



Neutral Citation: [2026] UKUT 00143 (TCC)

Case Number: UT/2024/000140

**UPPER TRIBUNAL**  
**(Tax and Chancery Chamber)**

George House, 126 George Street,  
Edinburgh, EH2 4HH

*National insurance contributions – secondary Class 1 contributions – host employer  
provision – meaning of “made available” – appeal dismissed*

**Heard on:** 5 and 6 November 2025

**Written submissions:** 28 November 2025, 16  
and 30 January 2026 and 6 February 2026

**Judgment date:** 07 April 2026

**Before**

**JUDGE NICHOLAS ALEKSANDER**  
**JUDGE ANDREW SCOTT**

**Between**

**BILFINGER SALAMIS UK LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Representation:**

For the Appellant: Mr Philip Simpson KC, instructed by AAB

For the Respondents: Mr Adam Tolley KC and Mr Giles Reid, instructed by the Advocate General

## DECISION

### Introduction

1. This case concerns a decision of the First-tier Tribunal (“the FTT”), released on 16 August 2024 ([2024] UKFTT 736 (TC)), about a scheme intended to avoid a liability of the appellant (“Bilfinger UK”) to secondary Class 1 national insurance contributions (“secondary Class 1 NICs”). The FTT decided that the scheme did not achieve that objective. Bilfinger UK appeals against that decision with the permission of the FTT.
2. Bilfinger UK, a company incorporated in Scotland and based in Aberdeen, had for some time been supplying services to Marathon Oil UK Ltd (“Marathon”) in connection with Marathon’s operation of oil platforms on the Brae field in the North Sea. Bilfinger UK used its own employees to provide those services, and, accordingly, accounted for secondary Class 1 NICs in respect of their earnings.
3. The contract under which those services were supplied was subject to renewal. Marathon put out a tender for the services, requesting, if possible, an employment model which did not incur a liability to secondary Class 1 NICs. It did so because, under the proposed contracts, Marathon would bear the economic cost of those contributions even though it would not be the person liable to pay the contributions to HMRC.
4. Bilfinger UK was successful in the tendering process. It implemented an offshore employment model designed, as requested by Marathon, to avoid a liability to secondary Class 1 NICs.
5. The model involved the incorporation of BIS Guernsey Limited (“Bilfinger Guernsey”) as a wholly-owned subsidiary of the Bilfinger Group.
6. The model had the following features:
  - (1) the permanent employees of Bilfinger UK were, with effect from 1 January 2009, transferred to Bilfinger Guernsey;
  - (2) Bilfinger UK entered into a contract with Marathon for the provision of certain “industrial services” on the Brae Field platforms: the contract obliged Bilfinger UK to “provide personnel and resources” to perform the functions set out in the contract;
  - (3) Bilfinger Guernsey entered into a separate contract with Bilfinger UK for the provision of labour, scaffold and equipment;
  - (4) Bilfinger UK also entered into a contract with Bilfinger Guernsey for the provision of human resource services; and
  - (5) Bilfinger Guernsey entered into a contract with Voyonic Crewing Limited (“Voyonic”) – a Guernsey company unconnected with Bilfinger UK – for the provision of payroll and administration services.
7. There was no contract between Marathon and Bilfinger Guernsey.

8. These arrangements were in effect from 1 January 2009 until 1 April 2014 when the employees of Bilfinger Guernsey were transferred back to Bilfinger UK and the contractual arrangements described above were unwound. It appears that the reason that the arrangements were unwound at that time was as a result of provision made, with effect from 6 April 2014, by the Social Security (Categorisation of Earners) (Amendment) Regulations 2014 (“the amending 2014 regulations”).

9. It was common ground that, as Bilfinger Guernsey lacked the necessary residence or presence in Great Britain, the company was not liable to pay secondary Class 1 NICs while the arrangements had effect.

10. However, HMRC contended that, as the personal services of the employees of Bilfinger Guernsey were “made available” to Bilfinger UK, para. 9 of Sch. 3 to the Social Security (Categorisation of Earners) Regulations 1978 (“the 1978 regulations”) applied with the result that Bilfinger UK was liable to secondary Class 1 NICs in the amount of £2,914,408 in respect of the period from 6 January 2009 to 5 April 2014.

11. The issue in this appeal is whether the assessment of Bilfinger UK in those terms was correct and, in particular, concerns the meaning of “made available” in para. 9 of Sch. 3 to the 1978 regulations.

12. The same issue has also arisen in three separate cases progressing through the tribunal system: see *Aramark Limited v HMRC* ([2024] UKFTT 832 (TC)) and *Odfjell Technology (UK) Limited v HMRC* ([2025] UKFTT 28 (TC)) and also the case of *Wood Group Engineering (North Sea) Limited v HMRC* where a decision had not been released at the time of the proceedings before us but was subsequently released on 22 December 2025 (see [2025] UKFTT 1607 (TC)). Permission to appeal to this Tribunal has been granted in respect of all of the decisions in these cases.

13. Mr Tolley, on behalf of HMRC, referred us to certain passages in the decisions in *Aramark* and in *Odfjell*. The points made by him in relation to those cases were made so as to further explain his principal submissions. Following the release of the First-tier Tribunal’s decision in the *Wood Group* case, we invited the parties to make written submissions in relation to that decision, and this decision takes account of those submissions. However, given that there are separate appeals to this Tribunal against all of the decisions in these cases, we have considered that it is not appropriate to refer further to any of them.

### **Relevant law**

14. The system for national insurance contributions is contained in Part 1 of the Social Security (Contributions and Benefits) Act 1992 (“the 1992 Act”). Among other things, it provides, in the case of employed earners, for liabilities to pay Class 1 contributions, which consist of primary and secondary contributions.

15. Secondary Class 1 NICs are, under s.7(1)(a) of the 1992 Act, the liability of the secondary contributor, which, in the case of an earner employed under a contract of service, means the employer.

16. Under section 6(1) of the 1992 Act, secondary Class 1 NICs are paid in respect of the earnings of an employed earner. The expression “earnings” is defined by s.3(1) of the 1992 Act to include “any remuneration or profit derived from employment”. An “employed earner” is defined by s.2(1)(a) of the 1992 Act as “a person who is gainfully employed in Great Britain either under a contract of service, or in an office (including elective office) with earnings”. Individuals working on the Continental Shelf (which includes the Brae field) are, as a result of regulation 114 of the Social Security (Contributions) Regulations 2001 (“the 2001 regulations”), treated as gainfully employed in Great Britain.

17. Section 1(6) of the 1992 Act imposes a territorial limitation on the liability to pay secondary Class 1 NICs: the putative secondary contributor must fulfil “prescribed conditions as to residence or presence in Great Britain”. At the relevant time, regulation 145 of the 2001 regulations set out those conditions as residence or presence, or having a place of business, in Great Britain when the secondary Class 1 NICs became payable.

18. The above tests for identifying the secondary contributor are supplemented by other provisions. In particular, s. 7(2) of the 1992 Act provides that:

“(2) In relation to employed earners who—

(a) are paid earnings in a tax week by more than one person in respect of different employments; or

(b) work under the general control or management of a person other than their immediate employer,

and in relation to any other case for which it appears to the Secretary of State that such provision is needed, regulations may provide that the prescribed person is to be treated as the secondary contributor in respect of earnings paid to or for the benefit of an earner.”

19. The 1978 regulations were originally made under the predecessor to s.7(2) of the 1992 Act. Regulation 5 of the 1978 regulations made provision for the person specified in column (B) of Sch. 3 to the 1978 regulations to be the secondary contributor in relation to an employed earner in an employment described in column (A) of that Schedule.

20. In the period relevant to this appeal, para. 9 of Sch. 3 to the 1978 regulations specified in column (A) the following category of employment:

“Employment by a foreign employer where—

(a) in pursuance of that employment the personal service of the person employed is made available to a host employer; and

(b) the personal service is rendered for the purposes of the business of that host employer; and

(c) that personal service for the host employer begins on or after 6th April 1994.

Where the employment is as a mariner, this paragraph only applies where the duties of the employment are performed wholly or mainly in category A, B, C or D waters.”

21. If an individual’s employment fell within this provision, column (B) specifies that the secondary contributor was “the host employer to whom the personal service of the person employed is made available”.

22. For the purposes of para. 9 of Sch. 3 to the 1978 regulations:

(1) the expression “foreign employer” was defined (see regulation 1 of the 1978 regulations) to mean a person who would be the secondary contributor but for the fact that the person did not meet the prescribed conditions as to residence or presence; and

(2) the expression “host employer” was defined by that regulation to mean a person having a place of business in Great Britain.

23. Para. 9 of Sch. 3 was inserted into the 1978 regulations by regulation 4 of the amending 1994 regulations. The Explanatory Note to the amending 1994 regulations said this about the insertion made by regulation 4:

“Regulation 4 amends Schedule 3 to the principal Regulations [ie, the 1978 regulations – see regulation 1(2)] by extending the description of employments in respect of which persons are treated as secondary Class 1 contributors to workers seconded, on or after 6th April 1994, by foreign employers to employers in Great Britain.”

24. In the remainder of this decision a reference to the host employer provision is a reference to para. 9 of Sch. 3 to the 1978 regulations.

### **The FTT’s decision**

25. The relevant parts of the FTT’s decision concerning the meaning of the host employer provision are contained in [38] to [85] of that decision. At [38] to [40] of its decision, the FTT, under the heading “*Summary of our view*”, said this:

“38. [...] we consider, for the reasons set out below, that the purpose of the provisions is to cover secondment-like arrangements (as opposed to subcontracting of a service). It is not an anti-avoidance provision and would cover a secondment entered into for non-tax purposes.

39. “Personal service” has the same meaning as in the employment case law, namely the obligation that the employee work “by one’s own hands”, not “by another”.

40. When personal service is *made available* some degree of direction (which need not include a *legal right* to give such direction) necessarily abides with the person to whom the personal service is made available. If the foreign employer tells the employee to obey the host employer’s reasonable directions, which are made for the host employer’s business, and the employee does so, we consider the requirements for the personal service to be “made available” (sub-paragraph (a)) and “rendered” (sub-paragraph (b)) are satisfied.”

26. Pausing here, there is no challenge by the appellant to the FTT’s finding at [39] (which is explained in more detail at [62] to [70] of the decision) that “personal service” has the same meaning in the host employer provision as it has in the employment case law (in the context of determining what counts as a contract of service).

27. In relation to the purpose and context of the host employer provision (see [42] to [61]), the FTT concluded as follows:

(1) the broad purpose of the provision made by Sch. 3 to the 1978 regulations was to deal with a case where either the identity of the secondary Class 1 contributor was ambiguous or where there was arguably no secondary Class 1 contributor ([43]): the host employer provision was an example of the latter ([44]);

(2) the host employer provision covered “classic” cases of secondment but also instances that would not generally be considered to be secondments ([50] and [51]);

(3) the host employer provision did not “target” avoidance although it may apply to avoidance arrangements ([53]);

(4) the host employer provision was not made under s.7(2)(b) of the 1992 Act (which referred to employed earners who “work under the general control or management of a person other than their immediate employer”), and, accordingly, a requirement for control and management by the host employer should not be read into the host employer provision (see [55] to [59]): among other things, there was nothing on the face of the host employer provision to suggest that the employee need work under the general control or management of the host employer ([59]); and

(5) the use of “employer” in the defined term “host employer” did not suggest that the legislative intention was to cover a person who was, in substance but not in form, an employer of the individual concerned: this would go against the statutory purpose of the host employer provision (see [67] and [68]).

28. The FTT set out its conclusions on the meaning in the host employer provision of “made available” (and also “rendered”) at [72] to [78] of its decision. For the purposes of this appeal, the most relevant paragraphs are these:

“77. If the foreign employer tells the employee to obey the host employer’s reasonable directions, which are made for the host employer’s business, and the employee does so we consider (a) and (b) [of para. 9 of Sch.3 to the 1978 regulations] are satisfied. We consider this to be the case even if (i) the foreign employer has not entered into any contractual agreement with the host employer, it can apply to voluntary arrangements; and (ii) whether or not there are any contractual restrictions on the foreign employer recalling the employee from their instruction of obedience to the directions of the host employer.

78. We consider the word “direction” to be more apt than management or control. Control might suggest a level of control equivalent to that in the second limb of *Ready Mixed Concrete*: that cannot be the case, otherwise there would be no foreign employer. Control in that sense also refers to a legal right against

the employee. Management may suggest a power of the host employer to discipline or performance manage the employee: we do not consider that necessary. The host employer may (but need not) have a remedy against the foreign employer for inadequate performance by the employee. But that is not what (a) and (b) are driving at.”

29. The FTT then went on to consider at [86] to [88], under the heading “*The combined operation of the contracts*”, how the contracts interacted with each other. The FTT quoted the dicta of Lord Briggs and Lord Leggatt in *Hurstwood Properties Ltd v Rossendale Borough Council* [2021] UKSC 16 at [12] that “where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole” before the FTT concluded at [88] that:

“[...] viewed realistically it cannot be doubted that the sole purpose of the scheme was aimed at avoiding National Insurance. The lack of any other purpose was shown by how the scheme was unwound in 2014, once the legislation was changed that arguably had made the scheme effective.”

30. The FTT then made a series of factual findings at [90] to [205] of its decision. For present purposes, it is enough to record the FTT’s conclusions about the application of the law to those facts. At [206] to [208] the FTT said this:

“206. It is HMRC’s case that the offshore employment model, as implemented, fell within limb (a) of paragraph 9 simply because:

- (1) between 2009 and 2014, Bilfinger Guernsey engaged employees who worked on the Brae Field on Marathon operations;
- (2) the employees’ contracts of employment entitled Bilfinger Guernsey to direct their employees to work on the Brae Field;
- (3) Bilfinger Guernsey did direct the employees to work on the Brae Field;
- (4) the reason for the direction to work on the Brae Field was an obligation owed by Bilfinger UK to Marathon; and
- (5) there was no direct contract between Bilfinger Guernsey and Marathon.

207. While we accept such facts, we consider that something more is required to fall within limb (a) of paragraph 9. This is unsurprising since otherwise ordinary subcontracting could be caught, whilst the purpose of the provisions is to apply to secondment-like-arrangements.

208. Applying the reasoning in paragraphs [38] to [88] above, for the reasons below, we find that viewed realistically, “the personal service” of individuals was “made available” and “rendered” to Bilfinger UK for the purposes of Bilfinger UK’s business. Accordingly paragraph 9 applies.”

31. Having recorded its conclusions in relation to personal service at [209] to [214], the FTT dealt with the meaning of “made available” in these terms:

“215. The personal service was “made available” to Bilfinger UK, for the purposes of Bilfinger UK’s business, by the core team’s deployment on the

platform: where they worked to fulfil Bilfinger UK's obligations under the Marathon Contract.

216. The employees worked as part of a team that was, on the platform, ultimately accountable to the Services Supervisor, themselves a Bilfinger Guernsey employee. The core team generally perceived themselves to be working for Bilfinger UK. Mr Carson, then Services Supervisor, identified Mr Forbes as his boss. Through this chain of command the personal service of the core team was placed at the disposal of Bilfinger UK, that was sufficiently able to direct the core team to ensure that personal service was rendered on a day-to-day basis. For the most part this was achieved through the deployment. The initial core team had previously been working in the same roles when employees of Bilfinger UK. Following their transfer it was just a matter of carrying on as before.

217. An illustration of what happened when the employees did not make themselves available for work was E1, who was the subject of the disciplinary proceedings for excessive use of a work phone, for personal calls, during working hours. A written warning was issued by Bilfinger Guernsey on the recommendation of Mr Forbes. We heard a great deal concerning irregular events such as this, however we consider them to be of limited significance compared to the day-to-day operational norm that the core team operated under the direction of Bilfinger UK.

218. Marathon was the client of Bilfinger UK. Ultimately the work of the core team was for the benefit of Marathon. However, viewed realistically the personal service of the core team was made available to Bilfinger UK, not Marathon. In making this finding we consider it relevant that there was no contract between Bilfinger Guernsey and Marathon: so from the legal perspective of the LSE Contract the personal service was made available to Bilfinger UK. From a commercial perspective there was no reason why Bilfinger Guernsey would wish to benefit Marathon, other than its contractual obligation to Bilfinger UK. We also consider it relevant that the core team identified themselves as working for Bilfinger UK.

219. Bilfinger Guernsey retained "control" in the employment law sense: the core team were still their employees. But the control by Bilfinger Guernsey was generally exercised on the advice of Bilfinger UK. This is unsurprising since the control by Bilfinger Guernsey was exercised from a remote location, by non-technical staff, who knew little or nothing of the work being done, and that control deployed by staff employed primarily by Voyonic, whose services were in employment, not platform operations."

### **Ground of appeal and submissions by parties**

32. Bilfinger UK's ground of appeal was that, although the FTT had correctly held that the expression "making available" in the host employer provision entailed "some" degree of direction to lie with the proposed host employer, the FTT had erred in law in either (a) fixing, as a matter of law, on too low a degree of direction, or (b) concluding that the facts found by the FTT were sufficient to amount to the degree of direction required.

33. In his submissions before us, Mr Simpson began by answering in the affirmative the question whether some power of direction or control must abide with the proposed host employer for an individual's "personal service" to be regarded as "made available" to that host

employer. There were three principal reasons advanced for this submission (and, in this part of our decision, the quoted text is from Mr Simpson’s skeleton argument).

34. The first reason was that, if something is made available to someone to use, that “necessarily involves that that someone has power to decide how to use it (and indeed whether to use it at all)”. Accordingly, the proposed host employer must have some decision-making power as to what a foreign employer’s employee is to do by way of the personal service that is “made available to” it. This same reason was also said to apply in the same way to HMRC’s contention that “made available” meant “placed at the disposal of”.

35. The second reason was that this requirement for some power of direction reflects the context that there “must be” some fact distinguishing cases to which the host employer provision applies from those involving contracts for services. It was submitted that such arrangements are not intended to be caught by the host employer provision as “otherwise, the application of the provision would be extended far beyond its proper scope, to all sorts of situations in which individuals employed by foreign employers did work in the United Kingdom as directed by their (foreign) employers so that that (foreign) employer performed a contract for services it had with a UK person. The fact of distinction must involve some greater degree of control lying with the proposed host employer vis-à-vis the individuals doing the work than does in the context of a contract for services.”

36. The third reason is the submission that the need for some degree of direction fits with what is “supposed” to be the overall policy of the host employer provision. In particular, it is said that “the basic idea” of the host employer provision is to put the host employer in the same position as an employer resident in Great Britain who employs individuals and that the host employer provision is “aimed at situations that approximate” a contract of employment. That is said “necessarily” to involve “some degree of control abiding with the proposed host employer: possibly not the degree of control as abides with an employer in ordinary course”. The skeleton argument then submits that “this broadly corresponds to the (somewhat amorphous) idea of ‘secondment’”, which is said to be “an individual, formally engaged as an employee by one person, [who] in fact works within the organisation of another, at that other’s direction”. It is acknowledged, however, that “secondment” does not have a technical meaning and that the focus must always be on the words in the legislation rather than on any gloss that seeks to elucidate the meaning of that expression.

37. Having argued that some degree of direction or control must be intended to lie with the host employer, Mr Simpson then addressed the degree of direction or control required. He submitted that “the very minimum power of direction that must abide with the host employer for paragraph 9 to be satisfied must be the power to decide what tasks the individual actually does day-to-day”. As we understand it, the reason for this was simply that it was otherwise “impossible to understand how that personal service is ‘made available to’” the putative host employer. The reference to the “very minimum” power of direction was because Mr Simpson further submitted that “one might argue that rather more control” than merely decision-making power as regards what tasks are to be done should lie with the host employer provision, citing the law of delict or tort in support of this submission.

38. Once the law, as submitted by Mr Simpson, was then applied to the facts of the case, there could, so said Mr Simpson, be only one decision open to the FTT, namely that the power of

direction required by the host employer provision did not abide with the appellant. At all times, the relevant power of direction was with Bilfinger Guernsey.

39. HMRC's primary case was that the host employer provision did not contain any requirement for direction or control by the host employer. If, contrary to that case, the host employer provision did contain a requirement for direction or control, HMRC's submission was that the FTT was correct to conclude that the level of direction or control was necessarily lower than that required for a contract of employment and, on the facts as found by the FTT, the tribunal was correct to conclude that the evidence established the required level of direction or control.

### **Construction of the host employer provision**

#### *Preliminary observations: key principles*

40. It is, in our view, important to remind ourselves at the outset of three key principles in determining the short point of statutory construction before us.

41. The first is to remind ourselves of the modern approach to statutory interpretation. This has been set out by the Supreme Court in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3. Of particular relevance to this case is what is said at [29] and [30] by Lord Hodge (in a judgment with which Lord Briggs, Lord Stephens and Lady Rose agreed):

“29. [...] Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. [...]

30. External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. [...] But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

42. The second is the *Ramsay* principle, which was stated at [9] in the Supreme Court's decision in *Rosendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16 “to have reached a state of well-settled maturity”. Of particular relevance to this case is what was said at [11] to [13] of the judgment:

“11. The result of applying the purposive approach to fiscal legislation has often been to disregard transactions or elements of transactions which have no business purpose and have as their sole aim the avoidance of tax. This is not because of any principle that a transaction otherwise effective to achieve a tax advantage should be treated as ineffective to do so if it is undertaken for the purpose of tax avoidance. It is because it is not generally to be expected that

Parliament intends to exempt from tax a transaction which has no purpose other than tax avoidance. [...]

12. Another aspect of the *Ramsay* approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to a transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose. [...]

13. The decision of the House of Lords in the *Barclays Mercantile* case made it clear beyond dispute that the approach for which the *Ramsay* line of cases is authority is an application of general principles of statutory interpretation. Lord Nicholls of Birkenhead, delivering the joint opinion of the appellate committee (which also comprised Lord Steyn, Lord Hoffmann, Lord Hope of Craighead and Lord Walker of Gestingthorpe), identified the “essence” of the approach (at para 32) as being:

“to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description.” [...]

43. The third principle concerns the proper approach to determining the meaning of a word used in a statutory provision. The law on this has been settled for over half a century but, in the context of this case, we consider that it is especially instructive to remind ourselves of the relevant legal test and the common errors to be avoided.

44. The seminal authority is the House of Lords decision *Brutus v Cozens* [1973] AC 854, a case which concerned the meaning of “insulting” in s. 5 of the Public Order Act 1936. Lord Reid said this at [C] and [D] on p.861:

“The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the Court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word “insulting” being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved.”

45. He continued at [G] on the same page in these terms:

“No doubt the Court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the

words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different.

Or the Court could frame a definition. But then again the tribunal would be left with words to consider.”

46. He concluded at [A] on p.863 as follows:

“Parliament has given no indication that the word is to be given any unusual meaning. Insulting means insulting and nothing else.”

47. Finally, we consider it helpful to consider the application of these three principles in the recent decision of the Court of Appeal in *Altrad Services Ltd v HMRC* [2024] EWCA Civ 720. The case concerned an avoidance scheme seeking to “refresh” capital allowances. In a judgment given by Sir Launcelot Henderson (with which Whipple LJ and Nugee LJ agreed) the following comments were made about the approach to the interpretation of the words used in the relevant statutory provisions, the overall purpose of those provisions and how the *Ramsay* principle should be applied to the facts of the case:

“82. It is also material to observe that the phrase “ceases to own” is expressed in simple, non-technical language which should require no elaboration to unpack its meaning. Neither “ceases” nor “own” is defined, so each word should be given its ordinary and natural meaning; and, as we have seen, “own” is intended to be synonymous with “belongs to” in the predecessor legislation, which was a similarly non-technical and everyday expression.

83. The question which must therefore be answered is whether, as a matter of ordinary language, and in a real and practical sense, the taxpayers ceased to own the assets which they sold to the Bank as step 1 in the scheme. In answering that question, it is elementary that the scheme must be regarded as a whole, and as it was intended to operate. [...]

84. [...]

85. Adopting this holistic approach, and on the basis of the unchallenged facts found by the FTT, I have little hesitation in concluding that the taxpayers did not cease to own the relevant assets within the meaning of section 61(1)(a) when they were sold to the Bank. On the contrary, the whole purpose of the scheme was that the same assets would be returned to the sole beneficial ownership of the taxpayers upon exercise of the put option by the Bank three weeks later, and that for all practical purposes the taxpayers would continue to have the uninterrupted beneficial use of the assets for the purposes of their trade in the meantime. On the FTT’s findings, the scheme was entirely tax-motivated and none of the steps in it had any real commercial purpose. [...]

#### *Context and purpose*

48. We start with the context and purpose.

49. In interpreting the 1978 regulations, we must have regard to the statutory provision under which the regulations (and any amendment of the regulations) were made. The FTT found that none of the regulations made under s.7(2) of the 1992 Act were specifically made under paragraph (a) of that subsection. We observe that, in any event, the power to make the regulations is found in the whole of the provision contained in that subsection (so that it would have been an error if the regulations had cited only one or other of the paragraphs of s.7(2)).

As a matter of ordinary language, paragraphs (a) and (b) of s.7(2) of the 1992 Act are, in effect, examples of specific cases which Parliament considered to be appropriate cases for fixing the liability as secondary contributor on a prescribed person: see the reference to “any other case” for which it appears to the Secretary of State that “such provision is needed”. The FTT considered that the broad purpose was to identify a secondary Class 1 contributor where there was ambiguity as to who the person was or arguably where there was no such contributor. We would not ourselves regard the provision as being confined to those cases. For example, para. (a) of s.7(2) is aimed at a rather different case (more than one person making payments in relation to an employed earner in respect of different employments).

50. Rather, it seems to us that, in enacting s.7(2) in the terms in which it did, Parliament’s purpose was to confer a wide discretion on the Secretary of State to provide “where it appears to the Secretary of State that such provision is needed” special provision identifying a person prescribed in the regulations as the secondary contributor. The cases in question where the power might be exercised are many and varied, and no attempt was made by Parliament to delineate them further.

51. We next consider the overall context provided by the 1978 regulations. Read as a whole, the 1978 regulations seem to contain – not unsurprisingly given the width of the power to make the regulations as described above – a miscellaneous collection of cases where a person described in the regulations is to be the secondary contributor in relation to the description of employment concerned.

52. However, it is relevant to consider the provision made by para. 2 of Sch.3 to the 1978 regulations, column (A) of which relevantly provides as follows:

“Employment, whether or not under a contract of service (not being employment described in paragraph 2 in column (B) of Schedule 1 to these regulations or an employment to which paragraph 1, 4, 5, 7 or 8 of this Schedule applies) in which the person employed renders, or is under an obligation to render, personal service and is subject to supervision, direction or control, or to the right of supervision, direction or control, as to the manner of the rendering of such service and where the person employed is supplied by or through some third person (including, in the case of a body of persons unincorporate, a body of which the person employed is a member) ...”

53. The simple point to observe here is that the Secretary of State, in making appropriate provision in the regulations, was well able to make provision by reference to whether a person was subject to “supervision, direction or control” or “to the right of supervision, direction or control” as to the manner in which a person rendered “personal service”. It does not, of course, necessarily follow from this that, in inserting para. 9 into the same Schedule as para. 2, the Secretary of State rejected any concept of “supervision, direction or control” in the provision made by para. 9.

54. But, as Lord Hodge made clear in *R (O)*, it is the language used by the law-maker (in this case, the Secretary of State rather than Parliament) that is the primary source from which the purpose of the legislation is to be inferred and it does seem to us to be – to put it at its lowest – surprising that, having referred to the “rendering” of “personal service” in both paras. 2 and 9 of Sch.3, the Secretary of State then chose different words in the form of “made available” to

indicate that, as the FTT found and as the appellant submits, some level of “direction” was required. The question which naturally arises is why, if that was indeed the Secretary of State’s intention in inserting para. 9 into Sch.3 to the 1978 regulations, the Secretary of State chose not to refer in terms to “direction” (or “control”) and, indeed, not to go on and provide in terms what the necessary level of direction was.

55. The FTT referred to the Explanatory Note to the amending 1994 regulations as providing some background about the purpose and context. Paragraph [30] of *R (O)* makes it clear that Explanatory Notes to Bills may cast light on the meaning of particular statutory provisions, and other sources may disclose the background to a statute and help a court to identify the mischief it addresses and the purpose of the legislation.

56. The amending 1994 regulations are not, of course, provision made by Parliament but by the Secretary of State, so the dicta in *R (O)* need to be adapted to some extent. The regulations were made under the negative resolution procedure so that they had effect when made: it is possible for either House of Parliament to “pray” against the regulations (once made) but that possibility is exceptionally rare in practice. Unlike a Bill presented to Parliament by a Minister of the Crown where the legislation is considered and then enacted by Parliament and where the Explanatory Notes are prepared by a constitutionally separate body (namely, the department of the Minister sponsoring the Bill), a statutory instrument (such as the amending 1994 regulations) and the Explanatory Note (described, it should be noted, as not forming part of the regulations) are prepared by the same person in the same document.

57. One might think therefore that, on any view, provision made by the Explanatory Note to the regulations might be relevant to the interpretative exercise: after all, the explanatory comment is made by the actual law-maker at the same time as the regulations themselves are made.

58. In the particular case before us, we consider that the Explanatory Note said nothing about the mischief to which the new para. 9 of Sch. 3 to the 1978 regulations was addressed. Nor did it provide any further background. Rather, it was limited to a simple description of the effect of the new provision.

59. Moreover, as befitted a note that was intended to be explanatory, it described matters in a simple, non-technical way and was not unduly troubled by matters of technical accuracy. It referred to “employers in Great Britain” (which, although this is not stated in terms, must be a reference to the “host employer”) but was not concerned about the technical meaning attached to “in” Great Britain (namely, having a place of business in Great Britain) and nor was it concerned with the fact that the host employer would not actually be an “employer” of the person concerned. Beyond those matters, it referred, without more, to “workers seconded”. Again, “workers” was not the technically accurate description of the persons concerned, who would have been more accurately described as “employed earners”. The reference to the workers being “seconded” is all that we are left with.

60. The word “seconded” is not a term of art and, as was recognised by both the FTT and the appellant, is a somewhat amorphous expression of uncertain meaning. It no doubt helps to provide some kind of indication of a case at which the new para.9 of Sch.3 to the 1978 regulations was aimed but it seems to us to do little more than that. In particular, we do not

think it can fairly or reasonably be read as providing an exhaustive definition of the cases intended to fall within the host employer provision. There is a real danger here in “over-analysing” what was intended to be a short, non-technical explanation of the provision, which, as we have noted, not unreasonably glossed over technical niceties. No doubt, it met that objective but it was not, and was not intended to be, a substitute for considering the words actually adopted in the host employer provision.

*Meaning of “made available” and “rendered” in host employer provision*

61. We can now turn to the host employer provision itself. The description contained in column (A) of para. 9 of Sch. 3 to the 1978 regulations amounts to the following short sentence (omitting the commencement and the paragraphing and, at least for this case, the irrelevant “mariners” exception):

“Employment by a foreign employer where in pursuance of that employment the personal service of the person employed is made available to a host employer; and the personal service is rendered for the purposes of the business of that host employer.”

62. It is no longer disputed by the appellant that the reference to “the personal service” of the person employed carries its case law meaning in determining whether or not a contract is a contract of service. That seems to us to follow from the fact that the personal service concerned is “in pursuance” of the employment of the person by a foreign employer and, bearing in mind the constituent elements of the test for determining a contract of employment, it would be surprising if this were anything other than a direct reference to one of those elements.

63. The provision then continues by saying that the personal service in question “is made available to a host employer” and that it must be “rendered for the purposes of the business” of that host employer. There is, in our view, nothing at all in the context (as we have described it above) to suggest that any of those words (“made available”, “rendered”, “for the purposes of the business”) are being used in an unusual sense. Those words – which we note are all simple, everyday words (although “rendered” is, perhaps, somewhat old-fashioned now) – are intended, therefore, to bear their ordinary meaning.

64. It is at this stage that we consider it pertinent to remind ourselves of the warning given in *Cozens* about the dangers of a court in seeking to define everyday words:

“No doubt the Court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved. But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different.

Or the Court could frame a definition. But then again the tribunal would be left with words to consider.”

65. It seems to us that we were being invited to do just that by the appellant. In our view, and to adapt the conclusion of Lord Reid in *Cozens*, the Secretary of State in making the amending 1994 regulations inserting para. 9 into Sch. 3 to the 1978 regulations has given no indication

that the words “made available” are to be given any unusual meaning: “made available” means made available and nothing else.

66. Understood in their ordinary, everyday meaning, those words do not, despite the submissions made by Mr Simpson, carry any connotation of “direction” in the manner submitted by him. Mr Simpson submitted that, if something is made available to someone to use, that “necessarily involves that that someone has power to decide how to use it (and indeed whether to use it at all)”. However, that seems to us to be nothing more than an assertion of the intended result of the appeal rather than an exposition of the ordinary meaning of the expression “made available”. As Mr Tolley noted in his oral submissions, it is perfectly normal English usage to talk of making something available to a person subject to particular terms or conditions. Nor can the requirement for some kind of direction be gleaned from the use of “rendered” in para. 9 of Sch. 3 to the 1978 regulations. The mere fact that the personal service is “made available” is not enough: the service also has actually to be “rendered” for the purposes of the business of the person to whom the personal service is being made available. That seems to us to be the self-evident purpose of that part of the host employer provision.

67. Mr Simpson also submitted that the host employer provision is “aimed at situations that approximate” a contract of employment. This was said to broadly correspond “to the (somewhat amorphous) idea of ‘secondment’.” We consider that at least some cases commonly regarded as constituting secondments will be covered by the host employer provision. We would not, however, be prepared to say more than that. Substituting proxies for the language used by the law-maker, particularly “amorphous” ones like “secondment”, is not the judicial task before us. The statutory question is not to be re-formulated into a question as to whether a case is one of secondment, whatever that expression might mean. That is even more the case in relation to the notion of “secondment-like-arrangements”, a word chosen by the FTT at [207] of its decision to describe the purpose of the host employer provision. As the House of Lords wisely noted in *Cozens*, embarking on an exercise like this would mean that “the tribunal would be left with words to consider”: but they would be our words and not the words deliberately chosen by the law-maker.

68. Nor do we think that it helps at all to say (as Mr Simpson submitted) that the host employer provision was aimed at situations that “approximate” a contract of employment. There is nothing in the context or, more importantly, the language of the provision that bears that out. The intention, as we have noted above, of the 1978 regulations was simply to describe particular cases and then provide who was to be the secondary contributor in relation to those cases: nothing more and nothing less. In any event, the notion of an arrangement “approximating” to a contract of employment simply begs the question as to the level of approximation required. Again, that would be to substitute a different test from the one actually used by the Secretary of State in the amending 1994 regulations.

69. We consider that the real issue troubling the FTT in leading it to its conclusion that “some” level of direction was required was the notion that there must be some fact distinguishing cases to which the host employer provision applies from those involving contracts for services (referred to by the FTT (see [207] of its decision) and the appellant as “ordinary sub-contracting”). Mr Simpson submitted that such arrangements were not intended to be caught by the host employer provision as “otherwise, the application of the provision would be extended far beyond its proper scope”.

70. We are unable to accept that is the case. Indeed, we consider that this represents an inverse of the true position: the proper scope or intention of the host employer provision is to be inferred from the everyday language used in the provision.

71. What we suspect has caused the confusion in this case are the unusual arrangements devised by the appellant to meet Marathon's desire to avoid bearing the economic cost of the secondary Class 1 contributions. As the FTT found, the scheme adopted was intended for no other purpose than to avoid a liability to secondary Class 1 NICs. For Marathon and the appellant, the world would, as a matter of substantive reality, continue as it did before the scheme was put into effect. The scheme adopted was not an ordinary secondment. Nor can it reasonably be regarded as an ordinary case of sub-contracting. In this connection, it needs to be recalled that the host employer provision was engaged only if the "personal service" of the person (in the employment law sense of the obligation of the employee to work "by one's own hands" and not "by another") was made available to another and that service was then "rendered for the purposes of the business" of that other. Both elements need to be satisfied.

72. As we do not consider that some level of direction is intended to lie with the host employer in the host employer provision, it is not necessary to address Mr Simpson's further submissions about what that level might be. However, we would not want our decision to be read as suggesting that matters such as the direction that the host employer has in relation to any person will be irrelevant to the statutory question. In any given set of facts, such matters might indicate that the host employer provision is engaged. But that is, in our view, as far as it goes.

### *Conclusion*

73. It is question of law for us to determine the meaning of the expressions "made available" and "rendered for the purposes of the business" in the host employer provision. In deciding that question, we need to determine whether those words are used in an unusual sense. In our view, there is nothing in the context suggesting that they are. Rather, they are common, everyday words and should be given their ordinary meaning. There is nothing in the ordinary meaning of those words that implies that the host employer must have some level of direction in relation to the rendering of the personal service. The presence or absence of direction in the host employer may be relevant as a factor to be considered in determining whether or not the "personal service" of a person is "made available" to another but it is not part of the statutory test.

74. We do not consider it helpful to substitute other words for those used in the legislation. While no doubt cases commonly regarded as secondments may fall within the host employer provision, whether or not they do so in any given fact pattern depends on whether the arrangements answer the actual statutory description by reference to the words used in the host employer provision.

75. There is, in our view, no difficulty in applying the host employer provision to sub-contracting arrangements. The scheme in this case was a long way from being a normal sub-contracting arrangement. The application of the host employer provision to a case such as this tells us little (if anything) about its application to more typical, commercial arrangements.

76. The case before us concerns an avoidance scheme with no purpose other than the purpose of avoiding secondary Class 1 NICs payable by the appellant. The scheme involved a number of different contracts intended to operate as a whole.

77. The simple questions for the FTT were whether, as a matter of ordinary language, and in a real and practical sense, the effect of the scheme “made available” the personal services of the employees to the appellant and whether those services were then “rendered” for the purposes of the appellant’s business. In answering those questions, the FTT was required to regard the scheme as a whole and as it was intended to operate. That was all that the FTT was required to do.

78. Accordingly, the FTT was wrong to hold that some degree of direction must necessarily lie with the host employer if the host employer provision was to apply, and, to that extent only, we consider that the FTT erred in law.

79. It follows from the above analysis that we accept HMRC’s primary case and that, consequently, we consider that the grounds of appeal are not made out.

### **Was the error of law material?**

80. As we have found an error of law in the FTT’s decision, we may (but need not) set aside its decision: see s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. It is open to us to find that the FTT has made an error of law but reached the right result in any event: see, for example, the case of *BTS v HMRC* [2017] UKUT 159 at [67] and [68].

81. In *Degorce v HMRC* [2018] 4 WLR 79, the Court of Appeal (in a judgment given by Henderson LJ with which Thirlwall LJ and Longmore LJ agreed) held that the Upper Tribunal should decide whether to set aside a decision of the FTT by reference to the materiality of the error of law: the key issue is whether the error of law “might (not would) have made a difference” to the outcome. Henderson LJ explained the reasoning for this at [95]:

“I would accept the submission of Mr Gibbon that, if the Upper Tribunal finds an error of law to have been made, it then has a broad discretion whether or not to set aside the decision of the FTT. That is the clear import of the words “may (but need not) set aside”, and in my view it would be wrong in principle to interpret the scope of this discretion by reference to the previous law on tax appeals under TMA 1970. TCEA 2007 set up a new tribunal structure, and the provisions of section 12 apply to all chambers of the Upper Tribunal, not merely to the Tax & Chancery Chamber. That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT’s decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision be set aside. Conversely, if an error of law is made, but the Upper Tribunal is satisfied that it was immaterial,

there will be no injustice to Mr Degorce in allowing the decision of the FTT to stand.”

82. We do not consider that there is any realistic possibility that the FTT in this case might have reached a different conclusion if it had directed itself to the law as we have declared it to be. At [208] of its decision the FTT said in terms “that viewed realistically, “the personal service” of individuals was “made available” and “rendered” to Bilfinger UK for the purposes of Bilfinger UK’s business”. In reaching that view, it was, as a result of its findings at [74] to [78], applying a higher standard or, at any rate, a further test than we have found to be applicable, importing into the simple, everyday language of “made available” and “rendered” a requirement for some level of direction: see, for example, [207] of its decision where the FTT held that “something more” is required before a case falls within the host employer provision.

83. Accordingly, we consider that the FTT’s error of law was immaterial in the sense described in *Degorce*. The decision of the FTT as to the outcome (namely, that the host employer provision did apply throughout the relevant period with the result that the appellant was correctly assessed to secondary Class 1 NICs) stands.

**Disposition**

84. For the reasons given above, the appeal is dismissed.

**JUDGE NICHOLAS ALEKSANDER  
JUDGE ANDREW SCOTT**

**RELEASE DATE: 7<sup>th</sup> April 2026**