Neutral Citation: [2026] UKUT 00013 (TCC)

Case Number: UT/2023/000080

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Edinburgh

POST-CESSATION RECEIPTS

Heard on: 1 and 2 October 2024
Judgment date: 19 December 2025

Before

JUDGE JULIAN GHOSH KC
LORD CLARK

Between

(1) **MR JAMES O'NEIL**

(2) **MRS DEBORAH O'NEIL**

(3) **MRS MAY MCCALLUM**

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Ben Elliott, Counsel, instructed by McLaughlin Crolla LLP

For the Respondents: Mr Roddy MacLeod, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DRAFT/DECISION

INTRODUCTION

1. This appeal from the First-Tier Tribunal (Tax Chamber) ("**the FTT**") concerns the taxation of a payment received during the tax year ending on 5 April 2015 as compensation for a mis-sold interest rate hedging product ("**the Redress Payment**").

2. The Appellants are the former partners of a Scottish partnership, Blackpool Leisure and Promotions ("**the Partnership**").

3. The Respondents ("**HMRC**") consider the Redress Payment to be taxable in the hands of the Appellants as post-cessation trading receipts of the Partnership under the Income Tax (Trading and Other Income) Act 2005, ("**ITTOIA 2005**"), section 242. This is on the basis that the Appellants "received" or were "entitled" to the Redress Payment as a "post-cessation receipt" within the meaning of ITTOIA 2005, section 245 and therefore the regime in ITTOIA 2005, Part 2, Chapter 18 applies.

4. The Appellants accept that the Redress Payment is taxable. Their position, however, is that it is not them who are taxable on the Redress Payment. Rather, they say that the Redress Payment is a receipt which is taxable in the hands of a Scottish company, Blackpool Promotions Ltd ("**the Company**"), which was the 100% subsidiary of a holding company, Lythe Holdings Limited ("**Lythe**"). Lythe was held by the Appellants: 70% by the First Appellant, 20% by the Second Appellant and 10% by the Third Appellant. The Appellants' submissions were on the basis that if the Company is not taxable on the Redress Payment, the Appellants are so taxable (this seems to be common ground, in that neither party made any contrary submission).

5. If they are wrong on that (that is, the Company is not taxable), the Appellants submit that HMRC were wrong to issue discovery assessments under the Taxes Management Act 1970 ("**TMA 1970**"), section 29 in relation to the Appellants' personal tax returns. There are two separate elements to this submission, concerning (a) the relationship of the "post-cessation receipts" regime to the regime which otherwise applies to the taxation of partnerships in ITTOIA 2005, Part 9 and (b) the power of HMRC to issue discovery assessments at all when the powers to amend self-assessment returns or to issue closure notices are available.

6. HMRC also imposed penalties under paragraph 3(1)(a) of schedule 24 to the Finance Act 2007 ("**FA 2007**") on each of the Appellants in relation to the underassessed income on the basis that their failure to include their share of the Redress Payment on their self-assessment tax returns was "careless". The FTT upheld the penalty issued to the First Appellant, Mr O'Neil ("**the Penalty**"). The Appellants appeal against the Penalty. Again, there are two separate aspects to the appeal against the Penalty: (a) a complaint about how HMRC pleaded their case in the FTT led to procedural unfairness and/or a failure to discharge the burden of proof and (b) a complaint that any loss of tax was not "due to" any carelessness on the part of the Appellants.

7. We find:

(1) The Appellants (not the Company) are taxable on the Redress Payment as the persons "entitled" to this sum.

(2) The discovery assessments on the Appellants are sound in law. Put short, Part 2, Chapter 18 of ITTOIA 2005 applies to tax the Appellants and Part 9 ITTOIA 2005, is

irrelevant. Further, HMRC have the power to issue discovery assessments in the circumstances of this case.

(3) The Penalty is sound (there was no procedural unfairness and the loss of tax was indeed due to carelessness on the part of the Appellants).

8. We have set out the relevant provisions in an Appendix to our decision.

FACTUAL BACKGROUND

9. The primary facts are set out in the FTT's decision at paragraphs ([28] – [38] and [72]). We refer to paragraphs of the FTT decision in summarising these facts. We set out additional facts specific to the issues relating to the validity of the discovery assessments and the Penalty when we deal with these latter issues.

10. The Partnership is a Scottish partnership which commenced trading as a travel agent on 1 April 1983. The profits of the Partnership were shared equally amongst the Appellants as partners ([28]). Between 2005 and 2007 the Partnership acquired four hotels ("**the Properties**") and from then on carried on a business of hotelier and travel agent ([29]).

11. In May 2007, as a condition of obtaining loans from the Royal Bank of Scotland ("**RBS**") the Partnership entered into an interest rate hedging product ("**the Swap**") ([12], [30]). There are no restrictions in the Swap documentation on the transfer or assignation of the Swap to a third party ([72(4)]).

12. In 2009, Brodies Solicitors LLP advised the Partnership that the Swap was inappropriate for the Partnership's business ([31]).

13. By agreement dated 22 May 2012, governed by Scots law ("**the Agreement**"), the Partnership sold its business (except for the Properties) to the Company for £6 million [33]. Importantly, RBS was not notified of the transfer of the Swap or of any subsisting rights of the Partnership against RBS for having been mis-sold the Swap ([72(5)]).

14. The FTT found (at [72(3)]) that the reason for transferring the business and the Hotels was to facilitate the termination and refinancing of the RBS loans by loans from Santander who had agreed to make loans to the Company in October 2012. The Swap was terminated at some point after the Agreement on the payment of a termination fee by the Company.

15. Following the transfer effected by the Agreement, the Partnership held only the Properties ([34]).

16. In October 2012, the Partnership sold the Properties to Lythe ([36]).

17. The parties agreed that the Partnership had no ongoing business after 31 October 2012 ([44]). The FTT found ([72(8)]) that "at best", on the basis of the evidence they had seen – having seen no evidence about the transfer of the Properties to the Company ([47]) – the Partnership's business ceased on the date of the transfer of the Properties.

18. In August 2012, RBS informed the Partnership that they had agreed with what was then known as the Financial Services Authority ("**FSA**") to undertake a review of interest rate swaps sold since 1 December 2001 ([35]). On 10 March 2014, RBS wrote to the Partnership's solicitors with an offer of redress based on the outcome of their review. The terms of the offer were that payment could be made only to the partners of the Partnership and not to any third parties ([37]). The offer was accepted and on 22 April 2014, the Redress Payment was paid into a joint account in the name of the First and Second Appellants ([37]).

19. The FTT made the following findings:

(1) No formal claim had been made by the First Appellant at any time ([72(1)]);

(2) The First Appellant, at the time of the Agreement (22 May 2012), had "…been considering some action but no action had actually been taken" ([79]); and

(3) The Partnership's position as an "unsophisticated client" who had been identified as having been mis-sold the Swap in accordance with the FSA's directions meant that the Partnership had a right to the Redress Payment without the need to make a claim ([72(2)]).

20. The FTT also held that "…the Redress Payment could only be paid to the Partnership because only the Partnership had qualified as an 'unsophisticated client' at the time that the Swap was entered into…[and] as a matter of regulatory law RBS would have been acting outside its ambit had it made the Payment to any other entity" ([81(2)]). We do not consider that this is a finding of fact but it is convenient to record this holding here.

21. The Redress Payment was originally not included in the Company's return for the year ended 31 March 2014 but (put short) the Company accepted that the Redress Payment was taxable and the Company paid the additional tax due to HMRC ([38]).

The Terms of the Agreement

22. The Recitals to the Agreement provide:

> "(A) The Seller carries on inter alia the Business.
>
> (B) The Seller has agreed to sell and the Buyer has agreed to purchase the Business (together with the Assets) as a going concern subject to and on the terms and conditions of this Agreement."

23. Clause 2.1, the operative provision, provides:

> **"2 Agreement to sell and purchase**
>
> 2.1 Subject to the terms of this Agreement, the Seller as beneficial owner agrees to sell, free from all Encumbrances, and the Buyer agrees to purchase, with effect from the Effective Time, the Business comprising of the Assets as a going concern and including all other property, rights and assets owned by the Seller and used, enjoyed or exercised or intended to be used, enjoyed or exercised exclusively in the Business at the Effective Time, save for the Excluded Assets."

24. Clause 8.2 provides:

> **"Clause 8: Passing of title and risk and Third-Party Consent**
>
> […]
>
> 8.2 In so far as any Assets are not delivered or formally transferred, novated or assigned to the Buyer at Completion and until such time as they are formally transferred, novated or assigned to the Buyer:
>
> 8.2.1 the Seller shall be deemed to hold all such Assets on trust for the Buyer; and
>
> 8.2.2 to the extent permissible under law or the terms of any relevant agreement
>
> 8.2.2.1 the Seller shall use all reasonable endeavours to ensure at its cost that the Buyer shall be entitled to the benefit, use and enjoyment of those Assets, to receive

the income therefrom, and to have the right of enforcement of the Business Claims, if any, relating to those Assets; and […]"

25. Clause 1.1 includes the following definitions:

(1) "**Assets**" are defined as

"the Business and all of the assets of the Business including the Goodwill, the Moveable Assets, the Fixed Assets, the benefit (subject to the burden) of the Contracts, the Records, Book Debts, the Stock, the Business Information, the IT System, the Business Name, the Business Intellectual Property Rights, the Business Claims, the cash in hand and at the bank of the Seller, excluding the Excluded Assets";

(2) "**Business"** is defined as

"the business of travel agency carried on by the Seller at the Effective Time";

(3) "**Business Claims**" are defined as:

"all of the Seller's rights, entitlements and claims against third parties arising directly or indirectly out of or in connection with the operation of the Business or relating to the Assets, including rights under any warranties, conditions, guarantees or indemnities or under the Sale of Goods Act 1979, but excluding any rights, entitlements and claims relating to the Excluded Assets";

(4) "**Contracts**" are defined as

"all contracts, licences, arrangements and other commitments relating to the Business entered into, on or before and which remain to be performed by any party to them in whole or in part at, the Effective Time".

(5) "**Completion"** is defined as

"the completion of the sale and purchase of the Business and the Assets in accordance with this Agreement."

(6) "**Completion Date**" is defined as

"6th April 2012, notwithstanding the date of this Agreement";

(7) "**Effective Time**" is defined as

"the close of business on the Completion Date".

The Assessments and the Penalties

26. The Partnership did not file a return for the relevant tax year. The Appellants each filed self-assessment tax returns under TMA 1970, section 8 for the relevant year of assessment, none of which referred to the Redress Payment.

27. HMRC notified the Appellants and their accountants in letters dated 20 June 2017 that they were commencing investigations into the Appellants' personal returns for the relevant tax year, specifically in relation to the Redress Payment.

28. HMRC issued discovery assessments, under TMA 1970, section 29, dated 26 September 2017 to each of the Appellants on the basis that each partner was entitled to one third of the Redress Payment, which was subject to income tax as "other income". We note that by the time of the hearing before the FTT, HMRC had made it clear that the tax charge was a charge as a post-cessation trading receipt, not as "other income" ([15]). We do not understand the Appellants to take any point on this. The Appellants appealed against both the discovery assessments and the penalties.

29. HMRC issued further discovery assessments on 16 May 2018 on each of the Appellants and on 21 June 2018, issued further penalties on the Appellants.

30. The Appellants requested a statutory review of all the assessments and penalties on 25 November 2019. HMRC's review conclusion letter, dated 30 March 2020 (Officer Agg) concluded that:

(1) The 26 September 2017 assessments were validly issued and should be amended on the basis that the Redress Payment constituted partnership income of each Appellant, increasing the liability;

(2) The 7 November 2017 penalties should be reduced on the basis that the Appellants' behaviour was "careless", rather than "deliberate"; and

(3) The 16 May 2018 assessments and the 21 June 2018 assessments should be cancelled.

31. The Appellants notified their appeals to the Tribunal on 29 June 2020. HMRC filed in each appeal a materially identical statement of case, each dated 20 September 2020, with an appendix.

THE FTT DECISION

32. The FTT heard the appeals on 29 and 30 September 2022. After the hearing, it directed the parties to obtain Scots law advice from a jointly instructed Scottish lawyer, Mr Edwards, ([10], [11]), who was also qualified in English law. Mr Edwards' advice was obtained on 30 November 2022 and the parties made further written submissions.

33. The Agreement is governed by Scots law and, as we make clear below, Scots private law is critical to the resolution of whether either the Swap or the Claim Right was assigned by the Agreement. It is unsatisfactory that the FTT was in a position where neither the Judge (Judge Short) nor the Appellants' counsel (who was instructed by a firm of Scottish accountants, McLaughlin Crolla) were Scots lawyers. Neither do we readily understand the FTT's approach, in an adversarial process, of directing the parties to jointly appoint a dual Scots and English qualified lawyer. First, HMRC's counsel, Mr MacLeod, is a member of the Faculty of Advocates who, along with HMRC, had a responsibility to make such submissions on Scots law as HMRC wished to make, to assist the FTT. Secondly, we do not understand why a qualification in English law was necessary. English private law is irrelevant to the effectiveness of the assignation. Finally, insofar as the Appellants' legal team were concerned, they should have been left free to instruct their own representative to make submissions on Scots law. But (through no fault of their own) they were put in a position that they had to jointly appoint and accept the analysis of a dual-qualified lawyer, Mr Edwards, who, although jointly instructed by the parties and not instructed or appointed by the FTT, was effectively acting as an *amicus*. We make it plain that submissions of law are properly made by parties' representatives, who are appropriately qualified to make competent submissions to the Tribunal. If parties wish to proceed on the basis of a jointly instructed representative, so be it. But parties should not be put in a position where they are effectively forced to adopt submissions of any representative by being directed to instruct a representative, jointly or otherwise.

34. The FTT handed down its decision on 30 March 2023. It found for HMRC as regards (1) the taxability of the Redress Payment in the hands of the Appellants, (2) the validity of the discovery assessments and (3) in relation to the Penalty issued to the First Appellant. It cancelled the penalties issued to the Second and Third Appellants.

1. Redress Payment taxable in the hands of the Appellants, not the Company

35. The FTT concluded that the Partnership was the entity entitled to the Redress Payment under the Agreement. It followed, as we explain below, that the Appellants were the taxable persons for income tax purposes.

36. The FTT adopted the agreed term "**Claim Right**" to refer to "the asset in question from which the Redress Payment arises" ([40]), that is to say any of the Partnerships' rights subsisting against RBS for mis-selling ([56(5)]). The Appellants submitted that the Agreement effected a transfer from the Partnership to the Company both of the Swap ([57(1)]) and the Claim Right ([57(2)]). The Respondents submitted that there was no such Claim Right ([63(1)], [63(5)]), and even if there were, neither the Claim Right nor the Swap were effectively assigned by the Agreement as a matter of Scots law ([63(2)] – [63(4)]).

37. The FTT found that the intention of the parties to the Agreement was that the Swap should be transferred with the rest of the Partnership's business assets ([95], [97]). However, neither the Swap (nor, separately, the Claim Right) had been assigned under the Agreement by the Partnership to the Company because assignation requires, in Scots law, intimation (here to RBS) and there had been no intimation of the assignation of either the Swap or the Claim Right to RBS ([83]-[94]).

38. The absence of any intimation required to effect the assignation of the Swap was, for the FTT, evidenced by correspondence between RBS and the partners (that is, the Appellants) about the Offer and the issue of the cheque in the names of the partners ([86], [90], [91], [101], [111]). The FTT also relied on the fact the RBS gave the First Appellant no choice as to the form of the Redress Payment, which the FTT said "supports the fact that RBS had not been notified of the assignment [sic] of the Swap" ([101]).

39. The FTT further held that clause 8.2.2 of the Agreement (which we have set out above and which we discuss below) was "…not legally effective in the context of an agreement governed by Scots law" and did not effect "some kind of equitable transfer" ([99]). Where the Agreement was governed by Scots law, clause 8.2.2 could not be relied upon because Scots law "does not recognise the concept of property held on trust" [112].

40. In relation to the Claim Right in particular, the FTT acknowledged that Scots law recognises a "right to sue" which can be assigned ([84]). But the FTT held that the Claim Right was not subsisting at the time of the Agreement; rather, the Claim Right arose "at the time when RBS recognised, as a result of the action of the FSA, that the Swap had been mis-sold to the Partnership" ([80](1) and (2)]). The FTT found that the Claim Right did not arise from the terms of the Swap but rather resulted from the Partnership's position as an "unsophisticated" client who had been identified (and only upon being identified) as having been mis-sold the Swap in accordance with the FSA's directions ([72(5)], [80]-[81], [110]). The FTT expressed a clear view that the Claim Right arose because the FSA "determined entity [here RBS] is obliged to make compensation payments to a certain limited class of clients" ([80](5), [110]), stating that "…it seems…more likely that without the FSA's intervention the Partnership would…not have been in a position to make a claim against the banks…" ([80](5)). According to the FTT, then, the Claim Right should be treated as arising at the earliest on 8 August 2012 (the date of the first letter from RBS) and "could only be a Claim Right in the name of the Partnership" ([81.2]). Thus, for the FTT, the Claim Right post-dated the Agreement ([110]).

41. Further, as in relation to the Swap, the absence of any intimation of any transfer to RBS meant, for the FTT, that there was no assignation of the Claim Right ([111]). Nor was clause 8.2.2 of the Agreement legally effective in Scots law to effect any sort of equitable transfer of the Claim Right ([99]). The FTT's view that where the Agreement was governed by Scots law,

clause 8.2.2 could not be relied upon because its assertion that Scots law "does not recognise the concept of property held on trust" ([112]) applied in relation to the Claim Right as it did in relation to the Swap.

2. Discovery assessments were valid

42. In relation to the discovery assessments, where the post-cessation receipt was received by the Partnership, the FTT concluded (at [73-77]) that the Discovery Assessments were validly made in the name of the individual partners (that is, the Appellants), under ITTOIA 2005, section 245, on the basis that the Partnership had ceased. It recorded (at [76]):

> "It is difficult to see how, in circumstances in which the Partnership business had ceased and HMRC had no evidence that the Partnership continued to exist, it can be said that HMRC should have assessed the Partnership under s 30B TMA 1970. The only possibility was for HMRC to make an assessment in the name of the former partners as individuals. In accordance with s 245 ITTOIA 2005, it is the individual partners who, after the cessation of the Partnership, were entitled to the Redress Payment (if the Company was not so entitled)."

3. The Penalty issued to the First Appellant was valid

43. The FTT had to consider whether each of the Appellants had been "careless" for the purposes of FA 2007, Schedule 24, paragraph 3 and therefore attracted the penalties. The burden of proof in relation to the penalties is on HMRC. The FTT considered (1) whether HMRC were barred from defending the penalties because of a deficiency in their pleadings and, assuming that HMRC were not so barred (2) whether each of the Appellants had been "careless" in the relevant sense.

44. The FTT upheld the penalty imposed on Mr O'Neil (i.e., the Penalty) but cancelled the penalties on the other Appellants:

(1) In relation to the sufficiency of HMRC's pleadings, the FTT held that although HMRC had not pleaded their case in sufficient detail in their statement of case or skeleton argument, the Appellants were aware of the issue, HMRC had made oral submissions on the Penalty and the Appellants had responded to those arguments at the Tribunal. This meant that there was no procedural unfairness to the Appellants despite the deficiencies in HMRCs' pleadings ([114], [118], [120]). The FTT noted that HMRC had stated in their review letter of 20 March 2020 (at 7.3.2 of that letter) that "…your behaviour was careless in that you did not advise your accountants of the redress payment until the matter was raised by HMRC".

(2) The FTT further held that HMRC had made oral submissions before the FTT ([119]) which distinguished the present case from *Burgess v HMRC* [2015] UKUT 578 (TCC) ("*Burgess*"). In *Burgess,* a failure of pleadings was fatal for HMRC because HMRC had wrongly assumed that the validity of discovery assessments was not in issue at all, whereas, in this case, the parties were all aware that the validity of the Penalty was in issue ([119]). The FTT noted that the Appellants had written to HMRC on 23 June 2022, prior to the hearing before the FTT, pointing out that HMRC had not addressed the question of what evidence demonstrated carelessness on the part of the Appellants. There had not, however, been any unfairness to the Appellants to justify rejection of HMRC's case ([120]).

(3) In relation to whether there had been careless behaviour by the Appellants, the FTT held that the First Appellant had acted carelessly in failing to properly consider the tax treatment of the Redress Payment and the penalty issued against him should be upheld ([121(1)]). The FTT found (seemingly as a fact) that although the First Appellant had

"spoken to his former accountants about the receipt of the Redress Payments, he had not requested formal advice from them, rather relying on internet searches" ([121(1)(a), (b)]), and observed that although "it may be correct that there was confusion in the market at the time about how these payments should be taxed", the First Appellant was not absolved from making any enquiries at all, or from at least notifying HMRC of receipt of the Redress Payment ([121(1)(c)]). The FTT said that "it was not convinced" that the First Appellant had considered the position for himself and decided it was sufficiently uncertain to make it reasonable not to declare it ([121(1)(d)]). We understand the FTT to be saying that the First Appellant had not, on the balance of probabilities, taken advice on the tax treatment of the Redress Payment, rather relying on internet searches, and in those circumstances, it was careless (in the sense of not being reasonable) to have failed to notify HMRC of receipt of the Redress Payment.

(4) The penalties against the Second Appellant and the Third Appellant were cancelled on the basis that HMRC had not pleaded their case ([124]). There was "a total lack of evidence" ([121(3)]) about their decision-making process and no suggestion that they relied on the First Appellant ([121(2)-(3)]).

THE GROUNDS OF APPEAL

45. The Appellants now appeal to the Upper Tribunal, with the permission of Tribunal Judge Cannan, on the grounds that the FTT made the following errors of law:

(1) The FTT erred in law in concluding that the Partnership was entitled to the Redress Payment in that:

(a) It erred in holding that the Redress Payment was not an asset subject to the Agreement; and

(b) It erred in concluding that clause 8.2 of the Agreement was legally ineffective as a matter of Scots law and that the clause did not transfer the benefit of the Redress Payment to the Company.

(2) If the Partnership was entitled to the Redress Payment, the FTT erred in concluding that the payment was taxable as partnership profits and that HMRC were able to assess those profits by issuing discovery assessments to the individual partners under the TMA 1970, section 29.

(3) As to the Penalty:

(a) The FTT erred in finding that HMRC had discharged their burden of proof in relation to the issue of carelessness and/or in finding that there was no procedural unfairness in circumstances in which HMRC failed to plead or advance a positive case in advance of the hearing; and/or that

(b) The FTT erred in finding that the relevant inaccuracy was caused by carelessness on the part of the First Appellant, and/or in failing to address the issue of "causation".

THE ISSUES: DISCUSSION AND CONCLUSIONS

GROUND 1: ARE THE APPELLANTS "ENTITLED" TO THE REDRESS PAYMENT FOR THE PURPOSES OF ITTOIA 2005, SECTION 242?

46. The Income Tax (trading and Other Provisions) Act 2005 ("ITTOIA 2005"), section 242 imposes a charge on "*...post-cessation receipts arising from a trade*". The charge is on *"...the person receiving or entitled to the receipts*" (section 245). As we observe above, the taxation of the Redress Payment in the hands of the Appellant arises if and only if the Appellants are either in receipt of or are entitled to the latter within the meaning of ITTOIA 2005, section 245.

47. In the Appellants' first ground of appeal, the Appellants submit that the Company is "entitled" to the Redress Payment pursuant to the Agreement. For the appeal to succeed, the Appellants' submission must amount to the proposition that the Appellants neither "received" the Redress Payment in any relevant sense (bearing in mind, at least so far as the First Appellant and Second Appellant are concerned, the Redress Payment was paid into their joint account), nor were "entitled" to the Redress Payment (because the Company had the only relevant "entitlement" for the purposes of section 245).

48. The Appellants accept that, in the absence of intimation of any assignation to RBS, no assignation of either the Swap or the Claim Right took place under the Agreement (so that the Appellants, qua partners of the Partnership, were relevantly entitled to the Claim Right and, therefore, the Redress Payment). This is whether the source of the Redress Payment, the Claim Right, is the offer of redress dated 10 March 2014 or some other source which arises from what we shall call regulatory law. This is clearly correct. Otherwise, there could be no assignation (even with intimation) to the Company. To be clear, it is no part of the Appellants' grounds of appeal (and of ground 1 in particular) that any form of intimation occurred to perfect an assignation of the Swap/Claim Right/Redress Payment. This means that although the Company has a valid right as against the Partnership and the Appellants *qua* partners (*Thome v Thome* (1683) 2 Brown's Sup 49; Stair III, 1, 15), the purported assignation has no effect as against third parties (Stair III, 1, 6), which third parties would include HMRC: *Booth v Buckwell* [1980] STC 578, 584. So we proceed on the basis that the Appellants say that the Appellants are not "entitled" to the Claim Right/Redress Payment despite there being no perfected assignation.

49. The Appellants' submissions rest on a number of short propositions:

(1) First, that the right to the Redress Payment arose as a function of the Appellants qua partners of the Partnership being parties to the Swap, so that the Claim Right arises at a time before the Agreement was concluded (and thus subject to the Agreement), or, alternatively, "future rights" qua parties to the Swap were encompassed by the Agreement.

(2) Second, that the terms of clause 8.2.1 the Agreement impress either or both of the Swap and the Claim Right (and therefore the Redress Payment) with a trust in favour of the Company. This means, say the Appellants, that the Appellants had no relevant "entitlement" within ITTOIA 2005, section 245.

(3) Separately and in the alternative to the second proposition above, clause 8.2.2.1 of the Agreement results in an "entitlement" for the Company to the Swap or Claim Right with the consequence that the only relevant "entitlement" to the Redress Payment is that of the Company.

50. For the appeal to succeed, the Appellants' propositions must amount to a submission that the Appellants were, at no time, "entitled" to the Redress Payment because by the time that RBS had contracted to make this Redress Payment in 2014, the terms of the Agreement meant

that only the Company had any relevant entitlement (because of the terms of clause 8.2.1/clause 8.2.2.1), irrespective of when the Claim Right accrued. Thus Ground 1 concerns (only) whether the Agreement resulted in the Company's entitlement to the Redress Payment and no such entitlement for the Appellants.

51. We conclude that the Appellants were "entitled" to the Redress Payment for the purposes of ITTOIA 2005, section 245. There is no trust in favour of the Company in respect of the Redress Payment, irrespective of when the Claim Right arose (the offer to make the Redress Payment was made to the Partnership but the Claim Right may have arisen before then: see [18] above). Nor does clause 8.2.2.1 of the Agreement confer a relevant entitlement on the Company (or remove the Appellants' entitlement to the Redress Payment).

The relevant statutory provisions

52. It is convenient, at this stage, to set out the relevant provisions relating to the substantive tax charge.

53. Provision for the income tax treatment of post-cessation receipts is set out in ITTOIA 2005, Part 2, Chapter 18.

54. ITTOIA 2005, section 242 imposes an income tax charge on "post-cessation receipts arising from a trade". Section 244(1) provides that income tax is charged under this Chapter on the full amount of the receipts received in the tax year. The charge to income tax under section 242 is a residual charge. Section 243(1) and (2) provide that a post-cessation receipt is chargeable to tax only insofar as it is not otherwise chargeable to income or corporation tax.

55. The charge under section 242 extends to post-cessation receipts of partnerships: see section 243(5) which excludes a charge under Part 2, Chapter 18 for certain profits for trades carried on outside the UK.

56. There is a broadly equivalent provision to section 242 which applies for the purposes of corporation tax: Income and Corporation Taxes Act 1988, section 103. This was considered by the Supreme Court in *Shop Direct Group v Revenue and Customs Commissioners* [2016] UKSC 7; [2016] 1 W.L.R. 733. At [21] Lord Hodge noted that:

> "The purpose of section 103 was to make sure that sums which a person received, which arose from a discontinued trade and which were not otherwise taxed, were brought into a charge to tax."

We assume the same purpose informs ITTOIA 2005, section 242.

57. ITTOIA 2005, section 246 defines "post cessation receipts" as follows:

> **"246 Basic meaning of "post-cessation receipt**"
>
> (1) In this Part "post-cessation receipt" means a sum—
>
> (a) which is received after a person permanently ceases to carry on a trade, and
>
> (b) which arises from the carrying out of the trade before the cessation."

58. Section 245 provides for the person liable to the tax charged under Chapter 18:

> **"245 Person liable**
>
> The person liable for any tax charged under this Chapter is the <u>person receiving or entitled to the receipts"</u> (*emphasis added*)

59. In order for the Appellants to be taxable on their respective shares of the Redress Payment, taking section 245 and section 246 together:

(1) The Redress Payment must have arisen "from" the Partnership's trade (to be a "post-cessation receipt"); we consider this condition in the context of the Appellants' second ground of appeal.

(2) The Redress Payment must have been received by the Appellants after the permanent discontinuance of the Partnership's trade; this condition is obviously satisfied, since the Hotels were sold on 31 October 2012, after which there was no ongoing business and the Redress Payment was made on 22 April 2014. We say no more about it.

(3) The Appellants must have "received" or become "entitled" to their shares of the Redress Payment. It is this condition with which the Appellants' ground 1 of appeal engages.

Preliminary point: the relevance of accounting treatment

60. We raised in the hearing the question of whether post-cessation receipts must, in order to be taxable, give rise to accounting profits in the hands of the putative taxable person. This question is important because the burden of proof for the discovery assessments is (we assume: see below) on HMRC. If the answer is "yes", HMRC would have to have shown that the Redress Payment would have given rise to an accounting profit in the hands of the Appellants in a set of notional accounts for the relevant year of assessment. HMRC have not made any submissions or led any evidence on this. But the answer is, we think, "no".

61. It is true that in the case of trading profits within ITTOIA 2005, section 5, HMRC are required to show that a notional trading and profit and loss account for the Partnership for the relevant tax year, prepared in accordance with generally accepted accounting practice, has included a credit entry in the profit and loss account for the amount of the Redress Payment (*Hepburn v HMRC* [2013] UKFTT 45). This is on the basis that ITTOIA 2005, section 25(1) provides:

> "(1) The profits of a trade to which the cash basis does not apply must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for income tax purposes."

62. But ITTOIA 2005, section 245 taxes "receipts" in the context of a charge on "post-cessation receipts", not "profits". Section 246(1) defines "post-cessation receipts" as a "*sum...which is received after a person permanently ceases to carry on a trade, and which arises from the carrying on of the trade before the cessation."*

63. We note that ITTOIA 2005, section 27 contains a definition of "receipts" in the context of calculation of the profits of a trade:

> " (1) In the Income Tax Acts, in the context of the calculation of the profits of a trade, references to receipts and expenses are to any items brought into account as credits or debits in calculating the profits.
>
> (2) There is no implication that an amount has been actually received or paid.
>
> (3) This section is subject to any express provision to the contrary."

64. "Receipts", in the "context of the calculation of the profits of a trade*"* means accounting receipts. But "receipts", in the context of section 245 and "post-cessation receipts", means the "sum" mentioned in section 246 *"*which arises from the carrying out of the trade before the

cessation [of the relevant trade]". While "receipts", in the accounting sense, quantify the taxable amount for trading profits, the quantification of the taxable amount for post-cessation receipts is done in section 246: by identifying whether there is a "sum" which arises from a trade which has permanently ceased, without reference to any accounting practice at all. Section 246 does not require any accounting recognition of a "sum" for that "sum" to fall within its provisions. Indeed, section 243(2) expressly distinguishes between a post-cessation receipt and the profits of a trade "for any period".

65. The notion of "receipts" in section 245 is used not to compute the taxable amount but to identify "the person liable to tax charged under this Chapter". That the legislature did not use the term "profits" in section 245 indicates that it did not intend for rules as to the calculation and assessment of trading profit and loss to have applied. This indicates that as far as post-cessation trading receipts are concerned, HMRC do not have the burden of showing that a notional trading account would have included a credit entry for the Partnership.

66. It follows that accounting practice, is, we consider, irrelevant to taxation in the context of post-cessation receipts.

"Entitlement" for the purposes of ITTOIA 2005, section 245

67. The parties made no submissions as to the technical meaning of the words "receiving or entitled to the receipts". We note, as a preliminary point, that the provisions do not require the person who is liable to tax in receiving or being entitled to "receipts" to be the same person carrying out the trade from which the "sum" arises under section 246(1). This is not surprising in the context of the taxation of post-cessation receipts, where an entity which has ceased to trade may well no longer exist when post-cessation receipts arise to a person who is "entitled" to these receipts. In the context of this case, this means that whether the relevant trade was carried on by the Partnership or the Partnership together with the Appellants as the partners of the Partnership is irrelevant. For the Appellants to be taxable persons under ITTOIA 2005, section 245, the Appellants must have received or become entitled to the Redress Payment.

68. The words "receiving or entitled to" are used in ITTOIA 2005, section 8, with reference to the person liable to the charge to income tax on trade profits imposed by ITTOIA 2005, section 5:

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

69. Authorities dealing with ITTOIA 2005, section 8 adopt, as a "working definition" of the term "entitled", "present right to a present payment" (see *Hepburn v The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 445 (TC) at [63]; *UBS AG v HMRC* [2013] STC 68 (UT) at [61] – [62]). We consider that the term "entitled" in section 245 has the same meaning, since section 245 imposes a charge on receipts which would, absent a cessation of trade, have been taxable on a trader. So for the Appellants to be relevantly "entitled" to the Redress Payment, the Appellants must have had a present "right" to the Redress Payment, which right was not somehow trumped by any right of the Company to the Redress Payment. This depends on the terms and legal effect of the Agreement (to establish the correct recipients in law of the Redress Payments) and the deed establishing the Partnership (to establish the rights of the Appellants as partners inter se).

Construction of the Agreement

70. The Agreement is governed by Scots law. The principles applicable to the construction of contracts at Scots law are materially similar to those at English law and both parties relied

on the Supreme Court decisions in *Arnold v Britton* [2015] AC 1619 (at [15] – [23]) and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 (at [10] – [15]).

71. Lord Hodge said in *Wood* at [10]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement."

72. Lord Neuberger in *Arnold v Britton* at [15] said:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

73. The relevant background context of the Agreement is, as the FTT found (at [94]), that this was a transfer between "closely related parties", in which the parties wished to transfer all of the Partnership's business as a going concern (other than the Properties) to the Company. The Agreement must be construed with this background in mind.

74. We first consider whether, as a matter of construction, the Swap and/or the Claim Right were within the scope of the Agreement. We summarise the relevant provisions of the Agreement (which we set out in full above) as follows:

(1) The Appellants sold the assets of the Partnership's business (the travel agency and hotel business) as a going concern (except for the Hotels themselves), as at the Effective Time (i.e. 6 April 2012). Assets not comprising the Partnership's business at the Effective Time were outside the scope of the Agreement entirely. Clause 2.1 provides that the Appellants, as partners of the Partnership, agreed to sell "…the Business **comprising the Assets** as a going concern…including all other property rights and assets owned by the [Appellants *qua* partners] and used, enjoyed or exercised or intended to be used, enjoyed or exercised in the Business **at the Effective Time** [save for the Properties]" (emphasis added). The definition of "**Assets**" is (with some circularity) "the Business and all of the assets of the Business including […]", and the "Business" is also defined as the "the business of travel agency carried on by [the Appellants *qua* partners] **at the Effective Time**". (emphasis added).

(2) So any "Asset" not used in the Partnership's business at the Effective Time (because it was acquired after that time) is outside the scope of the Agreement altogether. This is so even if the Claim Right is a "Business Claim" ("all of the [Partnership's] rights, entitlements and claims against third parties arising directly or indirectly out of or in connection with the operation of the Business") – where the Business Claim is "an Asset" and the Business is defined as the business carried on at the Effective Time.

(3) Clause 8 does not widen the scope of what is agreed to be sold in the Agreement under clause 2.1. Rather, clause 8 imposes an obligation on the Appellants, qua partners of the Partnership, to ensure that the economic benefits of the Assets, to the extent that title has not passed to the Company, arise to the Company, despite title not having passed.

(4) Clause 8.2 expressly relates only to Assets "not delivered or formally transferred, novated or assigned to [the Company]". In other words, clause 8.2 applies to Assets which exist at the time of the Agreement, where title to the Company, as Buyer, has not passed. Such Assets would, of course include Assets purportedly assigned, where the assignation was not yet intimated.

(5) Clause 8.2.1 "deems" the Appellants, *qua* Partners, to hold such Assets on trust for the Company and clause 8.2.2.1 requires the Appellants, *qua* partners of the Partnership, to use all "reasonable endeavours to ensure at its cost that the [Company] shall be entitled to receive the income [from such Assets] and to have the right of enforcement of the Business Claims, if any, relating to those Assets".

75. The Swap was within the scope of the Agreement. The Swap was, we consider, clearly an "Asset" within the definition provided at clause 1.1 of the Agreement. The Swap was taken out for business (trade) purposes in May 2007. The Swap was in place at the time of the Agreement. And, as we set out below, the Redress Payment arises "from" the Partnership's trade.

76. The Claim Right might have been within the scope of the Agreement. The Claim Right's status as a Business Claim (and therefore an Asset) depends on its legal nature. We record that we find the FTT's analysis of the nature of the Claim Right is difficult to follow and, indeed, contradictory. On the one hand, the FTT considered that as a matter of (unspecified) "regulatory law", the Partnership had a right to the Redress Payment (*qua* "unsophisticated client" which was mis-sold the Swap) without the need to make a claim ([72(2)]) and that RBS would be acting outside its powers if RBS had made the Redress Payment to anyone other than the Appellants ([81(2)]). We cannot detect any basis on the face of the FTT decision for what are findings of law and we cannot see any submissions made by either party recorded by the FTT on these issues. On the other hand, the FTT held that the Claim Right arose only when the FSA directed RBS to make the Redress Payment ([80(5), [110]). This is contradictory. We can see that if the Partnership had no legal right to the Redress Payment, the offer made by RBS and its acceptance by the Appellants gives rise to an enforceable right under the contract constituted by that offer and acceptance. But if, as recorded by the FTT, the Partnership had a right to the Redress Payment *qua* unsophisticated client without making a claim at all, this right surely arose at the time at which the Partnership entered the Swap; the offer and acceptance simply settled the Partnership's right on a contractual basis. And we have difficulty with the notion that a direction from the FSA can give rise (at least of itself) to the Claim Right if there was no prior right to the Redress Payment.

77. If the FTT is correct that the Claim Right arose in the hands of the Partnership qua unsophisticated client, this is a claim against RBS (a third party) which accrued when the Appellants, *qua* partners of the Partnership, became parties to the Swap in May 2007. If the offer of 10 March 2014 by RBS to make the Redress Payment and acceptance merely settled this prior right to the Redress Payment on a contractual basis, the Claim Right remains one that arose in May 2007, albeit contractually solidified in 2014; the right to the Redress Payment arising *qua* unsophisticated client is an Asset and the subsequent contractual settlement is subsumed within that prior right. In other words, the term "claim" in the definition of "Business Claim" in clause 1.1 of the Agreement is properly construed as a "claim" howsoever and whensoever settled. This is true whether any claim against RBS arose by statute or in common law.

78. We can, however, quite see that if there was no prior right to the Redress Payment at all, the offer of 10 March 2014, once accepted, represents a new right which cannot be an Asset owned by the Partnership *qua* Seller at the Effective Time on any view.

79. We cannot (and need not) decide which analysis was correct. We do note that if the FTT was correct to observe that RBS was permitted only to make the Redress Payment to the Appellants, it is very difficult to see how the Claim Right was properly assignable before payment. And we also note that if the Redress Payment indeed settled a Claim Right which had accrued before the Agreement was concluded, the Appellants would have to meet the point that there was a point in time that the Appellants were indeed "entitled" to (and therefore taxable on) the Redress Payment (even if this sum was successfully assigned to the Company), so as to attract a charge to tax under ITTOIA 2005, Part 2, Chapter 18.

80. Had it mattered, we would have had to remit this case to the FTT for parties to make submissions and the FTT to make precise findings. The relevant findings may have required the presentation of further factual evidence, which makes it inappropriate for this Tribunal to have made findings on this point. But as it happens, we do not have to resolve which view is correct for present purposes. It is now common ground that there was no perfected assignation of either the Swap, or the Claim Right because of the absence of intimation. And, for the reasons we give below, there is no trust of the Swap or Claim Right in favour of the Company.

No trust established by the Agreement

81. The FTT was simply wrong to say (at [99] and [112]) that Scots law does not recognise a trust of property. Trusts have been known to Scots law since the institutional writers (see Craig: Jus Feudale II, v, 9; Stair IV, vi and IV xxxv 21, III viii 30, III viii 71; Erskine III ix 5, ix 42). We also consider it wrong to describe Scots law as having introduced the notion of trusts by statute (see [25(2)]): the nature of a trust was described by Stair (at IV, vi 2) as "the stating of a Right so far as in the Person of the Trustee, as it hardly can be recovered from him, but by his faithfulness in following that, which he knows to be the true Design of the Truster". Trusts do not depend on any statute in these writings. For completeness, the Trusts and Succession (Scotland) Act 2024 (and the Scots trusts legislation which preceded it) pre-supposes the notion of a trust; statute does not, on any view, introduce the notion of a trust to Scots law (certainly not the 2024 Act; our point is made by section 46(3) of the 2024 Act, which applies to trusts established before its coming into force).

82. We respectfully adopt the definition of a trust set out in Wilson and Duncan *Trusts, Trustees and Executors* (Greens 1995) at 1-63:

> "A trust is...a legal relationship in which property is vested in one person, the trustee, who is under a fiduciary obligation to apply the property to some extent for the benefit of another person, the beneficiary, the obligation being a qualification of the trustee's proprietary right and preferrable to all claims of the trustee or his creditors".

83. While the beneficiary's rights are rooted in the law of obligations (not any notion of equity, as in English law), so that a beneficiary of a Scots trust has no separate property right or "estate" in trust property (*Sharp v Thompson* 1995 SLT 837, 1997 SC (HL) 66), these beneficiary rights are stronger than a mere contractual *jus crediti*, since, as Wilson and Duncan observe (1-51), the trust estate can be vindicated on the sequestration of the trustee. Trust property is outside the patrimony of the trustee in a personal capacity *(Kennedy v Bonnici* 2022 SLT 63). The proceeds of the sale of trust property are part of the trust fund, subject to the trusts under the principle of real subrogation: *Stair Memorial Encyclopaedia* Volume 24 [7]. And while a beneficiary (which, had a trust been established under the Agreement, would, in this case, have been the Company) has no title to sue for a debt due to the trust (*Anderson v Wilson* 2019 SC 271), the beneficiary has a right to recover trust property from third parties, both via the trustees and directly qua beneficiary: *Armour v Glasgow Royal Infirmary* 1909 SC 916 (in particular a sole Scottish beneficiary, which, in this case, would have been the

Company, has the right to call for trust property in a manner analogous to the rule of English law in *Saunders v Vautier*: *Gray v Gray's Trs* 1877 4 R 378 at 383).

84. Clause 8.2.1 is not, however, a provision under which a truster donates property to a person to hold that property for the benefit of another in any fiduciary capacity. This is a commercial transaction (albeit amongst friendly parties, on the incorporation of the Partnership's business) done for full value. The transaction (to use a neutral term) is a sale governed by contract, not a settlement. If intimation of an assignation is made, the very notion of a trust is redundant. The function of clause 8.2.1 is to give the Company commercial protection by way of access to the commercial benefits of the Assets where title has not passed. The question for us is whether clause 8.2.1 does so by giving the Company contractual rights, properly construed and in the right of any implied terms, or rights qua beneficiary of an express trust, so that the trusters as trustees (here, the Appellants: see below) have no relevant entitlement to the property subject to clause 8.2.1 (and only the Company does have such an entitlement). Put another way, the question is whether clause 8.2.1 imposes personal obligations on the Sellers to deal with the Assets within clause 8.2.1 is a particular way (under contract), governed by its terms (properly construed and subject to any implied terms) or whether clause 8.2.1 makes the Sellers custodians of these Assets, with fiduciary obligations (under a trust).

85. We do not consider that clause 8, and clauses 8.2.1 and 8.2.2.1 in particular, establish a trust which imposes fiduciary obligations on the Partnership and the Appellants *qua* partners and thus entitles the Company (and not the Appellants) to the Claim Right/Redress Payment. We were not referred to any authorities as to how to construe whether contractual provisions impose a declaration of trust or transfer a "beneficial" interest (see for example, what are now old authorities at 1-29, footnote 49 of Wlson and Duncan op. cit). But since each instrument should be construed according to its specific terms, we approach the question as one of principle.

86. Whether a trust is established depends upon the construction of the relevant documentation. We recognise that the word "trust" need not be used: *Macpherson v Macpherson's CB* (1894) 21 R 386. Clause 8.2.1 And clause 8.2.1 refers to there being a "deemed" trust. The Appellant's case is that clause 8.2.1 establishes an express trust for as long as (relevantly) Assets have not yet been assigned (so the trust property includes, in part, property intended to be assigned when the assignation has failed for want of intimation, which trust would cease if and when assignation was perfected). The Appellants do not submit that there is any constructive or resulting trust. We think the Appellants are correct that no constructive or resulting trust arises, or indeed any trust by operation of law. We record that it is most unlikely that a trust arises by any implication or operation of law: after all, even where a purchaser has paid the complete purchase for property and is in possession, in Scots Law, no trust arises in favour of the purchaser: *Gibson v Hunter Home Designs Ltd* 1976 SC 23, *Clark v Clark's Exrs* 1989 SLT 665. But as we say, the Appellants' submissions are restricted to whether an express trust arises.

87. Here, clause 8.2.1 employs unusual language of a "*deemed*" trust. The language of clause 8.2.1 of a "deemed" trust suggests that there is no express trust (a truster who wishes to make a trust simply settles property on terms in favour of beneficiaries: they do not "deem" a trust to arise). Such wording indicates that the parties did not intend there to be a trust but rather to impose contractual obligations on the Appellants, qua Sellers, which were analogous to a trust (a "*deeming*"), giving corresponding rights to the Buyer, the Company, under contract, not qua beneficiaries. Put another way, draftsperson of clause 8.2.1, by using the mechanism of a

"deeming", assumes there is no actual trust. The Company's rights and remedies under clause 8.2.1 and clause 8.2.2.1 would be for specific implement or damages in the Commercial Court *qua* Buyer, not *qua* beneficiary of a trust. This deeming does not bind non-parties to the Agreements, such as HMRC: *Booth v Buckwell*, supra. Indeed the heading of clause 8 (Passing of Title and Risk and Third-party Consent) makes it clear that the function of clause 8 is to give the Company, as Buyer, commercial protection where title had, for whatever reason, not passed (to speed up the perfection of title and to give the Company the economic benefits of any Assets for which title had not passed). The Appellants observe, correctly, that the Agreement (clause 1.2) expressly provides that titles headings are not to be used for interpretation. There is an air of unreality in observing that all background matters must be accounted for in construing a contract (including the terms of a contract: *Arnold v Britten*, supra) and ignoring altogether a heading which expressly reveals the function of a particular provision. We think that the correct approach is to account for this heading to Clause 8 to establish its function as a commercial protection for the Company where title to Assets have not passed but to respect the direction in clause 1.2 of the Agreement, so as not to use the heading to give a particular meaning to any provision, or to determine which one of any two provisions in the Agreement has primacy over the other. So the title tells us that clause 8.2.1 gives the Company commercial protection for Assets where title has not passed. This function is obvious from the terms of clause 8 themselves. This function (contractual protection for a sale at full value made under contract) reinforces our view that Clause 8 is a contractual provision which gives rise to contractual rights and obligations but not to fiduciary trust rights and obligations. But our conclusion that no trust is established would be the same even if we had ignored the title altogether.

88. The terms of clause 8.2.2.1 also suggest that Clause 8 does not impose any trust. Clause 8.2.2.1 requires the Sellers (the Appellants, qua partners), to make reasonable endeavours to allow the Company to "enjoy" the benefits, use, enjoyment and of income arising from (relevantly) the Assets not yet assigned. Clause 8.2.2.1 is a limitation on the responsibility of the Sellers in relation to not-yet-assigned Assets. This is the language of a contractual provision giving contractual rights, not a trust obligation for a truster who holds trust assets as a fiduciary for the benefit of a beneficiary. Clause 8.2.2.1 assumes that the Sellers are not mere custodians of the Assets but conversely assumes property and entitlement to the Assets within its scope are with the Sellers, who must, as a contractual obligation, make reasonable endeavours to give the Company the relevant "enjoyment" of the as-yet unassigned Assets. The notion of a trustee making "reasonable endeavours" to ensure, for example, that trust income goes to the beneficiaries is not readily intelligible.

89. The "deemed trust" language is explicable as a mechanism which makes it clear that the entirety of the economic benefit must pass to the Company as soon as possible and the Company has contractual rights to enforce the taking of title. We disagree with the FTT that clause 8.2.1 was "null and void". But we conclude that, in the absence of an assignation, clause 8.2 does not impose any trust on the Claim Right (or the Swap) so as to make the Company and not the Appellants "entitled" to the benefit of the Redress Payment. At most it operated to give the Company a personal right to oblige the Partnership to perfect the assignment and, in the meantime, to enable the Company to compel the Appellants to allow access to the economic benefits of the Assets not yet transferred.

90. The same reasoning applies, so that our conclusion holds good, in respect of the Claim Right (if this does indeed fall within the scope of the Agreement), whether the Claim Right as some sort of "future right to sue" in the hands of the Appellants *qua* partners as parties to the Swap, or whether the Claim Right arises in the hands of the Appellants separately to the Swap. Clause 8.2.1 does not impose a trust in favour of the Company on either of these.

91. In other words, clause 8.2.1, in the context of clause 8 as a whole, seeks to give the Company contractual rights to such economic benefits to unassigned Assets as the Appellants, qua partners, using "reasonable endeavours" can provide, as if the Assets had indeed been transferred (a "deemed" trust), rather than imposing fiduciary obligations on the Appellants.

What if Clause 8 had established a trust?

92. If we are wrong, and clause 8 indeed established a trust in favour of the Company, we would have to grapple with whether the Company was "entitled" to the Claim Right/Redress Payment (and the Appellants not so "entitled"). Of course, had the truster and trustee been different persons, intimation would have to take place in the normal way. But the trust which the Appellants submit arises in this case would be a truster-as-trustee trust, where intimation to RBS would not have been necessary to settle the Claim Right/Redress Payment in favour the Company. And in a truster-as-trustee case, intimation to the beneficiary is sufficient to settle trust property: *Clark's Trs v IRC* 1972 S.C. 177. So if (and only if) clause 8.2.1, and/or clause 8.2.2.1 of the Agreement establish a trust and there has been intimation of that trust to the Company, property within the scope of those clauses would be settled in favour of the Company.

93. But the Appellants would, in order to succeed on ground 1, have to establish three points, even if we are wrong to conclude that there is no trust.

94. First, that the Agreement was sufficient intimation to the Company (we do not see any other candidate intimation) of the trust: mere awareness is not necessarily intimation: see Stair II, 1, 24; Bell, *Commentaries on the Law of Scotland II*, 18).

95. Second, that the Claim Right existed at the time of the intimation, that is, the Agreement (and at the Effective Date), that is, it had already accrued at that time, as this treatment is restricted to property which exists at the time of the intimation to the beneficiary (here, the Agreement): *Clark Taylor & Co Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111; *Joint Administrators of Rangers FC plc* 2012 SLT 599 at [29]-[37].

96. Third, that it cannot be said (as we have observed above) that the Appellants were not relevantly "entitled" to the Claim Right/Redress Payment prior to any settlement. This third point is, of course, critical. This means that this particular issue depends not only on the technical question of intimation of an assignation, the distinction between fiduciary and contractual rights but on (1) when the Claim Right arose and (2) whether the Claim Right was assignable, prior to being satisfied, at all.

97. We do not decide any of these points. We would certainly have remitted these questions to the FTT for further argument had we considered that clause 8.2.1/clause 8.2.2.1 established a trust but given that we think it clear that no trust arises, we restrict ourselves to record that these questions would have to be addressed if we are wrong on this.

Clause 8.2.2.1

98. We have mentioned clause 8.2.2.1 in the context of construing clause 8.2.1 above, in concluding there is no trust. Clause 8.2.2.1, looked at whether together with clause 8.2.1 or in isolation, simply gives the Company contractual rights against the Appellants *qua* partners of the Partnership. In the absence of a trust in favour of the Company, clause 8.2.2.1does not assist the Appellants to show they had no "entitlement to the Claim Right. There has been no assignation of the Claim Right (even assuming assignation is permitted). The terms of clause 8.2.2.1 requires the economic benefits of the Assets to be passed to the Company (the precise mechanism is not specified but this would obviously include ensuring the passing of title). As we have observed, clause 8.2.2.1 assumes that property and entitlement to the Assets are with the Sellers.

99. As the Appellants pointed out, such a construction raises the spectre of economic double taxation. If the Appellants receive taxable amounts (such as the Redress Payment) and are contractually obliged to pay this onto the Company (say as a Business Claim) it may well be that both the Appellants and the Company are taxable on what is economically the same monies: the Appellants under ITTOIA 2005, section 242, and the Company under some other part of the tax code (for example, as a capital sum derived from an asset under the Taxation of Chargeable Gains Act 1992, section 22. Unless the Appellants obtained a deduction for the payment to the Company, this economic double taxation is not alleviated. For examples of such "double taxation", see *Spectros International plc v Madden* [1997] ST 114; *Burca v Parkinson* [2001] STC 1298). This prospect of double taxation does not mean that the Appellants are not "entitled" to the Redress Payment. Rather, it means that a case can arise where persons "entitled" to a payment (here the Redress Payment) are separately obliged to make over monies (under a separate agreement) to another person, who is taxable on that separate payment.

100. Such double taxation is often avoided in trading transactions, since, as we have observed, traders are taxed on accounting profits, so that if accounting practice imputed an accounting credit on the Company and not the Partnership as a trading profit, there is only one tax charge on an amount taxed as trading profits. But here section 245 asks simply whether the Appellants have "received" or are "entitled" to the Redress Payment. The Appellants cannot, on our analysis, simply deny this without analysis just because the Company might be taxable on a payment made under the Agreement by the Appellants to the Company. The offer, once accepted, fixes an entitlement to the Redress Payment on the Appellants. For the purposes of section 245, the sum of money received by the Appellants (in the absence of any trust over these monies) – is, conceptually, a different sum of money paid by the Appellants to the Company under clause 8.2 of the Agreement. The tax treatment of any monies paid to the Company in respect of (that is, equal to) the Redress Payment in the hands of the Company must be separately ascertained.

Conclusion on ground 1

101. In the absence of any assignation, if the source of the Claim Right is the RBS offer of redress of 10 March 2014, any trust of the Redress Payment, or any other "entitlement" to the Redress Payment in the hands of the Company, the only other persons "entitled to" the Redress Payment are the Appellants as the offerees (so far as the First and Second Appellants are concerned) and the Third Appellant (under the partnership deed for the Partnership). If the Claim Right has some other source (likely, although not inevitably, arising earlier than the RBS offer of redress), the only persons "entitled" to the Redress Payment would, absent any entitlement of the Company, be the Appellants qua partners of the Partnership. We do not understand there to be any dispute that, if the Redress Payment is monies of the Partnership or otherwise governed by the Partnership Deed, the Appellants are entitled to the Redress Payment as to one-third each.

102. We repeat that, despite the lack of analysis in the FTT Decision as to precisely what FCA's involvement involved, the taxation of the Redress Payment for the purposes of ITTOIA 2005, section 245 in the hands of the Appellants can be determined on construction of the Agreement. For completeness, however, we comment as follows: the main plank of the FTT's reasoning was what it said was a "factual" finding (at [72(2)]) that "the Partnership's position as an "unsophisticated customer" who had identified as having been mis-sold the Swap in accordance with the FSA's directions, meant that it had a right to the Redress Payment without needing to make a claim". We do not agree, however, with HMRC that the question of the source of the Redress Payment is a matter of fact. It is a question of law founded on findings of fact.

103. In conclusion, the Company is not entitled to the Redress Payment as a result of the Agreement. The Appellants are so entitled for the purposes of ITTOIA 2005, section 245.

104. Ground 1 of the Appellants' grounds of appeal fails. We set out below the positive reasons why it is that the Appellants are taxable persons within section 245.

GROUND 2

Ground 2(a) "Partnership profits"

105. HMRC charged income tax on the Redress Payment under ITTOIA 2005, section 242 as a post-cessation receipt of the Partnership and assessed the Appellants personally to income tax as the persons entitled under ITTOIA 2005, section 245 by way of discovery assessments under TMA 1970, section 29.

106. As we have observed, the FTT found that the Partnership's business had ceased at the earliest on 31 October 2012 ([72(8)], [108]). The Redress Payment was received during the tax year ended 5 April 2015 at a time when the Partnership was not trading. The Partnership did not file a return for the relevant tax year.

107. We understand the Appellants to say that, as the Partnership had ceased trading (and indeed, according to the Appellants, ceased altogether) before receipt of the Redress Payment (assuming that the Appellants, *qua* partners of the Partnership, are the persons "entitled" to the Redress Payment), there can be no "partnership profits" within the meaning of ITTOIA 2005 and therefore no taxable amount in the hands of any of the Appellants under section 852, in respect of the Redress Payment, which in turn, means that there are no taxable "post-cessation receipts" for the purposes of section 242.

108. We disagree. This ground 2(a) of appeal engages the condition of taxability we discuss above, namely, that the Redress Payment constitutes "post-cessation receipts" within ITTOIA 2005, section 246 as receipts "[arising] from the carrying out of the trade before the cessation". The Partnership had a business comprising a travel agency and a hotel trade. At the relevant time, while the Partnership was trading, the Appellants shared its profits equally. Further, the Swap was taken out in the course of the Partnership's business (we do not understand either party to disagree). Payments under the Swap are, we assume, agreed by the parties to have diminished the Partnership's trading profits year on year. As such, the Redress Payment, which compensated the Partnership (the Appellants, *qua* partners), is properly said to have arisen "from" the Partnership's trade (giving the term "from" a causal meaning), even if the Partnership had ceased trading by the time of the making of the Redress Payment to the Appellants (and even if the Partnership has ceased altogether).

109. The Redress Payment is, therefore, within the scope of "post-cessation receipts" in section 246. As we have observed above, it is not necessary for the person taxable as the person "entitled" to the relevant receipts within section 245 to be the same "person" who carried on the relevant trade within section 246. Assuming that each of the Appellants are entitled to one third each of the Redress Payment *qua* partners of the Partnership, even after cessation of trading (or altogether), it is correct for HMRC to have the Appellants assessed on a third each of the Redress Payment – as that is how the profits would have been divided when the Swap was entered into and payments under the Swap were made. The provisions of ITOIA 2005, Part 9 which, at the material times, broadly computed partnership profits at partnership level (section 850) and then attributed the respective partners their share of Partnership profits as profits of a notional trade (section 852) are irrelevant to the application of the post-cessation regime in Part 2, Chapter 18.

Conclusion on ground 2a (no partnership profits)

110. The Appellants' submissions that there were no "partnership profits" (and therefore no taxable post-cessation receipts" in the hands of the Appellants) on ground 2(a) fail.

Ground 2b: Power to issue discovery assessments

111. The Redress Payment was received (at least by the First Appellant and the Second Appellant) in late April 2014 ([37]), so the relevant year of assessment ends on 5 April 2015.

It is common ground that the Partnership has not filed any return (or partnership statement) for the relevant year of assessment, although the individual Appellants have filed returns for their respective individual taxable receipts (that is, not qua partners and not including any share of the Redress Payment). The Appellants say that even if the Redress Payment was assessable in the hands of the Appellants as "partnership profits" (or post-cessation receipts in respect of partnership profits), it was not open to HMRC to have assessed the Redress Payments on the Appellants by issuing discovery assessments in relation to their personal returns under TMA 1970, section 29.

112. The Appellants say (correctly) that HMRC had the power to compel the Partnership to file a return, including a partnership statement, under TMA 1970, section 12AA(3) and then open an enquiry into the Partnership's return under TMA 1970, section 12AC (after which HMRC could have either amended the return under section 30B or issued a closure notice under section 28B). In this case the onus would have been on the Appellants to displace the amendment or closure notice on an appeal.

113. Instead, HMRC issued discovery assessments under TMA 1970, section 29, without compelling a return. One set of discovery assessments was issued on 26 May 2017. A second set of discovery assessments was issued on 16 May 2018. In both cases, the discovery assessments were issued less than 4 years from the end of the year of assessment in which the Redress Payment was made, which was 2014/15).

114. The question arises as to whether HMRC have the power to issue these discovery assessments, given that HMRC were able to adopt the procedure in TMA 1970, section 12AA. The short answer is "yes". We have observed above that the Partnership has not submitted any return (which return, as the Appellants submit, correctly, would have included a partnership statement, which, in turn, forms the basis for a tax charge in the hands of the partners), although the individual Appellants did submit returns (not qua partners of the Partnership, which returns did not include the Redress Payments). But nothing in the text of section 29(1) or section 29 as a whole requires a return to have been made before a discovery assessment is properly issued. And section 29(3) clearly contemplates that a discovery assessment may be issued in the absence of a return. So the absence of a partnership return by the Partnership is irrelevant to the competence of a discovery assessment.

115. In the absence of a return, the only relevant condition for issuing a discovery assessment in the circumstances of this case is that the Board (or an officer of the Board) must "discover" "...that income which ought to have been assessed to income tax...[has] not been assessed" (section 29(1)(a)). The Appellants do not take any point on HMRC having "discovered" that the Appellants ought to have been assessed to income tax (in the sense that HMRC can properly be said to have "discovered" that, so far as HMRC are concerned, the post-cessation regime in ITTOIA 2005, Part 2, Chapter 18, applied after the HMRC enquiry).

116. Section 29(3) provides that certain other conditions (a loss of tax brought about by careless or deliberate behaviour by the taxpayer, or where an officer could not have been reasonably expected to have known of the absence of an assessment to tax, contained in section 29(4), (5)) must be satisfied if there has been a return submitted. We do not consider that the returns submitted by the Appellants are "returns" within the meaning of section 29(3), since, as we have observed, the basis of the tax charge on the Appellants is the partnership return and partnership statement (and the discovery assessments were issued to the Appellants qua partners of the Partnership). Indeed, section 29(3)(b) refers to a taxpayer being assessed "in the same capacity as that in which he made and delivered the return". So the conditions in section 29(4), (5) need not be satisfied in this case as there was no return. We should say, however, that if the Appellants' individual returns are indeed returns within the meaning of

section 29(3), this would mean that the conditions in section 29(4) (carelessness of the taxpayer brought about a loss of tax) or section 29(5) (insufficient disclosure to HMRC) must be satisfied for a discovery assessment to be competent. The Appellants did not take a point in this connection before us. The Appellants restricted their case to saying that HMRC had no power to issue discovery assessments at all in the absence of a partnership return (and in the absence of the partnership statement it would contain). We say no more about this particular point as we have decided that there is no return within the meaning of section 29(3), which does not preclude HMRC from raising discovery assessments (and we proceed on that basis).

117. Further, there is nothing in the text of TMA 1970, section 29 (or indeed anywhere else in TMA 1970) which precludes HMRC from issuing discovery assessments, despite having the power to compel a return and ultimately amend that return or issue a closure notice. The Respondents pointed out that the discovery assessments were made following the guidance in HMRC's Enquiry Manual EM3241:

> "In situations where there is no partnership statement to amend, it is not possible to issue a s30B(1) TMA 1970 notice. In this situation HMRC should issue s29 TMA 1970 discovery assessments to the individual partners."

118. This passage fails to take into account HMRC's power to compel a return. But we consider that it is not particularly curious to issue a discovery assessment in respect of post-cessation receipts, given that the trader may well not exist after the cessation of the relevant taxable activity and it is procedurally easier to issue a discovery assessment to the person "entitled" to the receipts, rather than to somehow compel a non-existent trading entity to submit a return.

119. In other words, there is a reason in principle why Parliament should wish HMRC to have at least the option of issuing a discovery assessment rather than proceeding under (in this case) section 12AA. We find that as a matter of both text (of section 29 and the TMA 1970 generally) and principle, HMRC have the power to issue the discovery assessments in this case.

120. The Appellants pointed out, in the course of submissions, that TMA 1970, section 50(7)(b) provides that the Tribunal has jurisdiction to increase the amount assessed if the Tribunal decides that "any amounts contained in a partnership statement...are insufficient". The Appellants take from section 50(7)(b) that HMRC are compelled to demand that a partnership is made to submit a partnership statement (and a return), rather than issue a discovery assessment, since otherwise the Tribunal's jurisdiction under section 50(7)(b) would be undermined. But the Tribunal has the same jurisdiction to increase the amount assessed if, relevantly, "the appellant is undercharged by an assessment other than a self-assessment" (section 50(7)(c)), which would encompass this case, where the Appellants have been subjected to discovery assessments. So, section 50(7)(b) does not assist the Appellants.

121. The rationale of the burden being on HMRC to show that the conditions for the issue of a discovery assessment are satisfied (*Burgess,* supra) is less obvious where a discovery assessment is issued in circumstances where HMRC have the option of issuing a return which HMRC could amend or issue a closure notice in respect of, by contrast to where this latter route is not available to HMRC because a return has indeed been submitted and HMRC have to rely upon extended time limits under TMA 1970, section 34. Be that as it may, we assume that the burden of proof to show that the discovery assessments are valid is on HMRC (HMRC did not plead otherwise). But in the context of this aspect of the Appellants' ground 2 of appeal, we find that HMRC have the power to issue the discovery assessments in the circumstances of this case. There is no ground advanced by the Appellants relating to the validity of these discovery assessments.

Conclusion on ground 2(b) of appeal (power to issue discovery assessments)

122. Ground 2(b) of the Appellants' grounds of appeal fails.

GROUNDS 3 AND 4: THE PENALTY

123. Under paragraph 1 of Schedule 24 to the FA 2007, a penalty is payable by a taxpayer who gives to HMRC a document including a return filed under TMA 1970, section 8, and the following conditions are satisfied (paragraph (1(1)(a)(b)):

(1) The document contains an inaccuracy which amounts to, or leads to, an understatement of a liability to tax: paragraph (1)(2)(a); and

(2) The inaccuracy was "careless". Under paragraph 3 an inaccuracy is "careless" "if the inaccuracy is due to failure by P to take reasonable care".

124. The Penalty depends on both the Appellants having been "careless" (which is relevant to ground 3 of the Appellants' grounds of appeal) and the inaccuracy being "due to" (caused by) carelessness (which is addressed by ground 4 of the Appellants' grounds of appeal).

125. The FTT, in upholding the penalty issued to Mr O'Neil only, found that HMRC had not pleaded their case in sufficient detail in their statement of case or skeleton argument, but that they had pleaded their case before the Tribunal. The Appellants were aware of the issue and responded to those arguments at the Tribunal ([114]). There had not been any unfairness to the Appellants to justify rejection of HMRC's case ([120]). It concluded that the First Appellant, Mr O'Neil, had been "careless" and upheld the penalty against him. The penalties against the other Appellants were cancelled "on the basis that HMRC had not pleaded their case in respect of the basis of these penalties."

GROUND 3: THE "BURDEN OF PROOF" AND "PROCEDURAL UNFAIRNESS"

126. In relation to ground 3, it is not any part of the Appellants' grounds of appeal that the Appellants' behaviour did not amount to "carelessness" for the purposes of Schedule 24. So, the issue of whether any particular behaviour was careless is not before us. Careless behaviour on the part of the Appellants is assumed. Rather, the Appellants say that the FTT was wrong in law to uphold the Penalty issued to the First Appellant on the basis that HMRC failed to plead a positive case on "carelessness" and as such:

(1) HMRC failed to discharge its burden of proof on carelessness and on causation; and/or

(2) The failure gave rise to serious procedural unfairness so as to justify rejecting HMRC's case.

127. "Carelessness" has, in principle, two component parts, competence (that taxpayer behaviour amounted to "carelessness") and time limits. It is common ground that the burden of proving both elements of carelessness rests with HMRC.

128. The Appellant relied on the decision of this Tribunal in *Burgess* at [43], [45] and [49]:

> "[43] In this case, therefore, HMRC had the duty of establishing their case on both the competence and time limit issues. The burden of proof lay on them in each of those respects. There was no obligation on the part of [the appellants] to raise those issues. [...]
>
> [45] [.....] Those issues were issues with respect to which HMRC had the burden of proof, and which, for HMRC to succeed, had to form part of HMRC's own case. They were not issues that the appellants had to raise or argue, and cannot therefore be regarded as points not taken by the appellants before the FTT for which permission of this tribunal is now required.

> [49] For HMRC to succeed before the FTT, either the competence and time limit issues had to be determined in their favour, or those issues had to have been conceded by the appellants. There was no such express concession and, in our judgment, none can be inferred. HMRC were wrong to assume, as it appears from their statement of case that they did, that the absence of reference by the appellants to the competence and time limit issues in their respective grounds of appeal, meant that those issues, on which HMRC's case depended, did not have to be determined in their favour. Those matters formed an essential element of HMRC's case, on which HMRC bore the burden of proof, and which if not proved would fail to displace the general rule that the assessments could not validly have been made. They were wrong too, once the appellants' first skeleton argument had been received, not to have appreciated that, far short of there being any concession on matters relevant to the competence and time limit issues, those matters were clearly the subject of dispute."

129. In *HMRC v Ritchie* [2019] UKUT 71 (TCC), this Tribunal held:

> "37. ...Fairness does not require, for example, that to advance an argument not present in its statement of case or the notice of appeal a party must always formally apply to amend its earlier pleading. On the other hand it does require that the other party is given adequate opportunity in the circumstances to meet the point, whether by argument or with evidence.
>
> 38. If a new argument is a pure point of law it might be addressed, as the case may be, after: a few minutes' thought; an evening's consideration; or one or more days' research. Provided that the other party has an appropriate opportunity to meet the point, it would generally not be unfair for the tribunal to take that argument into account."

130. We accept that, as a matter of principle, HMRC hold the burden of proof and are obliged to plead and prove their case – unless part of it is conceded by the Appellant. We find it difficult to extract, in relation to pleading, the question of whether HMRC have discharged the burden of proof from the question of whether there has been procedural unfairness. In contested litigation, the purpose of properly pleading one's case is a matter of the opposing party and the court understanding the case that has to be met. If HMRC had failed to properly plead its case on an issue or produce any evidence but the FTT found in its favour, that may well lead to procedural unfairness. But where the parties have adduced evidence relating to that issue, this is relevant to the question of procedural fairness.

131. The Appellant accepted that HMRC had put its case in relation to "carelessness" in the Review Conclusion letter and at this stage the Appellants did have notice of the basis on which the penalties were brought. These each provide at 7.3.2 that "I consider that your behaviour was careless, in that you did not advise your accountants of the redress payment until the matter was raised by HMRC. Furthermore, it is clear from this that the disclosure was prompted." Thus, ground 3 amounts to a pure pleading point, that HMRC had not included the complaint in the Review Conclusion letter in the HMRC Statement of Case.

132. In this case, HMRC's Statement of Case at paragraph 18 provides as follows:

> "As the Respondents understand it, the Appellant does not appeal against (i) the process under which the discovery assessment was made; nor (ii) the quantum of the penalty assessment. Instead, the Respondents understand that the Appellant's appeal against the penalty assessment is dependent upon his substantive challenge to the discovery assessment. On that basis, the relevant provisions of section 29 and 34 of TMA 1980 and Schedule 24 of FA 2007

> are not set out here (though, for completeness, they are set out in the appendix hereto)."

133. The Statements of Case obliquely refer to a basis on which the Penalty was levied at paragraphs 11 and 12:

> "11. The Appellant filed a personal tax return for 2014/2015 which did not record any part of the Payment.
>
> 12. On 20 June 2017, the Respondents Officer Angela Greig-Vile wrote to the Appellant (copied to his accountants) to enquire about the Payment. Absent any substantive response, on 26 September 2017, Officer Greig-Vile issued a discovery assessment for fiscal year 2014/2015. […] Under cover of the discovery assessment Officer Greig-Vile sought information to enable consideration of any penalty. Absent any substantive response, on 7 November 2017, Officer Greig-Vile issued a penalty assessment in the sum of £47,243.77."

134. Paragraph 16 refers in general terms to the review letter.

135. Very broadly, a taxpayer's notice of appeal represents the taxpayer' pleadings in tax litigation, whereas HMRC's Statement of Case represents HMRC's pleadings: *Ecko Ltd t/a Subway v HMRC* TC/2014/6668 [18]-[22], especially [21], [22]. This Tribunal in *Mainpay Ltd v HMRC* [2024] UKUT 0023 (TCC) at [127]-[128] expressly observed that

> "A statement of case must...set out [HMRCs'] position in relation to the case [and Rule 25(2) of the Tribunal Rules] means that the statement of case should set out the case which the appellant is expected to meet...HMRC should address the relevant validity issues in their statement of case regardless of whether the appellant has expressly challenged them".

136. Where the burden of proof is on HMRC and the Appellants have not expressly conceded the point, HMRC should have, in their pleadings, set out their case on carelessness. We accept that in many cases HMRC will not be apprised of particular acts and omissions of the Appellant which might mean the behaviour is not careless or, conversely, evidence that it is. But where HMRC have in fact issued penalties (presumably) considering they had a basis for issuing those penalties, they should have no difficulty in expressly stating that basis in their statement of case. In these circumstances it is insufficient to require the Appellant (and the Tribunal) to "infer" the basis on which the penalties are levied.

137. Paragraphs 11 and 12 of HMRCs' statement of case at best set out a foundation for HMRCs' position that a failure to disclose the Redress Payment at all was, relevantly, "careless". But this is not spelled out in the statement of case and these pleadings are deficient. But in this case, however, we do not consider that the deficiencies in HMRC's pleadings justify setting aside the penalty. The Appellants did not suffer any procedural unfairness and HMRC did discharge their burden of proof. In other words, on the facts of this case, the deficiencies in HMRCs' pleadings did not give rise to an automatic unfairness for the Appellants of a nature or strength to make the Penalty bad in law.

138. HMRC's statement of case is a response to the notice of appeal. In this case, the notice of appeal provides in each case that the Appellant was appealing both the assessments and the penalty solely on the grounds that the Appellant had no legal right to the Redress Payment and had disposed of the Claim Right to the Company pursuant to the Agreement. The Appellants accepted that HMRC's Review Conclusion Letter set out the basis on which the penalties were imposed.

139. The Appellants relied on a letter to HMRC dated 23 June 2022, 3 months before the hearing, in which they stated that "if HMRC seek to defend the penalties they are obliged to

prove carelessness and we note that HMRC's evidence does not expressly address the subject". The letter was sent, it said on its face, "to address two points arising from HMRC's evidence" – being the witness statement of Mr Cox. The Appellant enclosed the witness statement of Mr McLaughlin to which they sought HMRC's consent.

> "Additional Issues raised in Witness Evidence
>
> In the witness statement of Mr. Cox, HMRC have raised a number of issues which are not raised in their Statements of Case, in particular relating to the failure to disclose or discuss the redress payment and the delay in the BPA being raised in correspondence.
>
> The Appellants take no issue with HMRC raising these new issues, provided that they are given the opportunity to respond with evidence of their own on these issues."

140. The "new issues" of the "relevance of the failure to disclose" and the "delay in the Agreement being raised in correspondence" the Appellant identified in Mr Cox's witness statement can only have been relevant to the issue of carelessness. The Appellants sought – and were given – consent to file Mr McLaughlin's witness statement expressly in response to those issues. Mr McLaughlin, as the FTT identified, was not involved at the relevant period and much of his statement was directed at the First Appellant's conduct in relation to the HMRC investigation. Both HMRC and the Appellant adduced evidence which was expressly directed at the "carelessness" issue.

141. In other words, despite the absence any adequate pleading by HMRC in the Statement of Case in this present case, the Appellants were aware of the basis of HMRCs' complaint of carelessness, at least in the case of the First Appellant.

142. We therefore do not consider, in circumstances where the First Appellant was aware from the review conclusion letter of HMRC's case on the penalty but did not expressly in his Notice of Appeal seek to challenge it, and where the Appellant was apprised of all the issues, that HMRC's failure to expressly plead their case on carelessness in the statement of case was sufficient to show that there has been procedural unfairness to justify setting aside the Penalties. This is not a case in which HMRC did not adduce evidence going to the carelessness issue. HMRC were entitled to pursue their case on carelessness before the FTT.

143. In relation to the Second Appellant and the Third Appellant, we agree with the FTT that HMRC have said quite simply nothing at all to set out the basis of any complaint of carelessness and have, as a result, failed to discharge the burden of proof in respect of the penalties imposed on them.

Conclusion on ground 3 of appeal

144. Ground 3 of appeal in respect of the First Appellant fails.

GROUND 4. ANY LOSS OF TAX NOT "DUE TO" CARELESSNESS ON THE PART OF THE APPELLANTS

145. In ground 4 of the Appellants' grounds of appeal, the Appellants submit that HMRC have not pleaded its case and the FTT did not make sufficient findings regarding whether the inaccuracy was "due to [the Appellants'] failure to take reasonable care" within the meaning of Schedule 24, paragraph 1. In the light of the FTT's decision on the Penalties for the Second Appellant and the Third Appellant, this ground 4 is restricted in relevance to the First Appellant. The First Appellant does not submit that his behaviour in failing to include the Redress Payment in his tax return was not "careless" within the meaning of Schedule 24, paragraph 3. Rather, ground 4 is confined to a specific point on causation, that the insufficiency of tax was not caused, not "due to", the Appellant's careless behaviour.

146. The reference to "due to" is contained in paragraph 3, which provides that an inaccuracy is "careless" if "the inaccuracy is due to failure by P to take reasonable care*"*. That paragraph requires there to be a causal link between (1) the relevant inaccuracy and (2) "a failure" by the taxpayer "to take reasonable care". We recognise that this requirement is often forgotten (as in *HMRC v Bella Figura* [2020] UKUT 120 (TCC)).

The FTT decision

147. The FTT found that "[the First Appellant] Mr O'Neil did act carelessly in failing to properly consider the tax treatment of the Redress Payment". It made a number of findings in both fact and law at [121(1)(a) – (e)] of the FTT Decision, which we reproduce as follows:

> "(a) Mr O' Neil told us that he spoke to his former accountants, WDM about the receipt of the Redress Payment, but we did not see any evidence of him requesting or receiving formal advice from them. After he had transferred his business affairs to McLaughlin Crolla, he simply assumed that they would have been told about the payment by WDM and would deal with it. He did nothing to check that this had been done.
>
> (b) Unlike Mr Lovell, he seems to have relied entirely on the information he gleaned from entities such as Bully Banks on line. He said he did not own a computer or use the internet, yet he seems to have had access to the Bully Banks' advice on the tax treatment of the Redress Payment.
>
> (c) It may be correct that there was confusion in the market at the time about how these payments should be taxed, but that does not absolve a taxpayer from making any enquiries at all about how a significant sum should be taxed, or at least notifying it to HMRC on the white space of their tax return.
>
> (d) In our view, even if Mr O'Neil was not a details man, he should have made some follow up enquiries about the Redress Payment. We are not convinced that he had considered the tax position for himself and decided that it was sufficiently uncertain that it was reasonable for him not to declare it.
>
> (e) The Appellant referred to HMRC's statement in their letter of 30 March 2020 that the Appellant's accountants had provided a carefully considered view, we note that this statement was made in the context of the penalty reductions which were available and premised on the fact that Mr O'Neil himself had not notified his accountants of the Redress Payment until prompted by HMRC."

148. We take the findings of fact made by the FTT at [121] to be as follows:

(1) There was confusion in the market on the tax treatment of payments of the type of the Redress Payment ([121(1)(c)]).

(2) The First Appellant relied entirely on internet research and not any other advice ([121(1)(b)]).

(3) The First Appellant had neither sought nor received formal advice on this tax treatment ([121(1)(a); (d)]).

(4) The First Appellant had not considered his tax position for himself ([121(1)(d)]).

(5) The First Appellant had not relied on the "carefully considered view" of his accountants referred to at [121](1)(e)] at the time at which he made his return.

149. The FTT made what we take to be the following findings of law:

(1) A taxpayer should, to avoid being careless, make follow up enquiries (following up online enquiries), even where there is market confusion as to the correct tax treatment.

(2) A taxpayer should consider the tax position of any particular issue for themselves, to avoid being careless.

150. The FTT found that a failure to consider the position for themselves, combined with a failure to follow up online enquires with a request for formal tax advice, is "careless" behaviour within the meaning of Schedule 24, paragraph 3, even where there is confusion in the market as to the correct tax treatment of the relevant issue. As we observe above, the Appellants do not challenge this conclusion. The FTT made no finding as to whether the inaccuracy in the First Appellant's return (the absence of the Redress Payment) was "due to" the First Appellant's failures to take advice and consider the position for himself.

151. The test for carelessness is that of a reasonable and prudent taxpayer. The phrase "due to" in Schedule 24, paragraph 3 does not import a causal test analogous to delict but rather asks whether the inaccuracy in question (here the absence of any reference to the Redress Payment in the First Appellant's tax return) be accounted for by a failure to take care; we respectfully endorse the analysis on this particular point in *Delphi Derivatives Ltd v HMRC* [2023] UKFTT 722 (TCC) [166], [171].

152. In this case, there was no evidence before the FTT as to what advice to the First Appellant would have been, had the First Appellant not been careless and had taken formal tax advice. As we have observed, the advice which was given post-dated the Appellant submitting his tax return.

153. It is true that in a world in which the FTT acknowledged that there was confusion as to the tax treatment of the Redress Payment, where the burden is on HMRC show that the Penalty has been properly imposed, had the First Appellant been advised that the Redress Payment was not taxable and need not be included in the return, it is certainly possible that the First Appellant would not have been careless at all and that any carelessness (here attributable to advisers) would not have caused an insufficiency of tax. But where the relevant carelessness was not to take advice at all and to fail to consider the position for himself, the absence of the Redress Payment from the First Appellant's return (and the loss of tax to HMRC because there was no acknowledgment of the Redress Payment in the return) is clearly attributable to this carelessness.

Conclusion on ground 4

154. Ground 4 of the Appellants' grounds of appeal fails.

CONCLUSION AND DISPOSAL

155. We dismiss the Appellants' appeal on each of Grounds 1-4 and uphold the Discovery Assessments and the Penalty.

156. We have set out section 29(1), (3)-(5) of the Taxes Management Act 1970 in an Appendix.

JUDGE JULIAN GHOSH KC
LORD CLARK

Release date: 8 January 2026

Appendix

29 Assessment where loss of tax discovered.

1. (1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—
   a. that an amount of income tax or capital gains tax ought to have been assessed but has not been assessed,
   b. that an assessment to tax is or has become insufficient, or
   c. that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax....

(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. in respect of the year of assessment mentioned in that subsection; and
b. in the same capacity as that in which he made and delivered the return,

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 the 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.