Neutral Citation Number: [2023] EWCA Civ 114

Case No: CA-2022-000042

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)
MR JUSTICE MICHAEL GREEN AND UPPER TRIBUNAL JUDGE SCOTT
[2021] UKUT 281 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 February 2023

Before :

LADY JUSTICE KING
LORD JUSTICE SNOWDEN
and
LADY JUSTICE WHIPPLE

- -

Between :

THOMAS WILLIAM GOOD	**Appellant**
- and -	
THE COMMISSIONERS OF HM REVENUE AND CUSTOMS	**Respondents**

- -
- -

Rupert Baldry KC (instructed by **Greenwoods Legal LLP**) for the **Appellant**
Aparna Nathan KC (instructed by **HM Revenue and Customs**) for the **Respondents**

Hearing dates: 19 and 20 October 2022

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Approved Judgment

LADY JUSTICE WHIPPLE:

Introduction

1. This is an appeal from the decision of the Upper Tribunal (Michael Green J and Judge Thomas Scott), neutral citation [2021] UKUT 281 (TCC), dismissing an appeal by Mr Good (the "taxpayer") from the decision of the First Tier Tribunal (Judge Christopher McNall and Mrs Helen Myerscough ACA CTA), neutral citation [2020] UKFTT 0025 (TC), dismissing the taxpayer's appeal against certain discovery assessments issued by HMRC.

2. The discovery assessments related to the tax years 2010/11, 2011/12 and 2012/13 and were for a total amount of around £180,000. The assessments related to income tax which HMRC contended was due on certain "Minimum Annual Payments", or "MAPs", arising as part of a scheme for the exploitation of film rights in which the taxpayer had participated (the "Scheme").

3. Before the FTT and the UT, the taxpayer raised a number of issues. However, as the matter has come before this Court, the issues have narrowed. The challenge is now limited to the scope and application of ss 609-611 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). The appeal is brought with the permission of the UT.

Legislation

4. The relevant legislation appears in Part 5 of ITTOIA, under the heading "Chapter 3, Films and Sound Recordings: Non-Trade Businesses":

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

> (3) This section is subject to Part 8 (foreign income: special rules).
>
> **611 Person liable**
>
> The person liable for any tax charged under this Chapter is the person receiving or entitled to the income."

Facts

5. The Scheme was designed by Scion Structured Products Ltd ("Scion"). The FTT summarised the aims of the Scheme and its intended operation at FTT [14]-[25] from which I extract the following:

> "14. The Scheme was a tax avoidance scheme. It was disclosed to the Respondents by way of a completed AAG on 27 April 2007. This summarised the arrangements as follows:
>
> > "A trade, set up through which an individual will enter into a series of transactions to purchase, enhance, exploit and sell film distribution rights worldwide. The individual undertaking the trade will incur expenditure on purchasing discrete film distribution rights with the intention of selling or exploiting those rights in return for the rights to participate in the proceeds of the exploitation of the same discrete film distribution rights."
>
> 15. The Explanation on the AAG says as follows:
>
> > "2. Additional financing is offered in order to assist in the funding of the purchase price of the discrete film distribution rights by way of a loan which is full recourse as to interest and limited recourse as to capital repayments.
> >
> > 3. In the early years of the trade it is anticipated that a loss will be incurred as a result of the incurral of expenditure (and a lack of income) which will be available for sideways loss relief."
>
> ….
>
> 18. … in broad terms, the Scheme involved a film studio selling the distribution rights to a film to a Scion film rights company. That film rights company would then sell or license the film rights to investors, amongst whom were the Appellants.
>
> 19. The Appellants would then ostensibly be trading in the buying, selling and exploitation of film rights.
>
> 20. In general, a Scheme user was required to contribute 21% of the cost of the film distribution rights, with the remaining 79%

> being provided by way of a loan from a Scion lender for a six year term.
>
> 21. That loan would be made available by a Scion lender on limited recourse terms (that is, limited recourse as to capital but full recourse as to interest): 'The Loan'.
>
> 22. The terms of the sale of the film rights would be for a share of profits supported by a 'Minimum Annual Payment' ('MAP') sufficient to meet the interest obligations under the Loan.
>
> 23. The Registration Agreement provides that the participant shall 'irrevocably agree' that the participant 'acknowledges' their understanding that 'you will be required to enter into security arrangements with the Lender pursuant to which you will grant in favour of the Lender a charge and an assignment of, inter alia, your right, title and interest in part or all of the sale proceeds payable to you from exploitation of the Film Rights acquired'.
>
> 24. An investor would sell the film rights in return for a share of the revenues arising from the exploitation of the film rights. An investor would use a proportion of the sale proceeds to repay the Loan and would retain approximately 45% of the revenues, leaving the investor with a trading profit.
>
> 25. As to the tax benefits, it was anticipated that the loss resulting from the fees and expenditure on the film rights acquisition would be available for sideways loss relief and that the interest on the loan would be deductible."

6. As the UT recorded at UT [9], the film rights were acquired under an Acquisition Agreement which required a lump sum to be paid for them. Those film rights were then sold pursuant to a Distribution Agreement for a consideration comprising the fixed element (the MAPs) and an entitlement to a variable element calculated by reference to the gross receipts of the relevant film (the "Defined Proceeds"). The income tax loss, referred to at FTT [25], was intended to arise in the first year by virtue of the difference between the total cost of acquiring the right and the value of the consideration received under the Distribution Agreement (calculated in accordance with the Generally Accepted Accounting Principles).

7. As the UT recorded at [10], HMRC denied the purported trading loss and sideways loss relief (also referred to at FTT [25] as an intended consequence of entry into the Scheme). In line with case law developments, the taxpayer has accepted that he was not carrying on a trade by his participation in the Scheme and in consequence he no longer pursues his claims for sideways relief.

8. That was not the end of the matter. As the UT recorded at [11], HMRC issued discovery assessments against the taxpayer, on the basis that the MAPs which were paid under the Distribution Agreement amounted to income to which the taxpayer was entitled and

on which income tax was due, regardless of the fact that other aspects of the Scheme were ineffective to achieve the intended outcome.

9. The evidence before the FTT included standard form accounts prepared by Scion for the taxpayer to reflect his investment in the Scheme. The accounts prepared in this way for the year to 5 April 2012 (one of the years covered by discovery assessment) showed the taxpayer to have received income from the Scheme. In the 2012 accounts, the taxpayer's income from the Scheme was shown for every year going back to 2007/08 when the taxpayer invested in the Scheme; the precise figure varied but it was around £140,000 pa. Notes to the accounts explained the source of that income was from film rights:

> "When the film rights are acquired, they are included as stock on the balance sheet and are valued at the lower of cost and net realisable value. When the film rights are subsequently sold for a right to future income, the stock is shown as having been sold, and the consideration that they have been sold for is recognised as income. The value of any unpaid consideration, which is the right to future income, is determined using a methodology set out by a 3rd party valuation specialist and this amount is shown as accrued income within current assets."

10. The income shown in these accounts consisted of the MAPs. The discovery assessments relate to income tax charged at the marginal rate on the MAPs for the latter three years in which the Scheme operated. Enquiries were opened into the first two years, 2007/08 and 2008/09, and have not been closed.

11. Consistent with the aim of the Scheme, the accounts also showed: (i) a large first year loss in 2007/08, of around £1.9m, representing the taxpayer's initial investment in the Scheme; that loss was not, as it has turned out, a trading loss and thus has provided no benefit to the taxpayer in the form of sideways relief, as was originally intended; (ii) interest and alternative finance payments in each year on money borrowed by the taxpayer to fund his investment in the Scheme, shown as a deduction against income. The amount of interest charged in each year modestly exceeded the income figure in that year, with the effect that the overall profit in each year was shown as a relatively small negative figure. Those interest payments were not, as it has turned out, deductible against the income.

12. The taxpayer included the income shown in these accounts in his tax return for the relevant years.

Litigation History

13. HMRC issued discovery assessments under s 29 Taxes Management Act 1970. The taxpayer appealed arguing that they were procedurally invalid, alternatively that the Scheme did not amount to a non-trade business for the purposes of s 609 ITTOIA, that the income was not in any event assessable under s 611 ITTOIA, and that the loan interest payments were deductible from the MAPs. The FTT dismissed the appeal on all grounds.

14. The taxpayer appealed to the UT, in essence advancing the same points as were considered by the FTT. The UT listed the eight issues which arose for determination before it at UT [13]. The UT dismissed the appeal on all grounds.

15. Only one issue from that list is now advanced as a ground of second appeal before this Court. The taxpayer does not appeal the UT's conclusions that the discovery assessments were procedurally valid, that the Scheme did not amount to a trade, and that the loan interest payments were not deductible against income. His sole remaining argument, renewed to this Court, is that he is not liable for income tax on the MAPs, either because the MAPs are not income to which he is entitled (under s 611), or because the MAPs are not income from the business of exploiting films (under s 609).

The Contracts

16. The FTT considered the Scheme documents at FTT [28]-[31]. In summary, the taxpayer executed a suite of documents between 25 March and 4 April 2008, relating to the acquisition and exploitation of rights in two films, "Repossession Mambo" and "Tenure". The contracts associated with each film were materially identical. Of that suite, I agree with the UT that the key documents are the Loan Agreement, the Distribution Agreement, the Security Assignment and the Direction (see UT [78] and [79]).

17. The Loan Agreement was dated 25 March 2008, between Scion Film Financing (Guernsey) Ltd as "Lender" and the taxpayer as Borrower. The loan was for £1.7 million on terms that it would be repaid within six years (the "Loan"). The purpose of the Loan was to enable the taxpayer to acquire certain rights to distribute films (referred to as the "Film Rights") as part of the "trade" (meaning, it seems, the non-trade film business, as it is now established to be). Recourse for repayment was limited to the proceeds derived from the Scheme. Interest on the Loan was due at 3% above Barclays base rate, and the obligation to pay interest continued until the Repayment Date, which was defined as the date on or before the sixth anniversary of the final drawdown of the Loan. It was a condition precedent to the Lender's obligation to make the Loan that the taxpayer entered into various other documents including the Distribution Agreement, the Direction and the Security Assignment.

18. With the Loan proceeds of £1.7m, combined with a cash contribution of £300,000, the taxpayer purchased certain rights to distribute the films which were the subject of the Film Rights, as defined in the Loan Agreement: see the Acquisition Agreement dated 4 April 2008 between Scion Rights Ltd as vendor and the taxpayer as purchaser.

19. The Distribution Agreement was dated 4 April 2008, between the taxpayer as Vendor and Scion Distribution Ltd as the Purchaser. The taxpayer assigned to the Purchaser all his right, title and interest in the Distribution Rights, which were defined as the rights in the relevant film. The assignment was in perpetuity. Clause 3.1 provided that in consideration of and subject to a valid and effective assignment as provided for by the Distribution Agreement, the taxpayer would be entitled to the MAPs, to be calculated as provided at clause 3.3, and to be paid each year on 5 April, from 2009 to 2015. In addition, the taxpayer was entitled to the "Defined Proceeds" which would be paid from

the gross proceeds of the film in question, if performance exceeded certain targets. (In fact, no Defined Proceeds were ever paid in respect of either film.)

20. The Security Assignment was undated but all agree that its execution must have pre-dated the Acquisition Agreement on 4 April 2008. It was between the taxpayer as Assignor and the Lender (ie Scion Film Financing (Guernsey) Ltd). Clause 1 defined the "Secured Obligations" as the taxpayer's obligation to repay the Loan and interest. Clause 2 contained the taxpayer's undertaking to pay and discharge the Secured Obligations, subject to certain restrictions on when the Lender could demand repayment. The taxpayer assigned the benefit of his interest in the films, under the Acquisition Agreement and the Distribution Agreement, to the Lender, by clause 3.1 which was in the following terms, "You" referring to the taxpayer:

> "3.1 You hereby unconditionally and irrevocably assign with limited title guarantee for the payment and discharge of the Secured Obligations to Lender by way of security all of your present and future right title and interest in the Film Rights and the benefit of your present and future rights under Acquisition Agreement including the distribution rights acquired thereunder and the Distribution Agreement (including without limitation the benefit of all income or monies payable to you in respect thereof) including the benefit of all proceeds payable to you in respect of your distribution rights therein and all royalties, fees and other payments and income paid or payable in relation thereto and all sums payable to you by way of repayment of the Purchase Price (as defined in the Acquisition Agreement), but excluding the Reserved Collateral, until you have unconditionally and irrevocably paid and discharged the Secured Obligations in full to the satisfaction of Lender."

21. By clause 3.2 of the Security Assignment, the taxpayer created a charge over his film interests in favour of the Lender as security for the payment and discharge of the Secured Obligations "to the extent not assigned under clause 3.1 above". By clause 3.3, "Reserved Collateral" was defined. By clause 7, once the taxpayer had repaid the Secured Obligations in full, he had a right to call for the Lender to "re-assign to you the Collateral assigned pursuant to clause 3.1 and release to you the Collateral charged pursuant to clause 3.2".

22. The Direction was dated 4 April 2008, between Scion Distribution Ltd, the taxpayer, the Lender (Scion Film Financing (Guernsey) Ltd) and Scion Rights Ltd. By clause 1, the taxpayer and the Lender notified the other parties of the Security Assignment and directed Scion Distribution Ltd to pay sums due under the Distribution Agreement to the Lender "until repayment in full of the aggregate amount of all indebtedness owing" under the Loan Agreement. Included in the sums directed to be paid to the Lender were the MAPs. The Lender undertook to apply all sums received from Scion Distribution Ltd under the terms of this Direction to the repayment of capital and interest on the Loan.

Decisions Below

First Tier Tribunal

23. The FTT held that the taxpayer was entitled to the MAPs. That entitlement was not a redundant part of the Scheme or without commercial purpose [200]. The FTT held:

> "201. In our view, that entitlement was beneficial ownership of the MAPs. That nature or quality of the Appellants' interest in the MAPs was embodied in the fact that the MAPs were used to discharge the Appellants' loan interest obligations."

24. The FTT went on to say that the economic activity represented by the Scheme was real, it was not a sham [218], the arrangements were not self-cancelling [219], the commercial reality of the position, looked at objectively, was that there was a loan, carrying interest and the Lender could ultimately, on the terms of the Loan Agreement, look to the taxpayer as the borrower to pay the interest [223]; that was not a theoretic recourse, the taxpayer's obligations were real [225]. In conclusion, the MAPs were income from the non-trade business and the taxpayer was entitled to the income for the purposes of s 611.

Upper Tribunal

25. The UT construed s 611 purposively:

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

26. The UT considered two decisions of the Court of Appeal: *Bostan Khan v HMRC* [2021] EWCA 624 ("*Khan*"), and *Ingenious Games v HMRC* [2019] UKUT 266 (TCC) (see UT [67]-[76]). (The Court of Appeal has since considered an appeal against the latter at [2021] EWCA Civ 1180, but not on the issues which are said to be relevant to this appeal.)

27. The UT said that in determining whether a taxpayer is entitled to income, it was necessary to look at a variety of factors, such as whether the relevant person has a right to the income and whether he or she derives a benefit from the income; the existence of a charge or assignment of that income is not determinative (UT [87]); the concept of beneficial ownership was not helpful as a starting point (UT [88]).

28. The UT concluded as follows:

> "92. When the question of entitlement is considered by reference to *all* of the key documents, we consider it clear that Mr Good was entitled to the MAPs within section 611. His explicit contractual entitlement to the MAPs under the Distribution

> Agreement over a period of years did not disappear when Mr Good entered into security arrangements, but rather it continued in effect subject to the terms of those arrangements. Indeed, to the extent that Mr Good had no longer been entitled to the MAPs, the assignment of those rights would have been ineffective to discharge his interest obligations under the Loan Agreement. That interest obligation did not on any argument cease by virtue of the security assignment and Mr Baldry confirmed that such a result was nowhere stated in any of the Scheme documentation. To the contrary, Clause 4.5 of the Loan Agreement made it plain that the obligation to pay interest under Clause 7 remained in full until the Repayment Date. Clause 1 of the Security Assignment itself stated that Mr Good agreed to comply with all past and future obligations and liabilities, whether actual or contingent, under the Loan Agreement, including in particular the obligations to repay principal and interest when due.
>
> 93. Stepping back from the detailed provisions of the key agreements, we consider that Mr Good's entitlement to the MAPs was shown by his continuing enjoyment of the benefit of the MAPs in the ongoing discharge of his interest obligations (under the security arrangements). As the Court of Appeal put it in *Khan* (at [81]):
>
> > 'Mr Khan derived a real benefit from the payment because it extinguished his corresponding liability to repay the loan. This was not a case in which Mr Khan's interest in the money could be described as a 'mere legal shell' with the vendor shareholders having all the rights of beneficial owners over that money.'
>
> 94. Mr Good thus obtained an enduring and "real benefit" from the MAPs through the discharge of his liability to pay interest under the Loan Agreement. His rights to the MAPs under the Distribution Agreement were not a "mere legal shell". In order to have had the power and authority to direct that income to be paid elsewhere, Mr Good must necessarily have had a right to it. He may not have "controlled" that income, but Khan makes clear that control and entitlement are different concepts.
>
> 95. We therefore conclude that Mr Good was entitled to the MAPs within the meaning of section 611."

29. The UT turned to the arguments on s 609 which they rejected in the following terms:

> "98. Once it is accepted that Mr Good's activities constituted a non-trade business of film exploitation, which is the issue to which the existence of "activities" is relevant, the only question is whether the MAPs were income "from" that business. The MAPs were part of the consideration received by Mr Good under the Distribution Agreement for the sale of the film rights; as such they were in our view clearly income from the

> non-trade business. There is no requirement in the legislation to limit that concept to income which is variable or calculated by reference to or dependent on film exploitation. Section 609 simply asks whether the non-trade business was the source of the income. It clearly was, and it did not cease to be so because the amount due was fixed. Put shortly, the source of the income is not altered by the method of its calculation."

30. The UT dismissed the appeal.

Submissions

31. I am grateful to both counsel and their legal teams for the expert assistance they have given the Court.

32. By his Notice of Appeal, Mr Baldry KC, who has represented the taxpayer throughout, advanced four grounds of appeal which expand on issue four, as it was in the UT, and which can be summarised as follows:

    (1) that the UT was in error of law in concluding that the MAPs were income to which the taxpayer was "entitled" within the meaning of s 611 ITTOIA. The taxpayer had assigned away his rights in the MAPs. The UT had misinterpreted *Khan,* which was, on proper interpretation, in the taxpayer's favour. (This is Issue 1: Entitled.)

    (2) That the UT had misconstrued the contracts, especially the Security Assignment by which the taxpayer assigned his right in the MAPs to the Lender. (This is Issue 2: Assignment.)

    (3) That the UT had mischaracterised the composite transaction by concluding that the taxpayer obtained a real benefit through the discharge of his liability under the Loan Agreement. The reality, based on the composite whole, was that the taxpayer did not obtain any real benefit from the MAPs. (This is Issue 3: Composite Transaction.)

    (4) That the UT was wrong to conclude that the MAPs were income from a business involving the exploitation of films within s 609 given that the taxpayer's rights to the MAPs were always intended to belong to the Lender as part of the financing arrangements for the Scheme; that meant that the only income which could truly be described as coming from the business involving the exploitation of films was the Defined Proceeds – but no Defined Proceeds were ever paid out on either film. (This is Issue 4: Business Income.)

33. By his supporting skeleton and oral arguments, Mr Baldry expands on these Grounds of Appeal. He submits that the UT erred in construing "entitled" as it is used in s 611 too broadly. It means either the person who actually receives the income in question or, failing that, the person entitled to the income. It could only ever mean one person, not both, because that would risk imposition of double taxation or would mean that HMRC could choose which of two or more taxpayers to pursue, which could not be right. The solution was to interpret "entitled to" as meaning the person to whom the income belongs, which is ordinarily the person legally entitled to it. By virtue of the assignment, in this case the income belonged to the Lender, not the taxpayer. On the facts, the taxpayer had alienated his right to the MAPs. Parliament could have

legislated to impose tax on an assignor such as the taxpayer, even though that person had alienated his interest in the MAPs, but Parliament has not done so (contrast, for example, the settlements code at Chapter 5, Part 5 of ITTOIA which contains measures specifically addressed to settlors who benefit from the income of the settlement).

34. That alienation was effected by clause 3.1 of the Security Assignment, by which the right to the MAPs had been irrevocably assigned. That clause read with clause 3.2 made it clear that everything was assigned. The taxpayer retained no benefit. The Lender would have the right to sue if the MAPs were not paid to it.

35. These were pre-ordained arrangements, deliberately structured to avoid the taxpayer retaining any entitlement to the MAPs; the valuable rights, such as rights to the MAPs, were all retained as a matter of commercial reality within the Scion group. The overall outcome might have been the same as if the taxpayer had received and then applied the MAPs to repayment of the Loan, but the parties had not structured their arrangements that way, instead the MAPs had been assigned and the tax consequences should follow the structure actually adopted. *Ingenious Games* [2019] UKUT 226 (TCC) supported that submission, because in that case, from the time of execution, the lender rather than the taxpayer was the person entitled to the receipts: see [620] and [634] of that judgment.

36. The cases on beneficial entitlement relied on by HMRC provided little assistance; they did not address the concept of belonging or entitlement for s 611 purposes. Because the taxpayer had no interest in the income, in light of the assignment, this case was also distinguishable from cases like *Peracha v Miley* [1990] STC 512 on which HMRC relied.

37. Finally, the MAPs were not income from the taxpayer's business of film exploitation, on any realistic view. The enduring rights created by the Distribution Agreement were always intended to belong to the Lender as part of the financing arrangements. The only income which could truly be described as arising from the business involving the exploitation of films was the Defined Proceeds, but there were none generated in fact.

38. Ms Nathan KC, who has represented HMRC throughout, resisted this appeal. In her Respondents' Notice, skeleton and in oral submissions, she contended that the UT was right for the reasons it gave and submitted that the appeal could not succeed in the face of the facts as found by the FTT. The legislation was deliberate in its wording and more than one person could come within s 611, because the person receiving income was not necessarily the person entitled to the income, but both were captured by the provision. She accepted that the test was not strictly one of beneficial ownership, but nonetheless, a number of cases about the meaning of beneficial ownership were of assistance in this case, notably *BUPA Insurance Ltd v HMRC* [UKUT] 262 (TCC), *Sainsbury v O'Connor* [1991] STC 318 and *Wood Preservation v Prior* [1969] 1 All ER 364. Three cases on broadly analogous facts illustrated the Court's approach when a person derived benefit from income paid to a third party: *CIR v Paterson* (1924) 9 TC 163, *Dunmore v McGowan* [1978] STC 217 and *Peracha v Miley*. This was not, she suggested, a case where the arrangements cancelled themselves out unlike *IRC v Scottish Provident Institution* [2004] UKHL 52; [2004] 1 WLR 3172, for example. The Distribution Agreement had real consequences, namely the payment of the MAPs, and had to be considered alongside the Loan, Security Assignment and Direction, in order to

determine whether the taxpayer was liable for tax on those payments as income to which he was entitled.

39. HMRC accepted that to be entitled, the person had to retain more than the "mere legal shell", a phrase taken from *Wood Preservation v Prior*. On the facts here, the taxpayer retained far more than the mere legal shell. Ms Nathan made three points. The first was that the taxpayer had a prior entitlement to the MAPs under the Distribution Agreement, which the Security Assignment did not entirely extinguish even if, whilst the taxpayer's obligations under the Loan Agreement were outstanding, the MAPs were to be paid at the taxpayer's direction to the Lender. The second was that the taxpayer still derived benefit from the MAPs, each and every time that they were paid to the Lender, because they were paid *on condition that* they were used by the Lender to reduce the taxpayer's liabilities under the Loan Agreement. The third was that once the taxpayer's obligations under the Loan Agreement were paid off in full, the rights to the MAPs would be returned to the taxpayer, either automatically under clauses 3.1 or 3.2, or following a request for reassignment or release of the charge under clause 7.

40. She submitted that the taxpayer had acquiesced in these arrangements and had directed that the MAPs should be paid direct to the Lender. An analogy could be drawn on the facts with *RFC 2012 plc v AG Scotland* [2017] UKSC 45; [2017] 4 All ER 654 at [58]-[59].

41. On the taxpayer's supplementary point relating to s 609, she submitted that the MAPs were plainly income from the film business.

Discussion

Khan

42. Much of the argument in this case centred on *Khan,* a recent decision of this Court. In *Khan,* a taxpayer agreed to acquire a company from the three existing shareholders by entering into connected share sale and buy-back transactions. By the share sale agreement, the taxpayer purchased the company's issued share capital of 99 shares for £1.95m in cash plus an amount equal to the company's book value of £19,000. Immediately following purchase, the taxpayer was appointed a director of the company with immediate effect and the existing shareholders resigned as directors. 40 minutes later, the company bought back 98 shares for £1.95m cash, shown as such on the company's financial statements, leaving the taxpayer holding the sole remaining share. The taxpayer's initial purchase was financed by the company lending £1.95m to the taxpayer, which loan was offset against the company's obligation to pay an equivalent sum as the price of the 98 shares which it subsequently bought back. The result was that the taxpayer became the sole shareholder and owner of the company at a personal cost to him of £19,000 and the departing shareholders received a sum equal to the company's distributable reserves of £1.95m. HMRC issued a closure notice to the taxpayer requiring payment of £600,000 in tax on the basis that the buy-back agreement resulted in a distribution by the company to him in the amount of £1.95m which was liable to tax under s 385(1) of ITTOIA which provides that the person liable to pay tax on a distribution is the person "receiving or entitled to" it. The taxpayer appealed against that notice contending that the reality of the series of arrangements was that the former shareholders received the distribution, not him.

43. The Court dismissed the appeal, holding that the taxpayer was entitled to the distribution, even though he never actually received it. Andrews LJ gave the leading judgment, with which Dingemans LJ and Peter Jackson LJ concurred. The Court arrived at a number of conclusions on the meaning of entitlement:

> (1) The phrase "the person receiving or entitled to" is used in many provisions of ITTOIA to denote the person who is liable to pay the tax on the income or benefit: [7]. The phrase must be given a consistent meaning wherever it appears in ITTOIA: [11].
>
> (2) Either receipt or entitlement will suffice: [10]. The net is cast wide in terms of the persons from whom the Revenue can seek payment: [71].
>
> (3) If the relevant legislation requires the court to focus on a specific transaction, then other transactions, though related, are unlikely to have any bearing on its application. Not all fiscal legislation is concerned with the overall effect of a series of related transactions as if they were one composite transaction: [50]. In the instant case, the statutory provisions required a focus on the actual transaction under which the distribution arose rather than the transactions as a whole: [52], [73].
>
> (4) The authorities on "beneficial ownership" and "beneficial entitlement" concerned different statutory provisions and should not necessarily be read across to "entitlement" in ITTOIA: [64]-[68].

44. The Court rejected Mr Khan's appeal, holding that he was entitled to the distribution and liable to tax on it. Even if the arrangements were to be viewed as a composite whole:

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

45. In a concluding passage to which the UT referred (at UT [69]), the Court said this:

> "83. Despite Mr Sykes' attractive presentation of the arguments, I am not persuaded that the concept of "receipt" in section 385(1) contains an implicit requirement that the person who receives the distribution must also have practical control over it. "Entitlement" means no more than having the right to the taxable income, in this case, the distribution, and there is no further implicit requirement of benefit in the sense used in the group or consortium tax relief cases. If one asks the only pertinent question: "to whom did the purchase price of the 98 shares belong?" there is only one answer, and that is Mr Khan. However, even if there had been a requirement of benefit, Mr Khan did benefit from the distribution. As the UT held at para 97 it was the fact that he was entitled to and did receive the distribution that enabled Mr Khan to discharge his liability to repay £1.95m to the Company."

46. Mr Baldry and Ms Nathan both rely on *Khan* to support their cases. Mr Baldry places particular reliance on three points which he says emerge from *Khan.* The first is Andrews LJ's acceptance that "entitled to" equates with "belonging" or "belongs". She explained her approach at [8] (emphasis added in the final sub-paragraph):

> "…As the Explanatory Notes to section 385 state at paragraph 1558, [the predecessor legislation at] section 131(4) of ICTA suggested that:
>
> > "where the distribution *actually belongs to someone other than the recipient,* or under any provision of the Tax Acts it is *treated as belonging to someone other than the recipient,* that other person is liable for the tax charged." (Emphasis supplied.)
>
> That indicates that the person "entitled to" the taxable income means the person to whom that income belongs. In the case of a dividend or distribution by a company out of its profits, that will usually be the owner of the shares."

Mr Baldry says that the concept of belonging is equally applicable in this case, and submits that the MAPs do not 'belong' to the taxpayer.

47. The second is the proposition that any legal obligation to deal with the money in any particular way after it has been received is irrelevant. He relies on [69] of *Khan* where Andrews LJ said this, referring to *Wood Preservation v Prior* (emphasis added in the final sub-paragraph)*:*

> "The issue in [*Wood Preservation v Prior*] was whether the taxpayer company, which had granted an option to another company over 5% of its shares in a subsidiary, which was not yet exercisable, was the "beneficial owner" of the shares. It was held that it was. At p 976C-D Lloyd LJ said:
>
> > "The question is not whether the taxpayer company required the consent of [the option holder] before a dividend could be paid, or whether a payment of dividend was likely or not (it was clearly contemplated as a possibility). The question is rather whether the taxpayer company would have received the dividend if it had been paid. The answer is in the affirmative. *The fact that the amount of any dividend would have been deducted from the option price . . . does not mean that the taxpayer company was not beneficially entitled to the dividends in the meantime.* So I am not persuaded that the taxpayer company's rights in relation to the shares were no more than a 'mere legal shell'." (Emphasis supplied.)
>
> That case establishes that even in a statutory context in which equitable ownership may not be enough to amount to "beneficial ownership" or "beneficial entitlement", the focus is on identifying the person who in reality has the right to the money. Any legal obligation they may have to treat that money in a particular way after that right accrues or after payment is made is irrelevant."

Andrews LJ repeated the point at [72] of her judgment.

48. Thirdly, Mr Baldry argues that *Khan* supports his submission that by assigning the MAPs, the taxpayer alienated all his interest in the MAPs, so as no longer to be entitled to them. He relies on [73], with emphasis added:

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

49. I will address these three points in the course of my discussion, below. It is important, however, to record that *Khan* concerned very different facts and in consequence raised different arguments. There was no issue in *Khan* about the effect of an assignment, and in consequence there was no debate about who, out of assignor and assignee, was entitled to the payments for the purposes of the statute.

Issue 1: Entitlement

50. It is common ground that the *Ramsay* approach to statutory interpretation applies in this case. That approach was examined by the Supreme Court in *UBS AG v Revenue and Customs Commissioners* [2016] UKSC 13; [2016] 1 WLR 1005 at [61]-[68]. It is necessary to "have regard to the purpose of a particular provision and interpret its language, so far as possible, in the way which best gives effect to this purpose" (per Lord Carnwath at [61]); the "ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically" (per Lord Carnwath at [66], citing Ribeiro PJ in *Arrowtown Assets* 6 ITLR 454, para 35, also cited in *Barclays Mercantile Finance Ltd v Mawson* [2005] 1 AC 684 at [36] and in *Khan* at [49]).

51. The UT said that the purpose of s 611 was to subject to income tax any income from a non-trade film business (UT [66]). I agree.

52. In *Khan*, it was held that on a purposive reading of identical words in a different provision of legislation, focus had to be on the particular transaction under which the distribution arose, and not on the connected transactions considered as a composite whole [52]. The same applies here, and the focus must be on the transaction giving rise to the income in question. I do not understand that approach to be disputed in principle although there is a dispute about the way it is applied and with what result.

53. In construing s 611, I make the following points, endorsing the approach of the UT. First, the concept of receipt is different from the concept of entitlement, as a matter of ordinary language. A person who is entitled to a payment from a third party may not in fact receive the money; and the person who receives the money may not be the person who was entitled to do so as against the third party. It is accordingly clear that the class of persons intended to be caught by s 611 is wider than simply those who receive income. This was a point made by Andrews LJ in the context of s 385(1) in *Khan* at [10] and [71], and I agree with her. It is therefore no answer to a charge under s 611 to

say that you did not receive the income. The further question is whether you were entitled to the income *even though* you did not receive it.

54. Secondly, and related to the first point, it is possible that more than one person will potentially come within the ambit of s 611. This too was accepted by Andrews LJ in *Khan,* implicitly at least, see [10]. This is not antithetical to the purpose of the legislation. Given the context of Chapter 3 ITTOIA which is aimed at tax avoidance schemes involving the exploitation of films or sound recordings, and the purpose of the provision which I have identified above, it is not surprising to find the net cast wide in that way (to borrow a phrase from *Khan,* when the Court reached a similar conclusion in the context of s 385(1)). I do not accept that this will risk "arbitrary double taxation" as Mr Baldry suggests, although I do accept that in some cases HMRC may be put to an election as to which taxpayer should be pursued for the tax.

55. Thirdly, the words "entitled to" do not carry any special meaning, specific to the statute. They are words of ordinary usage and should be given their ordinary meaning. There are many references in the taxing statutes to beneficial entitlement and beneficial ownership, but s 611 does not refer to "beneficial entitlement", which it could have done if that meaning had been intended. I conclude that the words are not intended to import the domestic law concept of beneficial interest or entitlement. I have not found cases such as *BUPA Insurance, Sainsbury v O'Connor* and *Wood Preservation v Prior* to be of much assistance in construing the legislation, because they concern the meaning of beneficial ownership or beneficial entitlement in the context of facts which are far distant from this case. The words in the statute are not defined and fall to be construed and applied according to their ordinary, non-technical meaning. What is required is a realistic appraisal of the commercial reality or substance of the arrangements in light of the words of the statute, properly construed.

56. I come then to two of Mr Baldry's points based on *Khan*, which are relevant to his submissions on the meaning of the term "entitled". First, he argues that the words "entitled to" mean "belong(s) to" and argues that the MAPs did not belong to the taxpayer. Andrews LJ explained at [8] why that term was appropriate in that case, and she used that term in several places in her judgment (see [54] and [57] in addition to [8]). That was a case where, as she said at [27], Mr Khan was the legal and beneficial owner of the entire share capital of the company and the only person entitled to the distribution. This case is different. Here, the dispute centres on whether the person receiving the MAPs (the Lender) is also the person entitled to the MAPs. In determining that issue, in my view it is better to stick to the words of the statute which Parliament has chosen, and to ask whether the taxpayer was entitled to the income, that being the statutory question. That also avoids potential confusion in using "belongs" as a substitute for "entitled": the word "belongs" appears in its own right in different tax provisions and has been the subject of discussion in the case law (see eg *Melluish (Inspector of Taxes) v BMI (No 3) Ltd* [1995] STC 964 where the Court considered the meaning of "belongs" in the context of capital allowances).

57. Mr Baldry's second point derives from [69] and [72] of *Khan* where Andrews LJ said that any legal obligation the recipient of a distribution may have to treat that money in a particular way was irrelevant. Mr Baldry argues that the use of the MAPs by the Lender to meet the taxpayer's obligations under the Loan are not relevant. I cannot accept that proposition. For one thing, it is inconsistent with the taxpayer's own invitation to the Court to take account of the package of transactions (see Issue 3:

Composite Transaction). Secondly, and more fundamentally, it risks conflict with *Ramsay* which requires the transaction to be "viewed realistically" (see paragraph 50 above), which plainly requires regard to be had to the context surrounding the payments, including the way in which they are used, in an appropriate case. Thirdly, it is based on a misreading of [69] and [72] of *Khan* where Andrews LJ was simply making the point that s 385(1) required focus on the transaction giving rise to the distribution and not on the composite whole; she stated that in terms at [73]:

> "… section 385(1) is not a statutory provision that is concerned with the overall economic outcome of a series of commercially interlinked transactions, but only with the question of who was entitled to the distribution or who actually received it".

At a later point in her judgment, where she considered the composite whole as part of an alternative analysis, she did take account of the wider circumstances in which the distribution was made and recorded that the taxpayer benefited from the distribution by having his corresponding liability to repay the loan extinguished, treating that as a relevant fact (see [81]). Fourthly, and last, cases such as *Peracha v Miley* (see below) demonstrate the need to take account of the wider circumstances and show that the manner in which the particular payment is used may well be relevant to the question of entitlement.

58. Before reaching a conclusion on whether the taxpayer was entitled to the MAPs, construing s 611 in the manner I have suggested, it is necessary to consider Issues 2 and 3, which deal with arguments raised by the taxpayer as to why he was not so entitled.

Issue 2: Assignment

59. Mr Baldry argued that the effect of the Security Assignment was to alienate from the taxpayer all his interest in the MAPs. It was in this connection that he relied on the third point extracted from *Khan* at [73], where Andrews LJ suggested that the outcome in that case might have been different if there had been an assignment. The UT dismissed that argument in the following terms (emphasis added):

> "86. In relation to this passage in *Khan*, it is necessary to place it in its factual context. In this appeal, Mr Good undoubtedly entered into an assignment of the benefit of the MAPs and granted security over his rights to the MAPs. In *Khan*, however, there was no assignment or charge in respect of the distribution, so it is scarcely surprising that the Court of Appeal observed that this fortified its conclusion that no-one had a better right to the distribution than Mr Khan. <u>What the Court of Appeal did not say, because it was not necessary for it to do so on the facts before it, was that any charge, trust or assignment necessarily operates to deprive the chargor, settlor or assignor of any "entitlement" to income within that security arrangement.</u>
>
> 87. We do not consider that *Khan*, or any other authorities, establish that the question of "entitlement" to income for the purposes of the ITTOIA is necessarily determined solely by reference to the effect of any charge, settlement or assignment

> which takes effect in relation to such income. The points made by the Court of Appeal in *Khan* which we set out above at [68] show that other factors, such as whether the relevant person has a right to the income and whether he or she derives a real benefit from that income, are relevant to the question of entitlement. Furthermore, section 611, like section 385 in *Khan*, requires focus on the particular transaction under which the income arose rather than the scheme as a whole."

60. I agree. The existence of an assignment is not necessarily determinative of the s 611 question: whether it is or not will depend on the wider facts.

61. More generally, Mr Baldry argued that the Security Assignment operated to alienate from the taxpayer all title and interest in the MAPs. The high-water mark of his argument was clause 3.1 of the Security Assignment which is set out in paragraph 20 above. By clause 3.1, the taxpayer purported to assign to the Lender by way of security all rights to payment of the MAPs under the Distribution Agreement. Notice of that assignment with the consequential instruction about payment was given to Scion Distribution Limited by the Direction (see paragraph 22 above). The assignment in clause 3.1 was supplemented by the charge granted over the MAPs in clause 3.2 of the Security Assignment which was expressed to take effect if and to the extent that the rights referred to in clause 3.1 were not effectively assigned (see paragraph 21 above).

62. In agreement with HMRC's case, I reject the proposition that the taxpayer had completely alienated his rights in the MAPs so as no longer to be entitled to them. That does not reflect the reality of these arrangements. The MAPs were assigned in parallel with the Lender's obligation to use them to discharge the taxpayer's obligations under the Loan. The taxpayer derived a clear benefit from the MAPs, each time they were paid while the Loan remained outstanding, sufficient to mean that the taxpayer remained "entitled to" the MAPs for the purposes of s 611.

63. The tax cases on which Ms Nathan relied support that analysis. In *CIR v Paterson* a husband was held to be liable to tax on the full value of dividends paid on his wife's shares, even though those shares were held by an insurer as security for a loan, and the dividends were used to cover the interest on the loan, the premiums on a life assurance policy and an element of the capital repaid annually, with only the remainder actually being paid to the wife. Pollock MR said at p 179:

> "… the substance is that the whole sum received by way of dividend was in fact hers, although the disposal of it and the channel through which the first part of it was dealt with was the insurance society."

64. In *Dunmore v McGowan* the taxpayer was liable to tax on interest credited to a deposit account held as security for a third party loan. Stamp LJ said at p 220b:

> "The interest was received or 'got' when it was credited to the deposit account, an account of money which was at all times owed by the bank to the taxpayer, albeit charged in support of the guarantee."

65. In *Peracha v Miley*, the taxpayer was liable to tax on interest credited to a deposit account held by the bank as security for a third party loan for which the taxpayer had

become personally liable. The interest on the deposit was set off by the bank against the interest due on the loan. Dillon LJ said at p 515d:

> "… this case is to my mind indistinguishable from *Dunmore v McGowan*, because at each stage the taxpayer is liable for the interest on the debt and on being credited with interest on his deposit he gets the benefit, as in *Dunmore v McGowan*, that his liability for the interest falls to be reduced by the interest on the deposit which is credited to him."

66. The relevant provision in the latter two cases (s 148 of the Income Tax Act 1952 in the case of *Dunmore v McGowan* and s 114(1) of the Income and Corporation Taxes Act 1970 in the case of *Peracha v Miley*) imposed liability on the person "receiving or entitled to the income", wording identical to s 611.

67. Mr Baldry argued that these cases are distinguishable on their facts because none involved an assignment of the type in evidence here. But I do not accept that they can be distinguished in that way. The cases establish a broader principle that a person can, depending on the terms of the statute and the context of the particular payments, be held accountable to tax on payments to a third party if that person benefits from those payments.

68. Although different in their details, I conclude that these cases provide strong support for HMRC's case. In each of them, the taxpayer derived a benefit from the payment which was actually received by a third party, which benefit was sufficient to demonstrate their entitlement to the income for tax purposes. The type of benefit in each case was analogous with the benefit which the taxpayer derived from the MAPs being paid to the Lender in this case, the MAPs going to reduce the taxpayer's obligations under the Loan.

69. There is also merit in Ms Nathan's submission that the assignment was to last only for as long as the Loan remained outstanding. The Security Assignment contained two mechanisms by which the right to be paid the MAPs could revert to the taxpayer: either, by operation of clause 3.1, the assignment would simply cease to have effect once the Loan was repaid (at which point the direction to pay the MAPs to the Lender would also cease: see paragraph 22 above); alternatively, by operation of clause 7, once the Loan was repaid, the taxpayer could call for a reassignment of all the collateral that had been assigned and demand a release from the charge under clause 3.2 (see paragraph 21 above). I accept Mr Baldry's point that the Scheme did not envisage implementation of these reversionary rights, because the intention was that the MAPs would meet the interest due under the Loan up to the point that the Scheme concluded, but nonetheless, as a matter of contract, the taxpayer retained a right of reversion, and for that further reason cannot be said to have divested himself completely of the MAPs so as no longer to be entitled to them.

70. Ms Nathan is right to say that the taxpayer's right to the MAPs under the Distribution Agreement stood unchanged by the Security Assignment or the Direction. This point, however, carries less weight with me given that, if the taxpayer had divested himself fully of all entitlement to the MAPs by his subsequent contractual dealings, his rights under the Distribution Agreement would have become worthless, in reality.

Issue 3: Composite Transaction

71. Mr Baldry has one more argument that I must address before I reach any conclusions on the applicability of s 611. He argued that the UT was wrong to conclude, as it did at UT [94], that the taxpayer obtained a real benefit from the MAPs. He does not suggest that the Scheme should be considered as a composite whole (accepting that *Khan* rejected that approach), but he does say the reality of these arrangements is relevant to the issue of entitlement and that the Scheme had aspects which were self-cancelling or pre-ordained, so that in reality the taxpayer did not get any benefit from the MAPs. In this context he relies on *Ingenious Games* in the UT.

72. The UT dismissed Mr Baldry's arguments based on *Ingenious Games* at [73] and [82]. I think they were right to do so for the reasons they gave. That case was very different on its facts and involved different legislation, which warranted a view of the composite whole, which s 611 does not.

73. There are cases where the Court has taken an overall or composite view. For example, in *Scottish Provident*, the Court considered the whole series of transactions which were intended to have a "commercial unity" in determining whether the taxpayer was "entitled to" gilts, which was the statutory question in that case (see [19]). But I agree with Ms Nathan that *Scottish Provident* does not help here: it concerned different legislation with a different purpose, and it involved self-cancelling features within the series of pre-ordained transactions. Like the UT, I reject the suggestion that this Scheme involved self-cancelling features. The Distribution Agreement, the Security Assignment and the Direction created real obligations and benefits on the participants, which did not simply cancel each other out.

Conclusion on s 611- Issues 1, 2 and 3

74. Pulling the threads together, I am not persuaded that the Security Assignment together with the Direction had the effect of divesting the taxpayer of all benefit in and entitlement to the MAPs. The effect of those agreements was not to alienate all interest in the MAPs away from the taxpayer. Neither the Security Assignment nor the Direction touched the Distribution Agreement, which stood intact and bestowed on the taxpayer the right to the MAPs. The assignment of the taxpayer's rights under the Distribution Agreement combined with the Direction meant that he retained a real interest in the MAPs, which were paid to the Lender subject to the condition about how they were to be used, and the Lender's hands were tied by the obligation to apply the MAPs to meet the Loan obligations. That was of clear benefit to the taxpayer who was relieved of obligations he otherwise would have owed in relation to the Loan. Further, the taxpayer had a right to redeem his rights to the MAPs once the Loan was paid off.

75. The effect of the assignment was to divert payment of the MAPs to a third party, but as the cases in the line ending with *Peracha v Miley* show, the person can still be entitled to the payments (and liable to tax on them) if that person stands to benefit from the payments to the third party, and the way they are used by the third party. That principle applies here.

76. In my judgment, therefore, the taxpayer retained an interest and benefit in the MAPs which meant that he was "entitled to" the MAPs applying the ordinary meaning of those words. I agree with the UT at [92]-[95].

Issue 4: Business Income

77. The UT found that the MAPs were income from the taxpayer's business of film exploitation on the basis that they were part of the consideration received under the Distribution Agreement (see UT at [98]). The taxpayer disputes this finding, arguing that the MAPs were always intended to be paid to the Lender as part of the financing arrangements. They were distinct from the ongoing activities which make up the business and it was only the Defined Proceeds which, in reality, could have been income from the business.

78. HMRC argue that the UT was right to conclude that the MAPs were indeed income from the business of film exploitation.

79. This ground stands or falls with the earlier grounds relating to s 611. I have concluded that the taxpayer was entitled to the MAPs under the terms of the Distribution Agreement, even if the right to be paid them was assigned to the Lender. I have rejected the taxpayer's argument that the reality of the Scheme was that he was not entitled to the MAPs. It follows that for the purposes of s 609, the MAPs were income from the business of exploiting films. I accept that the Defined Proceeds, if any had been received, would also have been income from the film business. It is inescapable that the MAPs were derived from that business. They come within s 609. I agree with the UT at [98].

Conclusion

80. I reject the taxpayer's grounds of appeal. In my judgment, the taxpayer was entitled to the MAPs for the purposes of s 611 ITTOIA and the MAPs were income from the film business in which the taxpayer was participating for the purposes of s 609 ITTOIA.

81. The rejection of this appeal will be very bitter for the taxpayer. Not only has he lost his initial investment of £300,000 in the Scheme, but in addition he is liable to income tax on income which he never himself received; the tax bill is around £180,000 for the three years of the Scheme so far considered by HMRC, with enquiries into two other years remaining open. Financially, the taxpayer's investment in the Scheme has been disastrous. But that cannot affect the interpretation and application of the statute.

82. Since preparing this judgment in draft, I have had the benefit of reading Lord Justice Snowden's concurring judgment. My reasons for dismissing this appeal are set out above and rest on an assessment of the economic and commercial reality of these arrangements judged by reference to s 611, see in particular paragraph 55 above. It is a feature of this case that the taxpayer relies on the Security Assignment as the basis for his submission that he divested himself of all right and title to the MAPs. I am grateful for My Lord's analysis of the legal effect of that assignment in answer to Mr Baldry's submission and in the context of s 136 of the Law of Property Act 1925. I accept My Lord's conclusion that the assignment was not a valid statutory assignment because it was conditional (citing *Durham Bros v Robertson* [1898] 1 QB 765). That provides yet further support, if that were needed, for the conclusion I have already reached on this appeal.

83. I would dismiss this appeal.

LORD JUSTICE SNOWDEN:

84. I agree with the judgment of Lady Justice Whipple and gratefully adopt her detailed exposition of the facts and the relevant statutory provisions.

85. The aim of the Scheme was to convince HMRC that the taxpayer was carrying on a trade which involved taking loans to finance the purchase of film rights which he then sold in return for a share in the proceeds of their exploitation. The taxpayer sought to demonstrate that this was a trade, among other things, by presenting accounts which included the MAPs as his income against which was set his liability for interest and other finance payments on the loans which he had incurred to acquire the film rights.

86. Having failed for other reasons to establish that he was conducting a trade, the taxpayer now seeks to resile from the accounts which he prepared and to contend that on analysis of the arrangements into which he entered, he did not in fact receive and was not entitled to the income shown in those accounts.

87. For reasons that My Lady explains, I agree that the words "receiving or entitled to … income" in section 611 ITTOIA should be given their ordinary meaning. The ordinary meaning of "receiving or entitled to ... income" can be illustrated by a number of examples.

88. In a simple business, a person (A) will often finance his purchase of stock using a loan from his bank (B) and will use the money which he collects from selling those goods to customers to repay his debt to B. In that simple scenario, A is plainly both entitled to and receives the income generated by his business.

89. The analysis and result is no different if, instead of collecting the money personally from his customers, A instructs his customers to pay the money directly to B, which agrees to treat it as a reduction of A's debt. That, indeed, will be what commonly occurs in practice if a business is financed by an overdraft facility and A simply tells his customers to pay their invoices by bank transfer into his account with B.

90. There is also no reason for the analysis and result to be any different if, as is often the case, A's overdraft with his bank is secured over the receivables generated by the business, so that instead of choosing to do so, A is contractually obliged by the terms of the security to ensure that his customers pay their invoices into his account with B. In every ordinary sense of the words, notwithstanding the existence of security, A will still be receiving and entitled to the payments from his customers, which, though technically paid to B, will either result in a reduction of A's overdraft or increase his credit balance with B, depending on the state of his account.

91. Nor is there any reason to reach a different result in a case in which A happens not to take his loan from his bank, but finances his business by a loan from a third party (T). Even if the terms of T's security require A to instruct his customers to pay their invoices into T's bank account, and T agrees to credit A with the amount of such payments, it is no misuse of language to say that A should be regarded as entitled to those payments from his customers, because he used them to reduce his debt to T.

92. Accordingly, I agree with My Lady that on the ordinary meaning of its words, section 611 is entirely apt to apply to the MAPs which were owed to the taxpayer and which

he caused to be paid to the Lender by way of security on terms that they were to be applied in the discharge of his liabilities under the Loan.

93. For the reasons which My Lady gives, I also agree that section 611 does not invite a narrow technical approach to be adopted to the question of entitlement. My Lady says that on an ordinary reading of the section, the taxpayer had the benefit of the MAPs and he was therefore entitled to them, and so it matters not whether the assignment of the MAPs by way of security in the Security Assignment was a statutory or an equitable assignment. I agree.

94. Mr. Baldry KC sought to argue, however, as he has throughout, that the effect of the Security Assignment and the Direction was that the taxpayer had divested himself of all right, title and interest in the MAPs with the result that he was no longer entitled to them under section 611: see the summary of his argument in paragraphs [33]-[35] and [48] above.

95. The relevant provisions of clauses 3.1 and 3.2 of the Security Assignment and the terms of the Direction have been set out by Lady Justice Whipple in paragraphs [20]-[22] above.

96. Although Mr. Baldry's skeleton argument did not say so in terms, his contention that the taxpayer had divested himself of all title to the MAPs, thereby entitling the Lender to sue if the money was not paid (see e.g. paragraph [34] above), necessarily amounted to a submission that clause 3.1 of the Security Assignment, coupled with the Direction, effected a valid statutory assignment of the MAPs under section 136 of the Law of Property 1925 ("Section 136"). That is because compliance with Section 136 is the only way in which legal title to a debt can be assigned, thereby giving the assignee the right to sue for the debt in his own name without joining the assignor.

97. Section 136 provides,

> "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor … is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—
>
> (a) the legal right to such debt or thing in action; …"

98. An outright assignment of a debt with a proviso (express or implied) for reassignment of the debt on repayment by the assignor of the money lent to him by the assignee is to be regarded as absolute for the purposes of Section 136. Accordingly, if notice is given to the debtor, it will operate to transfer legal title to the assignee: see *Tancred v Delagoa Bay and East Africa Railway* (1889) 23 QBD 239.

99. However, an assignment of a debt which provides that the assignment is only to operate until repayment of money lent to the assignor, is to be regarded as conditional and not absolute for the purposes of Section 136. As such it cannot result in legal title passing to the assignee and takes effect as an equitable assignment only: see *Durham Bros v Robertson* [1898] 1 QB 765.

100. In *Durham Bros*, a sum that would become due under a building contract on completion of the buildings had purportedly been the subject of a statutory assignment by way of security for loans made to the builder. The instrument in question was a letter from the builder to the lenders which identified the amount that would become due and stated in relevant part,

> "…we hereby assign our interest in the above-mentioned sum until the money with added interest be repaid to you."

101. The lenders gave notice of the assignment to debtor named in the document and brought an action in debt to recover the sum due from him, claiming that they were entitled to do so as legal owners of the debt by way of a statutory assignment pursuant to the forerunner of Section 136.

102. The Court of Appeal held that although the letter was a valid equitable assignment, it was not a valid statutory assignment enabling the lenders to sue on the debt at law because the assignment was conditional and not an absolute assignment as required by the statute. Chitty LJ stated, at 772-773,

> "The assignment before us complies with all the terms of the enactment save one, which is essential: it is not an absolute but a conditional assignment. The commonest and most familiar instance of a conditional assurance is an assurance until J. S. shall return from Rome. The repayment of the money advanced is an uncertain event, and makes the assignment conditional. Where the Act applies it does not leave the original debtor in uncertainty as to the person to whom the legal right is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for revesting in the assignor the legal right is by a retransfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form: it is one of substance, relating to the protection of the original debtor and placing him in an assured position."

103. In my judgment, the relevant provisions of clause 3.1 of the Security Assignment and the Direction are materially indistinguishable from those which caused the assignment in *Durham Brothers* to fail to be a statutory assignment. Although stated at the start of the clause to be unconditional, the last part of clause 3.1 made it clear that the assignment only operated "until you have unconditionally and irrevocably paid and discharged the Secured Obligations in full to the satisfaction of [the] Lender". There was no mention in clause 3.1 of the possibility of a reassignment of the MAPs.

104. The point is reinforced by the Direction given by the taxpayer to Scion Distribution Ltd. That direction was to pay the MAPs to the Lender "until repayment in full of the

aggregate amount of all indebtedness owing pursuant to the Loan Agreement". The direction was therefore subject to an inherent condition.

105. Accordingly, even on Mr. Baldry's approach to section 611, which I do not accept, I consider that clause 3.1 was not a valid statutory assignment of the MAPs and that the taxpayer did not thereby divest himself of all right, title and interest in the MAPs. Instead, clause 3.1 amounted merely to an equitable assignment by way of security, under which the taxpayer retained the legal title to the MAPs, together with a conditional right to receive payment of the MAPs upon satisfaction of the Loan.

106. The provisions of clause 3.2 of the Security Assignment also do not take Mr. Baldry's argument any further. That is because clause 3.2, by its express terms, only purported to confer a charge in favour of the Lender over the MAPs. By its very nature, a charge over a receivable is merely an agreement by the chargor to appropriate the receivable to satisfaction of the secured liabilities, and does not transfer ownership: see Goode and Gullifer on Legal Problems of Credit and Security, 7th ed, paragraph 1-53, referring to *National Provincial Bank v Charnley* [1924] KB 431 at 449. Such a charge leaves the chargor with the legal title to the receivable and an entitlement to the equity of redemption. As such, on any view clause 3.2 of the Security Assignment did not divest the taxpayer of all right, title and interest in the MAPs

107. Even on its own terms, therefore, Mr. Baldry's argument does not work on the terms of the Scheme documentation in this case.

108. I would therefore also dismiss the appeal.

LADY JUSTICE KING:

109. I also agree that the appeal should be dismissed and that for the reasons given by Lady Justice Whipple, the taxpayer was entitled to the MAPs under the terms of the Distribution Agreement.

110. As discussed by Whipple LJ at paras [67], [75] and [76], I agree that the proper approach is to apply the ordinary meaning to the words "entitled to" in section 611. When such an approach is taken to the interpretation of the section, it is clear that a person can be held accountable to tax on payments which have been made to a third party, if that person benefits from those payments.

111. In his written case, Mr Baldry submitted that the taxpayer had alienated the income by way of a valid, irrevocable assignment in writing. The effect of this he said, was that as assignor, the taxpayer had ceased to be entitled to the income. Mr Baldry argued that that remains the position 'even if as part of some wider arrangement the assignor may continue to enjoy some benefit from the income which has been assigned.'

112. If contrary to the unanimous view of this court, it matters not if the taxpayer has had some benefit from the MAPs providing that the effect of clause 3.1 had been to create an irrevocable assignment in writing, it follows that in order to succeed in the appeal, it was incumbent upon Mr Baldry to demonstrate that the assignment in clause 3.1 of the Security Assignment did indeed operate as a valid statutory assignment.

113. For the reasons given by Lord Justice Snowden in his concurring judgment, I agree that the assignment was conditional and was not for the purposes of Section 136, absolute. As a consequence, the taxpayer retained more than a bare legal title.

114. Even if an unconditional statutory assignment would on a proper interpretation of section 611 have rendered any benefit received by the taxpayer to be irrelevant to the question of whether the taxpayer was "entitled to" the MAPs, this appeal would still be dismissed given that Clause 3.1 was a conditional assignment. The taxpayer having failed to divest himself of all title right and interest in the MAPs, remained entitled to the MAPs pursuant to section 611 and was accordingly liable to account to HMRC for the income tax in respect of the same.