deductions being sought against MAPs. The brief description of the Scheme lacked detail and was opaque. Importantly, the AAG1 Form said nothing about any years subsequent to 2007/08.

(4) The reference in the self-assessment return to "interest on bank and other loans" was too vague to alert an officer to the insufficiency of tax. The "turnover" figure in the return gave no indication that it represented MAPs. There was nothing in the return indicating that the business income was the MAPs. No information was provided in the "Additional Information" boxes to explain how the MAPs were accounted for.

(5) The Scheme Business Plan, Loan agreement and Distribution Agreements had been sent to HMRC by S4 on 14 October 2008.

(6) The focus of the meeting on 16 June 2009 was information gathering and the information gathered was not "sufficient to put HMRC on notice as to the treatment of the interest and MAPs".

(7) In connection with the ADR process, HMRC published a "Position Statement", dated 25 April 2013. It was notable that this did not refer to the MAPs at all.

38. The FTT joined together its conclusions as to the staleness issue and as to the section 29(5) condition for the 2011/12 assessment as follows, at [145]-[148]:

> 145. We do not consider that the information on the 2011/12 return (being the SRN in Box 18, '2007/8' as the year of advantage in Box 19, and Box 24 claiming "interest on bank and other loans") were sufficient to alert either the real (Officer Omole) or the hypothetical officer to the discovery situation.
>
> 146. She could not reasonably have been expected, on the basis of the information made available to her before the end of the enquiry window, of the situation mentioned in TMA s 29(1). Nor could the true position reasonably have been expected to be inferred by an officer of the Board from the information before HMRC at the time.
>
> 147. In our view, we accept that it did newly appear to Officer Omole, acting honestly and reasonably, in February 2016, that there was an insufficiency in an assessment.
>
> 148. For the reasons given above, we consider that Officer Omole made a discovery for 2011/12 in February 2016, and was entitled to issue the discovery assessment in the amount which in her opinion was to be charged in order to make good the loss of tax to the Crown.

39. As regards the 2012/13 assessment, the FTT reached the same conclusion in relation to section 29(5), for substantially the same reasons: [151] and [155].

Section 29(5): Discussion

40. Mr Baldry argued that the FTT had erred in law in reaching its decision. The Scheme had been disclosed to HMRC by a completed AAG1 Form and the relevant DOTAS number had been disclosed on the tax returns. Mr Good had provided HMRC with the principal transaction and supporting documents. In those circumstances, the only decision reasonably open to the FTT was to have concluded that sufficient information was made available to the hypothetical officer for them to have been reasonably expected to have been aware of the insufficiency of tax for that year when the enquiry window closed, or "the true position could reasonably have been inferred". Mr Baldry emphasised the importance of the inference test in section 29(6). The test is an objective one, and if we disagree with the FTT, he submitted that we should overturn its decision.

41. For HMRC, Ms Nathan argued that the findings made by the FTT (summarised above) both supported and justified the FTT's decision.

42. We begin from the position that we do not accept Mr Baldry's suggestion that we could or should simply substitute our own view for that of the FTT. The Tribunal's jurisdiction on an appeal from a decision of the FTT such as this is limited to points of law[11]. We can disturb the FTT's decision only if the FTT erred in law in reaching it. We take into account that the appeal on this ground is not framed as an *Edwards v Bairstow*[12] challenge to the FTT's findings. As Lewison LJ cautioned in *Fage v Chobani* [2014] EWCA Civ 5, "appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them"[13].

43. The FTT made no error of law in its approach to the issue and did not misdirect itself as to the applicable principles.

44. Importantly, the context was that the question of whether the condition in section 29(5) was satisfied in relation to the two discovery assessments fell to be tested not by reference to the effectiveness of the Scheme to produce the intended tax loss, but to the taxability of the MAPs and the deductibility of the interest payments. Most of the documents and information made available by Mr Good to HMRC before the closures of the two enquiry windows related to the effectiveness of the Scheme to create a year one loss. The FTT was correct to scrutinise each

[11] Tribunals, Courts and Enforcement Act 2007 section 11(1). An exception exists for certain "excluded decisions" which is not relevant in this appeal.

[12] 1956 [AC] 14.

[13] At [114].

item of information to determine the extent to which it was reasonable to conclude that the hypothetical officer would have been alerted to the insufficiency created in relation to the MAPs and interest payments. As was emphasised in *Langham v Veltema* and *Sanderson*, it is the actual insufficiency of which the hypothetical officer must be aware from the information that is treated as available by section 29(6).

45. We consider that in light of its findings the FTT was entitled to reach the conclusions which it did in relation to section 29(5) for the 2011/12 and 2012/13 discovery assessments, for the reasons it gave. In particular, the findings summarised at [34] and [35] above form an adequate and rational basis for those conclusions.

46. Mr Baldry urged us to conclude that the hypothetical officer should have inferred the insufficiency of tax from the information made available. However, we consider that such a conclusion would fall foul of the guidance in *Charlton* in relation to the construction of section 29(6)(d)(i) which we have set out at [28] above. We do not accept Mr Baldry's argument.

47. For these reasons, the appeal on this ground is dismissed.

Issue Three: Non-trade Business

48. Having concluded that the FTT was correct to determine that the discovery assessments were procedurally valid, we turn now to the substantive issues in the appeal.

49. The first substantive issues relate to the application of the provisions regarding income from a non-trade business involving the exploitation of film rights. The relevant legislation is contained in sections 609 to 611 ITTOIA, as follows:

> **609 Charge to tax on films and sound recordings businesses**
>
> (1) Income tax is charged on income from a business involving the exploitation of films or sound recordings where the activities carried on do not amount to a trade.
>
> Such a business is referred to in this Chapter as a "non-trade business".
>
> (2) Expressions which are used in this Chapter and in Chapter 9 of Part 2 (trade profits: films and sound recordings) have the same meaning in this Chapter as they do in that Chapter.
>
> **610 Income charged**
>
> (1) Tax is charged under this Chapter on the full amount of the income arising in the tax year.
>
> (2) See sections 612 and 613 for provision about the calculation of the amount of income charged under this Chapter.
>
> (3) This section is subject to Part 8 (foreign income: special rules).
>
> **611 Person liable**

> The person liable for any tax charged under this Chapter is the person receiving or entitled to the income.

50. As we discuss below, in order for Mr Good to be liable to income tax on the MAPs, these provisions require in effect that three elements are satisfied. First, he must be carrying on a business involving the exploitation of films or sound recordings. Second, those activities must not amount to a trade. Third, Mr Good must be a person receiving or entitled to income from that non-trade business.

51. The FTT found that all three of these requirements were met. Mr Good sought and obtained permission to appeal against all three decisions. However, in the hearing, Mr Baldry stated that Mr Good no longer sought to challenge the first two findings, but only the third. We therefore make no comment on those first two findings, and proceed on the basis that they are correct.

52. That disposes of Issue Three.

Issue Four: Section 611 ITTOIA

53. Mr Good appeals against the FTT's finding that the MAPs were income from a non-trade business which he received or to which he was entitled, within the terms of section 611 ITTOIA.

54. The decisions in *Khan* and *Ingenious Games* were released after the hearing, and we permitted the parties to make further submissions as to their relevance to this issue. We have taken those submissions into account in our discussion below.

55. HMRC did not seek to establish that Mr Good "received" the MAPs, so the issues for the FTT were whether he was entitled to them and whether they were income "from" the non-trade business.

The FTT's decision

56. The FTT dealt with this issue at some length, at [184]-[230] of the Decision. What follows is necessarily a summary.

57. The FTT recorded Mr Good's argument that the MAPs were not income from the business because the Scheme was a "package of contracts" with "pre-ordained outcomes" under which it was a Scion entity, and not Mr Good, which was paid and entitled to the MAPs. At [193] it stated:

> 193. The core of the Appellants' argument is that they cannot recover any right to MAPs payable under the Distribution Agreement, until the indebtedness under the Loan Agreement has been discharged in full: see Clause 1a of the Assignment, Notice of Assignment and Payment Direction; and Clause 1a of the Payment Directions. The Appellants argue that 'an integral feature' of the Scheme arrangements was that Loan funds were to be paid directly from Scion Lender to another Scion Entity pursuant to a Notice of Drawdown, "so that at no stage did the

> Loan funds fall outside the possession or control of the companies within the Scion group."

58. Mr Good sought to rely on the decision of the Upper Tribunal in *Ingenious Games v HMRC* [2019] UKUT 0226 (TCC)[14]. The FTT agreed with HMRC that *Ingenious Games* was "materially distinguishable". It also agreed with HMRC that "entitlement" to income did not require an entitlement to receive the income, so long as the individual could direct that the income be applied for his benefit[15].

59. The FTT considered that entitlement to income "has a relationship with beneficial ownership"[16]. It accepted HMRC's argument that beneficial ownership which fell short of legal ownership was within section 611, read purposively. It concluded that Mr Good did have beneficial ownership of the MAPs, because he had an entitlement to them. His rights amounted to more than "a mere legal shell", to adopt the terminology in some of the authorities concerning beneficial ownership for tax purposes. The FTT considered that the case law iteration of the concept of beneficial ownership should apply to section 611[17].

60. The FTT found that the MAPs were of "direct financial benefit" to Mr Good, because they were used by him to discharge his contractual burden to pay the loan interest under the Scheme. It observed that Mr Good could have equally paid the loan interest using other moneys. He had the "use and benefit" of the MAPs in meeting interest obligations to which he was otherwise subject. The MAPs were dealt with in the way they were (being directed towards repayments of Mr Good's loan interest) because Mr Good had so directed. This was not affected by the Scheme being put to participants on an "all or nothing" basis; Mr Good "knew that the loan was part of the package, and…that he had to sign up for the loan in order to get the benefit of the losses"[18].

61. The FTT considered that it was a point against Mr Good that he had included MAPs figures as "turnover" in his tax returns.

62. The FTT rejected the argument that Mr Good did not "control" the MAPs at any stage, because at the point of entering into the Scheme he gave instructions as to the future direction of the MAPs. It also rejected the argument that the MAPs were "an effectively self-cancelling arrangement", partly because the evidence showed that the MAPs were anticipated to be sufficient to meet "substantially" all of the interest, not all of it.[19]. Mr Good nevertheless remained liable for the full amount of the interest under the Scheme documentation.

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[14] We consider below the subsequent decision of the Court of Appeal.

[15] FTT [197], [204].

[16] FTT [198].

[17] FTT [203].

[18] FTT [215].

[19] FTT [219].

Arguments of the parties

63. Mr Baldry renewed his argument that because the Scheme documents were designed to be entered into as part of a single package, in reliance on *Ingenious Games* it was necessary to read each of the documents together with all the other documents. The correct approach, in considering the fiscal effects of inter-related documents in a tax scheme was to determine the effect of those documents taken together. When this approach was taken, it was apparent that Mr Good was never entitled to the MAPs. Although he had a *prima facie* right to the MAPs under the Distribution Agreement, he was contractually required to assign away all of his benefit under the Distribution Agreement and to irrevocably and unconditionally direct Scion Distribution to pay the MAPs to another Scion entity ("Scion Lender"). The authorities relied on by the FTT were not applicable to the facts of this case, and the FTT was wrong to have distinguished *Ingenious Games*.

64. Ms Nathan argued that section 611 is aimed at a beneficial entitlement to the income from a non-trade business. The courts have held that this encompasses incidents of ownership such as a right to deal with or enjoy the asset. This includes the ability to direct the income to be paid elsewhere and the discharge of an obligation of the person by the application of the income. Mr Good discharged his liability to make interest payments by directing that the MAPs should be paid to meet that liability; he thereby derived a benefit from the application of the income, and so was "entitled" to it. Even after the assignment to a Scion entity of his right to the MAPs, Mr Good retained a right to enjoy the fruits of the MAPs by the ongoing discharge of his obligation to pay interest. The FTT was right not to read across the analysis in *Ingenious Games* in relation to a different statutory provision and different contractual arrangements.

Entitlement: Discussion

65. We begin by construing section 611 purposively, and then consider whether that section was intended to apply to the transactions in question, viewed realistically[20].

66. Section 611 must be construed in the context of the code set out in ITTOIA to deal with income from a business of film exploitation which falls short of a trade. The code is broad in its scope, and its purpose is clear. Its evident purpose is to subject to income tax any income from such a business: section 609(1). The income to be charged is the full amount of such income arising in the relevant tax year: section 610(1). Then section 611 deals only with the person or persons who are liable for the tax.

67. As to the scope and meaning of "entitled" in section 611, the leading authority, in our view, is now the decision of the Court of Appeal in *Khan*, although, as we discuss below, it is important to keep in mind that there were significant differences between the facts in *Khan* and the facts in this appeal. In that case, Mr Khan

[20] Adopting the well-known approach of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets Ltd* [2003] HKCFA 46 at [35].

acquired the share capital of a failing company by a structure involving a loan from the company to make the purchase and a buy back of the shares by the company. Mr Khan borrowed £1.95m from the company and used it to buy the share capital of 99 shares for £1.95m plus its nominal net book value. At the same time, he entered into a buyback agreement under which the company repurchased 98 of the shares from Mr Khan for £1.95m utilising its distributable reserves. This was paid by way of set-off against Mr Khan's loan obligation. The buyback payment was accepted to be a distribution for tax purposes, and the issue was whether Mr Khan was a "person receiving or entitled to" that distribution within the meaning of section 385 ITTOIA. Mr Khan argued that the purchase, loan and buyback should be regarded as a single composite transaction, and the court should consider its overall effect, which was to leave him as the owner of one share in the company, which had no distributable reserves, at a cost equal to the nominal net book value. He contended that, viewed realistically, the persons who received and were entitled to the buyback payment were the vendor shareholders, and not him. The Court of Appeal dismissed Mr Khan's appeal, holding that he was a person receiving or entitled to the distribution within section 385.

68. Relevantly to this appeal, in summary the Court of Appeal decided as follows (references are to paragraphs of the decision):

> (1) The phrase "the person receiving or entitled to" is used in many provisions of ITTOIA to denote the person who is liable to pay the tax on the income or benefit: [7]. The phrase must be given a consistent meaning wherever it appears in ITTOIA: [11].
>
> (2) Either receipt or entitlement will suffice: [10]. The Court of Appeal accepted that "once a tax liability arises under s383 upon the making of a distribution, the net is cast wide in terms of the persons from whom the Revenue can seek payment": [71].
>
> (3) If the relevant legislation requires the court to focus on a specific transaction, then other transactions, though related, are unlikely to have any bearing on its application. Not all fiscal legislation is concerned with the overall effect of a series of related transactions as if they were one composite transaction: [50]. In the instant case, the statutory provisions required a focus on the actual transaction under which the distribution arose rather than the transactions as a whole: [52].
>
> (4) The person "entitled" to a distribution is the person to whom it belongs: [54].
>
> (5) "Control" over a payment is not necessary for "entitlement". They are different concepts: [62].
>
> (6) The decision in *Macpherson v Bond* [1985] STC 678 was distinguishable from Mr Khan's situation, because in that case someone other than the taxpayer (a bank) was entitled to the interest by reason of a pre-existing charge in favour of the bank which meant that the bank was "never obliged to pay that interest to anyone other than itself": [58]-[59].

(7) The authorities on "beneficial ownership" and "beneficial entitlement"[21] concerned different statutory provisions and should not necessarily be read across to "entitlement" in ITTOIA: [64]-[68].

(8) "…even in a statutory context in which equitable ownership may not be enough to amount to 'beneficial ownership' or 'beneficial entitlement', the focus is on identifying the person who in reality has the right to the money. Any legal obligation they may have to treat that money in a particular way after that right accrues or after payment is made is irrelevant.": [69].

(9) Because the question is one of actual receipt or entitlement at the time of the distribution, the statute requires the focus to be on the situation *at that time*, not on anything that happens to the money afterwards: [72].

(10) Even in construing a pre-ordained arrangement as a composite whole, the component transactions must be respected: "the end result must be one that can be achieved lawfully and consistently with the individual steps taken towards it": [76].

(11) "The fact that payment of the distribution was made by way of set-off against the liability to repay the loan does not mean that there was no receipt. Mr Khan derived a real benefit from the payment because it extinguished his corresponding liability to repay the loan. This was not a case in which Mr Khan's interest in the money could be described as a 'mere legal shell' with the vendor shareholders having all the rights of beneficial owners over that money.": [81].

69. In reaching the conclusion adopted by the Court of Appeal, Andrews LJ stated as follows (at [83]):

> …I am not persuaded that the concept of 'receipt' in s 385(1)(b) contains an implicit requirement that the person who receives the distribution must also have practical control over it. 'Entitlement' means no more than having the right to the taxable income, in this case, the distribution, and there is no further implicit requirement of benefit in the sense used in the group or consortium tax relief cases. If one asks the only pertinent question: 'to whom did the purchase price of the 98 shares belong?' there is only one answer, and that is Mr Khan. However, even if there had been a requirement of benefit, Mr Khan did benefit from the distribution. As the UT held at [97] it was the fact that he was entitled to and did receive the distribution that enabled Mr Khan to discharge his liability to repay £1.95 million to the Company.

70. Before considering the contractual documentation governing Mr Good's rights and liabilities in relation to the MAPs, we deal first with the relevance to that exercise of *Ingenious Games*, on which Mr Baldry placed considerable reliance.

71. There were only two issues before the Court of Appeal in that case, namely whether the LLPs were carrying on a trade, and, if so, whether they did so with a

[21] In particular, *BUPA Insurance Ltd v HMRC* [2014] UKUT 262 (TCC), *Wood Preservation Ltd v Prior* [1969] 1 All ER 364 and *J Sainsbury v O'Connor* [1991] STC 318.

view to profit. Neither of those issues is relevant in this appeal. The relevance of the case lies therefore in the Court of Appeal's apparent acceptance of the Upper Tribunal's approach to the question of whether, on the facts, the LLPs were entitled to receive certain receipts on a gross basis or only after deduction of Borrower's Distributable Profits ("BDRs").

72. Mr Baldry relied on the Upper Tribunal's reasoning to support the proposition that, like the LLPs in *Ingenious Games* in respect of the BDRs, construing the agreements as a package Mr Good was never entitled to the MAPs at the time when they arose. The correct approach to the question of entitlement, in considering the fiscal effects of a series of inter-related documents such as those in the Scheme, was to determine the effect of the documents taken together. Adopting that approach, there was a single composite transaction under which the MAPs were always required to be paid from one Scion entity to another to meet Mr Good's interest liabilities on the Loan.

73. We do not consider that the Upper Tribunal's decision in *Ingenious Games* supports the broad, generally applicable principle of construction put forward by Mr Baldry, for two reasons.

74. First, the Tribunal's analysis in that case of the approach to contractual construction in fact rejected a "composite agreement" approach. What it said was as follows:

> 108. However, where a number of contracts are entered into together, at the very least the existence of the other contracts is part of the factual background known to the parties at or before the date of the contract, as referred to by Lord Neuberger at [10] of *Wood v Capita*…commonly referred to as the 'factual matrix'. The existence of the other contracts is therefore a relevant part of the factual matrix when construing any one of them. Furthermore, where the contracts specifically cross-refer or there are other indications that they are intended to operate only as a package, then that fact will be relevant.
>
> 109. Authority for this approach is to be found in Lewison *The Interpretation of Contracts* (6th edn, 2016) para 3.03 where it is said:
>
> > 'Many transactions take place by the entry into a series of contracts … In such cases, where the transaction is in truth one transaction all the contracts may be read together for the purpose of determining their legal effect. This principle is a more specific example of the general principle that background is admissible in interpreting a written contract. It applies to other documents executed as part of the same transaction, whether they happen to be executed before, at the same time as, or after the document requiring to be interpreted.'
>
> 110. Therefore, where there is in truth one transaction, the tribunal is entitled to read the contracts together for the purpose of determining their legal effect. That is not the same as saying that where there is a series of contracts to implement a transaction there is a single composite agreement. As we have said, the 'composite agreement' approach is not

> correct as a matter of contractual construction. However, what must not be done is to adopt blinkers in looking at each agreement…

75. Second, the issues before the Tribunal in *Ingenious Games* were materially different to those in this appeal. In particular, the questions of whether or not particular activities amount to a trade, and whether there is a view to profit, require a wide-ranging consideration of the totality of the arrangements. The focus of section 611 is narrower. As was observed in *Khan*, not all tax legislation requires a focus on the composite transaction as a whole. We consider that sections 609 and 611 require a focus on the particular issue of entitlement to the MAPs as established by the relevant Scheme documents.

76. In his further submissions, Mr Baldry emphasised that he was not asking us to take the same approach as the appellant in *Khan*, namely looking at the overall economic outcome of the transactions as a whole. Rather, he stated:

> The Appellant's proposition is that he was not entitled to the MAPs because at the time they arose the parties' rights and entitlements had been established by the composite package of documents: see *Ingenious UT*. The true legal effect of those contractual documents taken together is that the person receiving or entitled to the MAPs is one and the same, namely Scion Lender.

77. We turn now to the Scheme documents. The FTT set out the position as follows:

> 28. On dates between 25 March 2008 and 4 April 2008, Mr Good executed a suite of documents relating to the acquisition and exploitation of rights in two films - 'Repossession Mambo' and 'Tenure'. He put in £300,000 of his own money and borrowed £1.7m from Scion Film (Guernsey) Limited, making a total capital contribution of £2m.
>
> 29. In outline, Mr Good, entered into:
>
> (1) A Registration Agreement signed by him on 25 March 2008 relating to the acquisition and exploitation through sale of film rights and contribution of capital to the trade, whereby he irrevocably agreed (inter alia) that he acknowledged his
>
> > 'understanding that you will be required to enter into security arrangements with the Lender pursuant to which you will grant in favour of the Lender a charge and an assignment of, inter alia, your right, title and interest in part or all of the sale proceeds payable to you from exploitation of the Film Rights acquired" (see Clause 6; page 1231 of the bundle);
>
> (2) An 'Advisory Agreement' with Scion Media Ltd;
>
> (3) A Loan Agreement with Scion Film (Guernsey) Ltd;
>
> (4) Two powers of attorney appointing Scion Media Ltd as his attorney in relation to each of the films;
>
> (5) In relation to 'Tenure', an Assignment, Notice of Assignment and Payment Direction directing Scion Distribution Ltd to pay the MAPs payable to the Appellant in relation to 'Tenure' under the Distribution

Agreement to Scion Bank in satisfaction of liability arising under the Appellant's loan agreement with Scion Film (Guernsey) Ltd;

(6) In relation to 'Repossession Mambo', a Notice of Assignment and Payment Direction directing Scion Film Distribution Ltd to pay the MAPs payable to the Appellant in relation to 'Repossession Mambo' under the Distribution Agreement to Scion Film Funding (Guernsey) Ltd in satisfaction of liability arising under the Appellant's loan agreement with Scion Film Funding (Guernsey) Ltd.

30. The 'Distribution Agreement Relating to Certain Film Rights', dated 4 April 2008, made between Mr Good as vendor and Scion Distribution Ltd as purchaser:

(1) Recites that the vendor 'owns the Distribution Rights and wishes to exploit them through sale';

(2) Recites that the vendor has agreed to execute the Deed and assign the Distribution Rights to the Purchaser for the Term;

(3) By Clause 1.1, assigns to the Purchaser for the Term, all his right, title and interest in the Distribution Rights;

(4) Clause 3 ('Distribution Receipts Entitlement') provides that:

> "3.1 In consideration of and subject to a valid and effective assignment of the Distribution Rights pursuant to Paragraph 1.1., Vendor shall be entitled to the following payments:
>
> (i) the Minimum Annual Payments [....]
>
> [...]
>
> 3.3 By way of a minimum entitlement, Purchaser shall pay to Vendor to be received by Vendor on 5 April in each year from 5 April 2009 up to and including 5 April 2015, the following amounts:
>
> [....]
>
> (the above payments being referred to as the "Minimum Annual Payments")

31. The 'Assignment, Notice of Assignment and Payment Direction' entered into on 4 April 2008 between Scion Distribution ('SDL'), Mr Good ('Sole Trader'), Scion Film Financing (Guernsey) Ltd ('Scion Bank') and Scion Rights Limited ('SRL'):

(1) Recites the loan agreement entered into between Scion Bank and Mr Good, whereby Scion Bank has agreed to make a loan available to Mr Good to enable him to purchase certain distribution rights in films;

(2) Recites the Distribution Agreement between SDL and Mr Good, whereby SDL had agreed to pay Mr Good 'certain consideration in return for the transfer by [Mr Good] of certain distribution rights in the film to SDL' (that 'certain consideration being the MAPs);

(3) Mr Good assigns all his benefit (including the MAPs) under the Distribution Agreement to Scion Bank;

(4) Mr Good 'irrevocably and unconditionally directs' SDL 'to pay Scion Bank or as Scion Bank may direct, until repayment in full of the aggregate amount of all indebtedness ... the MAPs"

(5) Scion Bank undertakes to Mr Good to apply all sums received from SDL pursuant to the instant agreement 'against the interest due and owing on, and repayment of the principal amount of, the loan advanced under the ... Loan Agreement."

78. The three key documents in relation to the question of entitlement to the MAPs are the Loan Agreement (dated 25 March 2008), the Distribution Agreement (dated 4 April 2008) and the Assignment, Notice of Assignment and Payment Direction (the "Direction") (also dated 4 April 2008). Neither party suggested that there was any material difference (for the purposes of analysing that question) between the relevant documents for the two films in which Mr Good invested, and we have proceeded on that basis.

79. A fourth key document is the Security Assignment, to which other documents refer. This document was undated. In the hearing before us, Mr Baldry said that it was missing from those before us. However, it transpires from his further submissions that in fact it was contained in the trial bundle, and we take it into account in our analysis.

80. Mr Baldry invited us to concentrate in particular on the following provisions of the key documents:

(1) Under the Loan Agreement (Clause 5.2(a)) as a condition precedent Mr Good was required to enter into various agreements including a deed of security in favour of Scion Lender which assigned to Scion Lender his share of the income from the exploitation of his film rights.

(2) Under the Security Assignment, Clause 3.1 states that Mr Good unconditionally and irrevocably assigns "by way of security all…present and future right title and interest in the Film Rights and the benefit of… present and future rights under the Acquisition Agreement including the distribution rights acquired thereunder and the Distribution Agreement (including without limitation the benefit of all income or monies payable to you in respect thereof) including the benefit of all proceeds payable…in respect of …distribution rights therein…".

(3) The Direction states (at Clause 1(a)) that "pursuant to the security agreements entered into between Scion Bank and [Mr Good] on or before the date hereof… [Mr Good] has subject to the terms of the same assigned to Scion Bank all of [Mr Good's] benefit under the Distribution Agreement including, without limitation, the benefit of all income or monies payable to [Mr Good] in respect thereof…[Mr Good] and Scion Bank hereby notify [Scion Distribution Limited] of such assignment and irrevocably and unconditionally direct [SDL] to pay the following to Scion Bank or as Scion Bank may direct, until repayment in full of the aggregate amount of all indebtedness owing pursuant to [the Loan Agreement]…(i) the Minimum Annual Payments…".

81. Mr Baldry submits that the effect of these provisions is that Mr Good *never* had any entitlement to the MAPs as that term is used in section 611. At the time when the MAPs became payable, the only person who was entitled to the MAPs was Scion Lender. Applying the approach in *Khan* of looking at the precise legal arrangements, which were in all material respects equivalent to those in *Ingenious Games* in respect of the BDRs, Mr Baldry argues that the person both receiving and entitled to the MAPs was Scion Lender and not Mr Good.

82. We do not consider that any useful purpose is served by comparing the facts of *Ingenious Games* with those in this appeal. As the FTT correctly observed, the facts were different in material respects, and the issues which fell to be determined required a broader approach. The question in this appeal falls to be determined by reference to the Scheme documents and in particular the four key documents.

83. As Mr Baldry's argument is framed, it is essentially that this was not a case in which the MAPs first belonged to Mr Good and he then assigned them as security. Rather, by virtue of the Security Assignment and the Direction, the MAPs never belonged to him in the first place and only ever belonged to Scion Lender.

84. Mr Baldry submitted that the authorities indicated a distinction between an application of income (to which the person applying it was previously entitled) and an alienation of income (which results in no entitlement having arisen). He said that *Commissioners of Inland Revenue v Paterson* (1924) 9 TC 163 and *Dunmore v McGowan* [1978] STC 217 were "application" cases, and so the FTT was wrong to have relied on them in reaching its decision. On the other hand, *Ingenious Games* was an "alienation" case, as is Mr Good's.

85. Mr Baldry placed particular reliance on the following statement in *Khan* at [73] (emphasis added to original):

> Mr Khan did not have a "bare legal entitlement" to the distribution. He had a contractual entitlement to the price for the shares he had sold to the Company under an agreement that was last in time to be executed. That price was to be paid by means of a taxable distribution. **He had not created a charge or trust over the price in favour of someone else, or assigned it to someone else.** No-one had a better right to that money than he did.

86. In relation to this passage in *Khan*, it is necessary to place it in its factual context. In this appeal, Mr Good undoubtedly entered into an assignment of the benefit of the MAPs and granted security over his rights to the MAPs. In *Khan*, however, there was no assignment or charge in respect of the distribution, so it is scarcely surprising that the Court of Appeal observed that this fortified its conclusion that no-one had a better right to the distribution than Mr Khan. What the Court of Appeal did not say, because it was not necessary for it to do so on the facts before it, was that any charge, trust or assignment necessarily operates to deprive the chargor, settlor or assignor of any "entitlement" to income within that security arrangement.

87. We do not consider that *Khan*, or any other authorities, establish that the question of "entitlement" to income for the purposes of the ITTOIA is necessarily determined solely by reference to the effect of any charge, settlement or assignment which takes effect in relation to such income. The points made by the Court of Appeal in *Khan* which we set out above at [68] show that other factors, such as whether the relevant person has a right to the income and whether he or she derives a real benefit from that income, are relevant to the question of entitlement. Furthermore, section 611, like section 385 in *Khan*, requires focus on the particular transaction under which the income arose rather than the scheme as a whole.

88. We respectfully agree with the observations of the Court of Appeal in *Khan* that in determining entitlement to income within ITTOIA the case law on beneficial ownership in the context of corporation tax group relief is not a particularly helpful starting point. We also agree that section 611 casts a wide net, with the consequence that it is irrelevant to Mr Good's entitlement to the MAPs that Scion Lender received them. Indeed, even if Scion Lender could properly be said to be entitled to the MAPs, that would not prevent section 611 applying to Mr Good if he was also so entitled.

89. We agree with the parties that in considering whether Mr Good was entitled to the MAPs, all of the Scheme documents are relevant. The flaw in Mr Baldry's approach is that he asks us to focus on the effect of the Security Assignment. However, it is essential also to take into account the effect of Mr Good's rights under the Distribution Agreement and his interest obligation under the Loan Agreement.

90. Under the Distribution Agreement, as consideration for selling his film rights, Clause 3.1 stated explicitly that Mr Good was "*entitled*" to the MAPs. Clause 3.3 provided that on 5 April for each of the years 2009 to 2015 "by way of minimum *entitlement*" the Purchaser would pay Mr Good the MAPs.

91. Under the Loan Agreement, Mr Good was obliged to pay the interest at the rates and times calculated under Clause 7. Clause 4.5 stated that "[F]or the avoidance of doubt, you acknowledge that you remain fully liable for interest accruing on the Loan until the Repayment Date, to be calculated and payable in accordance with Clause 7". Clause 10.1 refers to the security arrangements, and Clause 10.2 states that "[T]he Lender, in its absolute discretion, may accept such alternative security as may be offered by you from time to time, in place of all or any of the security referred to in Clause 10.1 above".

92. When the question of entitlement is considered by reference to *all* of the key documents, we consider it clear that Mr Good was entitled to the MAPs within section 611. His explicit contractual entitlement to the MAPs under the Distribution Agreement over a period of years did not disappear when Mr Good entered into the security arrangements, but rather it continued in effect subject to the terms of those arrangements. Indeed, to the extent that Mr Good had no longer

been entitled to the MAPs, the assignment of those rights would have been ineffective to discharge his interest obligation under the Loan Agreement. That interest obligation did not on any argument cease by virtue of the security assignment, and Mr Baldry confirmed that such a result was nowhere stated in any of the Scheme documentation. To the contrary, Clause 4.5 of the Loan Agreement made it plain that the obligation to pay interest under Clause 7 remained in full until the Repayment Date. Clause 1 of the Security Assignment itself stated that Mr Good agreed to comply with all past and future obligations and liabilities, whether actual or contingent, under the Loan Agreement, including in particular the obligations to repay principal and interest when due.

93. Stepping back from the detailed provisions of the key agreements, we consider that Mr Good's entitlement to the MAPs was shown by his continuing enjoyment of the benefit of the MAPs in the ongoing discharge of his interest obligations (under the security arrangements). As the Court of Appeal put it in *Khan* (at [81]):

> Mr Khan derived a real benefit from the payment because it extinguished his corresponding liability to repay the loan. This was not a case in which Mr Khan's interest in the money could be described as a 'mere legal shell' with the vendor shareholders having all the rights of beneficial owners over that money.

94. Mr Good thus obtained an enduring and "real benefit" from the MAPs through the discharge of his liability to pay interest under the Loan Agreement. His rights to the MAPs under the Distribution Agreement were not a "mere legal shell". In order to have had the power and authority to direct that income to be paid elsewhere, Mr Good must necessarily have had a right to it. He may not have "controlled" that income, but *Khan* makes clear that control and entitlement are different concepts.

95. We therefore conclude that Mr Good was entitled to the MAPs within the meaning of section 611.

"From" a non-trade business: Discussion

96. In addition to arguing that Mr Good was not entitled to the MAPs, Mr Baldry submitted that, even if he was, the income was not taxable under section 609 because it was not income "from a business involving the exploitation of films". We can deal with this point relatively briefly.

97. The argument is that section 609 brings into charge only income produced by ongoing "activities" of film exploitation, and the MAPs were not dependent on the proceeds of exploitation of the films but rather were fixed by contract and expressed as a percentage of the outstanding balance on the Loan. They were therefore payable irrespective of the amount of any receipts from exploitation of film rights and were self-cancelling amounts payable independently of any "activities".

98. We do not agree. Once it is accepted that Mr Good's activities constituted a non-trade business of film exploitation, which is the issue to which the existence of "activities" is relevant, the only question is whether the MAPs were income "from" that business. The MAPs were part of the consideration received by Mr Good under the Distribution Agreement for the sale of the film rights; as such they were in our view clearly income from the non-trade business. There is no requirement in the legislation to limit that concept to income which is variable or calculated by reference to or dependent on film exploitation. Section 609 simply asks whether the non-trade business was the source of the income. It clearly was, and it did not cease to be so because the amount due was fixed. Put shortly, the source of the income is not altered by the method of its calculation.

99. This conclusion is not changed by the pre-ordained and packaged nature of the contractual arrangements.

100. The appeal on this ground is dismissed.

Issue Five: Deductibility of Interest Payments

101. As set out at [8] above, under the Scheme, participants were required to contribute only 21% of the cost of the film distribution rights. The remaining 79% was provided by way of the Loan from Scion Lender. Mr Good was liable to pay interest on the Loan for the relevant years in which he was entitled to the MAPs. HMRC denied the deduction claimed by Mr Good for the interest payments against his liability in respect of the MAPs. The FTT rejected his appeal against that denial.

102. The FTT's decision is at [231]-[243]. It identified the question as whether the interest payments were deductible under section 612 ITTOIA. So far as relevant, this provides as follows:

> (1) This section applies for calculating the amount of income charged under this Chapter.
>
> (2) Expenses wholly and exclusively incurred for the purpose of generating the income are deductible.
>
> (3) If an expense is incurred for more than one purpose, a deduction may be made for any identifiable part or identifiable proportion of the expense which is incurred wholly and exclusively for the purpose of generating the income.
>
> (4) Expenses which would not have been allowable as a deduction in calculating the profits of a trade, if they had been incurred for its purposes, are not deductible under this section.
>
> (5) Expenses for which any kind of relief is given under any other provision of the Income Tax Acts are not deductible under this section.

103. The FTT had regard in determining this issue to the guidance in *HMRC v Investec Asset Finance plc* [2018] UKUT 69 (TCC). Applying that guidance, it found that it was "entirely clear from the written and oral evidence…together with

consideration of the Scheme documents" that one purpose of Mr Good in incurring expenditure on the loan interest was to implement the Scheme, with the intent of generating a large tax loss in Year One. There was therefore a duality of purpose, so that even if another purpose, including a dominant purpose, was to generate the MAPs, the payments failed the "wholly and exclusively" requirement. Mr Good did not seek to argue that any identifiable part or proportion of the interest qualified for relief under section 612(3), but rather that the interest in its entirety satisfied the "wholly and exclusively" requirement.. The FTT rejected the argument that its analysis confused the object of the interest payments with their effect. It also accepted HMRC's argument that the generation of the MAPs could not reasonably have been regarded as the purpose of the Loan (and interest payments on it) because, net of the borrowing, the MAPs were producing virtually no income.

104. Mr Baldry submitted that the FTT fell into error in taking an approach to the income of the business (the MAPs) which treated it as a distinct item with its own fiscal significance, while approaching the expenses of the business by reference to the Scheme as a whole, and the purpose of the Scheme. If the FTT had considered the purposes of the interest expenses as a separate item it could not properly have concluded that those expenses were incurred to generate a tax repayment. The Scheme was designed to ensure that the interest payments were matched by the MAPs, so the interest payments could not have been intended to bring about the tax loss. The tax loss was merely a consequence of the Scheme; it did not inform the purpose for which the interest was incurred.

105. Ms Nathan pointed out that the burden was on Mr Good to establish his purpose in paying the interest, yet he had produced no evidence of this. The FTT reached the right result for the right reasons, she said.

Discussion

106. The FTT was correct to identify section 612 as the applicable statutory provision. Most importantly, section 612 does not treat an expense as deductible if it is incurred wholly and exclusively for the purposes of the non-trade business, or for the purposes of the relevant arrangements. Rather, it requires that the expense is incurred wholly and exclusively for the purpose of generating the income chargeable under sections 609 and 610. That is a much narrower test. In this case, it means, as the FTT correctly found, that Mr Good had to establish (to the ordinary civil standard of the balance of probabilities) that he incurred the interest payments, or some identifiable part of them, wholly and exclusively for the purpose of generating the MAPs.

107. In addressing that question, the FTT began as follows:

> 233. We have regard to the remarks and guidance of the Upper Tribunal in *HMRC v Investec Asset Finance* [2018] UKUT 69 at Para 48 (itself relying on a passage from the judgment of Millett LJ in *Vodafone Cellular Ltd v Shaw* [1997] STC 734 as explained by the Upper Tribunal in *Scotts Atlantic Management Ltd v HMRC* [2015] UKUT 66 (TC) (Warren J and Judge Charles Hellier) at [47]-[53]:

> (1) The words "for the purposes of the trade"' mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. A fortiori they do not mean "for the benefit of the taxpayer";
>
> (2) Except in obvious cases which speak for themselves, ascertaining the taxpayer's object in making a payment involves an inquiry into the taxpayer's subjective intentions at the time of the payment;
>
> (3) The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment;
>
> (4) Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that, unless merely incidental, they must be taken to be a purpose for which the payment was made.
>
> 234. The Tribunal must take "a robust approach to ascertaining the purposes of the taxpayer": see *Scotts Atlantic* at [53].

108. We consider that the FTT correctly directed itself as to the relevant principles. Since there is no challenge to its findings of fact, in order to succeed on this ground Mr Good must therefore show that the FTT erred in law in applying those principles to the facts found.

109. Mr Baldry's first argument is that it was impermissible for the FTT to determine the liability to income tax of the MAPs by reference to the fiscal significance of the MAPs alone, but then to determine the deductibility of the interest payments by reference to the overall Scheme, describing the borrowing as going "into the merry-go-round of the Scheme in order to realise a loss"[22]. Essentially he was saying that, to be consistent, the FTT ought to have treated the MAPs in the same way for both issues, namely whether Mr Good was "entitled" to the MAPs and whether he had incurred the interest expenses wholly and exclusively to generate those MAPs.

110. However, we do not consider that there is any inconsistency here. The two issues are different. We have explained above how the issue of entitlement to income should be determined, and that is by looking at all the Scheme documents but focusing on the particular contract(s) under which the MAPs were paid. By contrast, in relation to whether expenses were incurred wholly and exclusively for the purpose of generating those MAPs, it is necessary to focus on the taxpayer's object in making the payment claimed as an expense.

[22] FTT [235].

111. In any event, Mr Baldry's description of the FTT's approach to the two questions is a material mischaracterisation. In determining that Mr Good was entitled to the MAPs, the FTT did not focus solely on the MAPs and ignore the other contractual arrangements or the Scheme as a whole. It disagreed with Mr Baldry's submission as to the analysis and effect of those arrangements, but it did not fail to take them into account. Further, in determining the deductibility of the interest payments, the FTT did not, as Mr Baldry asserts, fail to adopt a forensic approach, or fail to consider the interest payments "as a separate item".

112. Mr Baldry further argued that the FTT impermissibly confused the purpose of the interest payments with the effect or consequences of the Scheme as a whole. We agree that if the FTT had done this it would have been in error, but it did not. The FTT clearly had the distinction in mind from the passage set out above at [233] of the Decision, and it discusses that very issue at [239]. Its enquiry was into the purpose or object of the interest payments, and it made no error.

113. The remainder of Mr Baldry's argument is in substance a disagreement with the FTT's conclusion on the facts. However, given its findings of fact[23] its conclusion was entirely reasonable, and we agree with it. The FTT accepted the evidence presented to it, and found as a fact, that at least one purpose of Mr Good in entering into the Scheme was to realise the anticipated first year tax loss. Mr Baldry's objection is, in effect, that the Loan, under which the interest obligations were incurred, was either not part of the Scheme, or was necessarily to be considered divorced from the Scheme. Neither argument is sustainable.

114. Moreover, even if, as Mr Baldry insists, one looks at the Loan in isolation, we agree with the FTT that it would be unreasonable to conclude that the interest payments under the Loan were incurred "wholly and exclusively for the purpose of generating the [MAPs]" as required by section 612. The Scheme documentation stated that the MAPs were anticipated to cover "substantially all" of the interest obligations. What this means in practice is that Mr Baldry seeks to establish that the FTT erred in law in not reaching the conclusion that Mr Good incurred expenses of 100 wholly and exclusively for the purpose of generating income of 99. No evidence was presented, to the FTT or to us, to support such a conclusion.

115. Mr Baldry's skeleton argument states as follows (emphasis added to original):

> Once one accepts that *one of the purposes* for which the Scheme was implemented was to produce a stream of business income, the financing costs which were necessarily incurred in implementing the Scheme were incurred for generating the income [and] allowed to be deducted.

116. That is not what section 612 requires. The FTT's finding, supported on the facts, that there was more than one purpose in incurring the interest payments meant that under the terms of section 612 they were not deductible.

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[23] Particularly at FTT [55].

117. In making further submissions regarding *Ingenious Games*, Mr Baldry argued that the decision in that case that the trade should be recognised to the extent that the LLP contributed its own resources meant that the £300,000 of expenditure contributed by Mr Good from his own resources must be regarded as having being incurred wholly and exclusively for the purpose of generating the MAPs. That argument is entirely misconceived. Findings particular to the facts in *Ingenious Games* have no relevance to the purpose of the interest expenditure in this appeal. Moreover, neither the FTT nor we (nor, until this submission, Mr Baldry) have sought to draw any distinction in addressing the purpose of Mr Good's expenditure between the expenditure met from the Loan and that met directly.

118. The appeal on this ground is dismissed.

Issue Six: Deductibility of Other Expenses

119. HMRC disallowed certain other deductions claimed by Mr Good in his 2007/08 return. The FTT's decision on his appeal against the disallowance was as follows:

> 244. In relation to Mr Good's appeal against the amendments made by the Closure Notice for 2007/8, HMRC has disallowed the deduction of Year One expenses claimed such as accountancy fees, legal fees, and bank and credit card fees on the footing that those were not incurred wholly and exclusively for the purposes of generating the income.
>
> 245. We agree with HMRC. In our view, those expenses (which were all incurred in Year One) are part and parcel, and not independent, of the same. These would not have been incurred but for his entry into the Scheme. These fees and other expenses are in essence parasitic, and subject to the same analysis. The duality of purpose which renders the loan payments not deductible also catches these payments, which therefore themselves should not be treated as deductible.

120. We have no hesitation in dismissing the appeal against the FTT's decision. For the reasons we set out above in relation to the interest payments, the FTT made no error of law in reaching its conclusion. Indeed, we observe that these other expenses, all incurred in a year when no MAPs were due or received, have no apparent purposive connection to the MAPs as contrasted to the Scheme as a whole.

Issue Seven: Carried Forward Loss

121. At a late stage in the proceedings before the FTT, Mr Baldry raised the argument that, if all the other issues were determined against Mr Good, he would nevertheless be entitled to a "non-trade" loss which he could carry forward and set off against the income which HMRC had assessed on him by virtue of section 152 Income Tax Act 2007 ("ITA 2007"), reducing his chargeable profit to nil: FTT [246].

122. HMRC objected to the argument being raised late. The FTT permitted the point to be raised and heard submissions on it. It then dismissed it as follows:

> 254. The simple reason is that Section 155 of the *Income Tax Act 2007* provides that a claim for loss relief against miscellaneous income made on or after 1 April 2010 must be made by no later than four years after the end of the tax year in which the loss arise [sic].
>
> 255. We agree with HMRC that, in order to claim loss relief under section 155, a claim must be made.
>
> 256. In the case of each Appellant, Year One, in which the loss occurred, was 2007/8. As a simple matter of timing, the Appellants in these appeals fall foul of section 155 and are out of time to make any claim for relief.

123. Mr Good appeals against this conclusion. Mr Baldry argued that there was no prescribed form for making a claim under section 152 ITA 2007, and in this case Mr Good had expressly declared his losses on his tax return, thereby notifying HMRC he had made the losses which the legislation entitled him to carry forward. This constituted an effective claim.

124. Ms Nathan said that HMRC did not accept that a loss arose in Year One at all. In any event, HMRC disagreed that Mr Good's 2007/08 return constituted or contained a valid claim to carry forward losses. For either or both of these reasons, this ground should be dismissed.

Discussion

125. The relevant provisions on which Mr Good relies for this ground are as follows:

> **152 Losses from miscellaneous transactions**
>
> (1) If in a tax year ("the loss-making year") a person makes a loss in a relevant transaction, the person may make a claim for loss relief against relevant miscellaneous income.
>
> (2) A transaction is a relevant one if, assuming there were profits or other income arising from it—
>
> (a) those profits or that other income would be income on which income tax is charged under, or by virtue of, a relevant section 1016 provision ("the relevant provision"), and
>
> (b) the person would be liable for income tax charged on those profits or that other income.
>
> (2A) A "relevant section 1016 provision" means a provision to which section 1016 applies…
>
> (3) The claim is for the loss to be deducted in calculating the person's net income for the loss-making year and subsequent tax years (see Step 2 of the calculation in section 23).

(4) But a deduction for that purpose is to be made only from the person's relevant miscellaneous income.

(5) The person's "relevant miscellaneous income", in relation to the loss, is so much of the person's total income as is—

(a) income or gains arising from transactions, and

(b) income on which income tax is charged under, or by virtue of, the relevant provision.

…

153 How relief works

This section explains how the deductions are to be made.

The amount of the loss to be deducted at any step is limited in accordance with section 25(4) and (5).

Step 1

Deduct the loss from the relevant miscellaneous income for the loss-making year.

Step 2

Deduct from the relevant miscellaneous income for the next tax year the amount of the loss not previously deducted.

Step 3

Continue to apply Step 2 in relation to relevant miscellaneous income for subsequent tax years until all the loss is deducted.

155 Time limit for claiming relief

(1) So far as a claim for loss relief against relevant miscellaneous income concerns the amount of the loss for a tax year, it must be made on or before the fifth anniversary of the normal self-assessment filing date for the tax year.

(2) But—

(a) the question whether, and

(b) if so, how much,

loss relief against relevant miscellaneous income should be given for a tax year may be the subject of a separate claim made on or before the fifth anniversary of the normal self-assessment filing date for the tax year.

126. The version of section 155 cited by the FTT was that applicable to claims made after 1 April 2010[24]. Since on Mr Baldry's case the claim was made in the 2007/08 tax return, which was filed on 4 July 2008[25], the applicable provision was that set out in the preceding paragraph.

[24] Section 118(1) Finance Act 2008.

[25] FTT [9(1)(a)].

127. The code does contain an anti-avoidance provision (section 154A), but this applies only to losses arising on or after 3 December 2014[26], so it is not relevant to the loss asserted by this ground.

128. There are also generally applicable provisions dealing with claims, contained in section 42 TMA, which, so far as relevant, states as follows:

> (1) Where any provision of the Taxes Acts provides for relief to be given, or any other thing to be done, on the making of a claim, this section shall, unless otherwise provided, have effect in relation to the claim.
>
> (1A) Subject to subsection (3) below, a claim for a relief, an allowance or a repayment of tax shall be for an amount which is quantified at the time when the claim is made.
>
> (2) Subject to subsections (3) and (3A) below, where notice has been given under section 8, 8A, 11 or 12AA of this Act, a claim shall not at any time be made otherwise than by being included in a return under that section if it could, at that or any subsequent time, be made by being so included.

129. In relation to this ground of appeal, two issues arise. Was there a loss within section 152? If so, was a valid claim made in respect of the loss?

130. A loss may be the subject of a claim under section 152 only if the loss is made "in a relevant transaction". A transaction is a relevant transaction if (broadly) profits or income arising from it would be charged to income tax by virtue of a provision specified in section 1016 ITA 2007. Section 609 ITTOIA is so specified, meaning that in principle a loss arising from a non-trade business of film exploitation would be a loss made in a relevant transaction.

131. Was there in fact such a loss arising to Mr Good in 2007/08? In his tax return for that year, Mr Good claimed to have realised a trading loss of £1,888,225. The loss was claimed to have arisen by reference to the difference between the price paid by Mr Good to acquire the film rights and the accounting value of the consideration received for those rights under the Distribution Agreement.

132. We know that Mr Good subsequently accepted that the relevant loss was not a trading loss, because there was no trade[27]. We also know that he conceded that sideways relief would not be available for any loss[28]. Whether or not the amount claimed to be a trading loss in the 2007/08 return could nevertheless in principle be a loss falling within section 152 has not been the subject of scrutiny, or even detailed submissions by the parties. The FTT expressed no view on it,

[26] Section 22(9) Finance Act 2015.

[27] FTT [176]-[177].

[28] FTT [9(1)(s)].

having dismissed the appeal on that ground on the basis that no claim had been made in time.

133. An element of Mr Good's argument that he was not entitled to the MAPs was that the Scheme was, as HMRC had asserted, a packaged, pre-ordained tax avoidance scheme. It is unsurprising against that backdrop that HMRC do not accept that *any* loss arose in 2007/08. However, we do not consider that we need to reach a conclusion on this issue. That is because, for the reasons which follow, we have concluded that, even if there was a loss capable of being claimed under section 152, Mr Good did not make a valid claim for it.

134. Mr Baldry submits that the 2007/08 return contained, or must be construed following the failure of the Scheme to generate a trading loss as having contained, a claim under section 152. It is therefore necessary to consider the entries in that return. They are set out at FTT [9(1)] as follows:

> (a) His 2007/8 return was filed online on 4 July 2008. The return, including the self-employment pages, were prepared for Mr Good by S4 Financial plc and he approved the return for submission;
>
> (b)The self-employment page of his return stated that he was engaged in the business of "Trading in Film Rights", which had started on 25 March 2008, with his books made up to 5 April 2008;
>
> (c) He claimed a turnover of £102,029 in this self-employment, with total expenses of £1,990,367, being £1,901,784 as cost of goods, £88,563 as accountancy, legal and other fees, and £20 bank, credit card and other financial charges;
>
> (d)The turnover of £102,029 was taken from a 'Profit and Loss Account' sent to him from Scion, described as 'Right to Future Income' (page 946 of the bundle);
>
> (e) The £1,901,784 as cost of goods was taken from a 'Profit and Loss Account' sent to him from Scion, described as 'Direct Costs: Revaluation of Debtors' (ibid.);
>
> (f) He claimed to have realised a net trading loss in 2007/8 of £1,888,225, with the same sum as a net business loss for tax purposes;
>
> (g) He sought to set-off loss of £1,238,721 from 2007/8 against other income for 2007/8;
>
> (h) He sought to carry back £649,504 to previous year(s) and set-off against income (or capital gains);
>
> (i) Box 101 said:
>
> > "Please note losses of £649,505 are claimed under s 72 ITA 2007 to be set against early years (sic). This sum should extinguish all income for 2004/5, 2005/6, and 2006/7 and result in a refund due for earlier years of £235,701.60.
> >
> > The balance of losses remaining of £1,238,721 is therefore being claimed against income of the same year (i.e., 2007/8) under s 64 ITA 2007.

(j) No information was given in the 'White Space' in Box 16 of the Tax Calculation Summary…

135. We agree that there is no prescribed form in which a claim under section 152 must be made. However, we can see no reasonable basis on which Mr Good could be said to have discharged the burden of proof on him that he had in fact made such a claim by virtue of these entries in his 2007/08 return.

136. A claim under section 152 is not merely an abstract claim for a tax loss, whatever its nature and whatever income or profits it is to be set against. It must be a claim for a loss in a relevant transaction, and it must be a claim for "loss relief against relevant miscellaneous income". Subsections (4) and (5) of section 152 make it clear that in the circumstances of this appeal that is confined to income taxable on Mr Good under section 609 ITTOIA.

137. Mr Good made no claim in his 2007/08 return, or within the time period permitted by section 155, to set any loss against relevant miscellaneous income[29]. The claims for loss relief were for sideways loss relief of £1,238,721 and carry back relief against income or capital gains of previous years (as to £649,504). They were explicitly made on the basis that he incurred the loss in the course of a trade and that the claims were made under sections 64 and 72 ITA 2007. That was repeated in the white space entry at Box 101. The tax calculation summary pages showed only a repayment arising as a result of the carry back claim. Nothing stated or even suggested that the claim was made on any alternative basis. Nothing indicated or suggested that the claim was for relief "against relevant miscellaneous income". In practice, HMRC would have been unable to identify from the return that any claim, actual or protective, was being made under section 152.

138. We do not accept that the clear entries in the return and white space should somehow be rewritten or converted many years later into a claim which was made under section 152. Mr Baldry accepted in response to a question that if his submission was correct, HMRC would now be out of time to challenge the loss claim, regardless of its substantive validity. That reinforces our conclusion that the submission cannot be sustained in the face of the terms of the 2007/08 return submitted on behalf of Mr Good.

139. The FTT did not set out the reasoning above, but then Mr Baldry did not argue the point in the terms he did in this appeal. The FTT reached the right conclusion. The appeal on this ground is dismissed.

Issue Eight: Miscellaneous Income

140. Section 687(1) ITTOIA imposes a residual liability to income tax on income from any source (with certain exceptions) that is not otherwise specifically charged to income tax.

[29] Mr Good in fact had no such income in that tax year, but section 153 would have been capable of operating to carry forward against future income from the Scheme any loss validly claimed.

141. The FTT heard submissions from the parties as to whether the MAPs would be liable to income tax under section 687 if they were not so liable under section 609 and, if so, whether the loan interest payments would be deductible from the amount chargeable. It decided that if, contrary to its findings, it had determined that Mr Good was not liable to income tax on the MAPs under section 611, then he would have been liable under section 687[30].

142. In this appeal, Mr Baldry argued that if the MAPs were taxable as income at all, they fell to be taxed under section 687 rather than section 609, but only net of the loan interest payments. HMRC challenged both of those propositions.

143. As the FTT correctly observed[31], sections 609 and 687 are mutually exclusive. In light of our conclusion in relation to Issue Four that the MAPs were liable to income tax under section 609, we need express no view on this issue. Since it is not material to this appeal, we consider it preferable not to do so.

Disposition

144. The appeal is dismissed on all grounds.

Signed on Original

MR JUSTICE MICHAEL GREEN
JUDGE THOMAS SCOTT

RELEASE DATE: 18 November 2021

[30] FTT [264]-[266].

[31] FTT [260].