[2014] UKFTT 453 (TC)

TC03580

Appeal number: TC/2011/07724

Income Tax – Interest payments made by United Kingdom company to offshore trusts/companies – Whether interest "arising in the United Kingdom" within the meaning of s 874 Income Tax Act 2007 – Whether unpublished decision of Special Commissioner should be cited – Effect of citation of unpublished decision of Special Commissioner on subsequent decision of Tribunal

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARDMORE CONSTRUCTION LTD — **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS — **Respondents**

TRIBUNAL: JUDGE JOHN BROOKS
MR JULIAN STAFFORD

Sitting in public at 45 Bedford Square, London WC1 on 11 and 12 March 2014

James Kessler QC and Amanda Hardy, instructed by BDO Stoy Hayward LLP, for the Appellant

Richard Vallat, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal, by Ardmore Construction Limited ("Ardmore"), against three assessments to income tax, issued on 9 March 2011 by HM Revenue and Customs ("HMRC") under s 957 of the Income Tax Act 2007 ("ITA"), in respect of interest paid by Ardmore to offshore trusts and companies. It raises the issue of whether this was interest "arising in the United Kingdom" within the meaning of s 874 ITA. If, as HMRC contend, it was such interest Ardmore was liable to deduct and account to HMRC for income tax, amounting in total to £1,016,447.60, at 20%, under s 874 ITA.

2. A further issue raised by this appeal is whether an unpublished decision of a Special Commissioner should be cited before the Tribunal by HMRC in support of its case and, if not, the effect that this has on a subsequent decision where reference has been made to that unpublished decision.

3. James Kessler QC and Amanda Hardy appeared for Ardmore. HMRC was represented by Richard Vallat.

Facts

4. The facts were not disputed and the following 'Statement of Agreed Facts' was produced by the parties:

> *Ardmore*
>
> (1) Ardmore is a United Kingdom resident and incorporated company. It carries on the trade of general builders and civil engineering.
>
> (2) Cormac Byrne ("Cormac") and Patrick Byrne ("Patrick") are brothers. They are directors of Ardmore, and they own the company in equal shares.
>
> (3) Ardmore carries on its business entirely in the UK and derives its income solely from activities within the UK. All of its assets are and have always been situated in the UK, except for four 'A' redeemable shares in certain companies incorporated in the British Virgin Islands ("BVI") and controlled by family trusts established by Cormac and Patrick respectively (see below).
>
> (4) The above has been the case at all material times.
>
> *The Trusts and the BVI companies*
>
> (5) On 6 April 2005:
>
> (a) Cormac established the Cormac Byrne Trust ("the CBT");
>
> (b) Patrick established the Patrick Byrne Trust ("the PBT"); (together "the Trusts").
>
> (6) Each of Cormac and Patrick is entitled to an interest in possession in his Trust.

(7) The Trusts are governed by the law of Gibraltar. Fidecs Trust Co Ltd (“Fidecs”) was (and still is) the trustee (the “Trustee”). (It was renamed STM Fidecs Trust Co Ltd in 2007). The Trustee was (and still is) a company incorporated and resident in Gibraltar, and each Trust was (and still is) resident in Gibraltar for tax purposes.

(8) Each Trust acquired the entire issued ordinary share capital of, and control of, a company incorporated in the British Virgin Islands (“BVI”), as follows:

(a) CBT acquired the ordinary shares in Zeus Developments Ltd (“Zeus”), BVI registered number 643589.

(b) PBT acquired the ordinary shares in Halmyre Services Ltd (“Halmyre”), BVI registered number 643605.

(9) Each of Zeus and Halmyre (together “the BVI companies”) was incorporated in the BVI on 23 February 2005 but had its administrative office in Gibraltar. The directors of each of Zeus and Halmyre were at all material times (in each case):

(a) Mrs Trisha Agnes Navarro, a resident of Gibraltar (appointed on 23 February 2005 and resigned on 19 August 2005);

(b) Mr Sébastien Bernard Joël Moerman, a resident of Spain (appointed on 12 April 2005 and resigned 19 August 2008); and

(c) Ms Jacqueline Anne Hitchcock a Gibraltar resident (appointed on 2 May 2007 and resigned 20 June 2008).

The April 2005 share subscriptions

(10) On 11 April 2005 Ardmore subscribed for one “A” Redeemable Share of 1p in Zeus and one “A” Redeemable Share of 1p in Halmyre. The rights and incidents attaching to each Redeemable Share were as follows:

(a) the “A” Redeemable Shares conferred the right to receive notice of but not to attend or vote at a general meeting unless the business of the meeting included consideration of a resolution to wind up the Company or directly or adversely varying any of the special rights attached to the “A” Redeemable Shares in which case the holder could attend and vote only in respect of such resolution;

(b) the holders of the “A” Redeemable Shares were not entitled to any dividends or distributions;

(c) subject to BVI law, within seven days after the issue of any “A” Redeemable Shares the holder was entitled, by notice in writing to the Company, to redeem all or some of his “A” Redeemable Shares for their nominal amount plus any premium paid by the holder. If any “A” Redeemable Shares were not the subject of a redemption notice given within seven days after issue, they converted automatically into Deferred Shares;[1] and

(d) on a winding-up or dissolution or otherwise upon a distribution of capital the surplus assets of the Company shall be applied in paying to the holders of the "A" Redeemable Shares the nominal value paid up or credited as paid up at the date of return of capital. The "A" Redeemable Shares have no further right to participate in the assets of the Company on a winding-up, dissolution or distribution of capital.

Each "A" share was issued for £4m (constituting 1p share capital and a share premium of £3,999,999.99). As noted above, if no redemption notice was given within 7 days after issue, it converted subsequently to a Deferred Share. The Deferred Shares carried no entitlement to any dividend or distribution, no right to redemption, no right to vote at a general meeting (except on a vote to wind up the company or adversely vary special rights attached to the Deferred Shares) and, on a winding up or dissolution, the right only to repayment of their paid up nominal value (of 1p each).

(11) Ardmore paid £1,000 to each BVI company on the issue of each share. The balance was left outstanding.

(12) By virtue of a contractual choice of law clause (clause 6 of each share subscription agreement), each share subscription agreement was governed by the law of the BVI. Each was executed by Ardmore in the UK on 8 April and then by Zeus and Halmyre respectively in Gibraltar on 11 April 2005.

(13) On 17 May 2005 Ardmore paid £2.7 million to the BVI companies (i.e. £1,350,000 each) in part payment of the outstanding premiums. Payment was made to Fidecs who held the funds in its client account in Gibraltar on behalf of the BVI companies. Ardmore obtained the £2.7 million from its working capital, that is the profit from its UK trade.

June 2005 Loan Facility Agreements

(14) By letter dated 13 June 2005, Cormac and Patrick each requested that his Trust make a loan of £1,350,000 directly to Ardmore on commercial terms for "general business purposes".

(15) These requests were communicated to Fidecs by Ardmore's accountants (BDO Stoy Hayward LLP, "BDO") by email on 14 June 2005.

(16) On 16 June 2005, by email, BDO sent to Fidecs draft letters in the name of Fidecs confirming the agreement of Fidecs, as Trustee of each Trust, to the grant by each Trust of a loan of £1,350,000 to Ardmore, together with draft facility letters setting out the terms of the loan to be made by each Trust.

(17) Also on 16 June 2005, Fidecs (as Trustee of each Trust) signed each letter confirming its agreement to make the loans as requested, enclosing the signed

[1] Ardmore subsequently gave notice to each BVI company to convert the "A" Redeemable Shares into Deferred Shares

Facility Letter on behalf of each Trust to Ardmore setting out the terms of the loan. These terms were acknowledged by Ardmore.

(18) On 16 June 2005 agreements were made between (1) Ardmore and (2) each Trust, under which each Trust undertook to lend £1.35m to Ardmore ("the June 2005 Loan Facility Agreements").

(19) The main terms of the June 2005 Loan Facility Agreements were:

(a) Each loan was for £1,350,000.

(b) The loan was stated to be for general business purposes.

(c) After the first 12 months, the loan was repayable on 30 days' notice but repayment by Ardmore could be made at any time on 7 days' notice.

(d) The loan bore interest at 2% above the base rate of the Bank of England, compounded yearly.

(e) Interest was payable on receipt of a written demand from the lender, but Ardmore was permitted at any time to pay interest already accrued. On repayment of the loan all accrued interest became immediately repayable.

(f) The Agreements provided: "All payments under this Facility are to be made in Gibraltar to the account of the Lender at Nat West Offshore Ltd or other such bank in Gibraltar as notified to the Borrower in writing from time to time and all such payments including without limitation payments of interest shall be made from a source outside the United Kingdom."

(g) By contractual choice of law and jurisdiction clause, each Agreement was governed by the laws of Gibraltar and the parties submitted to the exclusive jurisdiction of the Gibraltar Courts.

(20) The June 2005 Loan Facility Agreements were signed on 16 June 2005 by the Trustee in Gibraltar and immediately afterwards by Ardmore in the United Kingdom.

(21) The Agreements provided: "This facility shall not be supported by any form of security over assets situated in the United Kingdom." None of the loans with which this appeal is concerned were secured loans.

Drawdown under June 2005 Loan Facility Agreements

(22) On 17 June 2005:

(a) Zeus paid £1,350,000 to PBT by way of loan.

(b) Halmyre paid £1,350,000 to CBT by way of loan.

(23) These payments were each funded by Zeus and Halmyre from the £1,350,000 received by each of them from Ardmore on 17 May 2005 (see paragraph (13) above) in part payment of the outstanding premiums on the April 2005 share subscriptions. As noted at (13) above, Ardmore had in turn obtained

the total funds of £2.7m from its working capital, that is the profit from its United Kingdom trade.

(24) On 20 June 2005:

(a) CBT lent £1,350,000 to Ardmore pursuant to the June 2005 loan facility.

(b) PBT lent £1,350,000 to Ardmore pursuant to the June 2005 facility.

(25) These funds were held in the Trustee's client account in Gibraltar on behalf of the Trusts from the time of receipt from Zeus and Halmyre on 17 June 2005 until paid to Ardmore on 20 June 2005 when they were paid into Ardmore's UK bank account with National Westminster Bank plc, Piccadilly, London.

5 July 2005 Loan Facility Agreements

(26) On 5 July 2005 further agreements were made between (1) Ardmore and (2) each Trust, under which each Trust undertook to lend £1.35m to Ardmore ("the 5 July 2005 Loan Facility Agreements").

(27) The terms of the 5 July 2005 Loan Facility Agreements were the same as the June 2005 Loan Facility agreements.

(28) The 5 July 2005 Loan Facility Agreements were signed on 5 July 2005 by the Trustee in Gibraltar and subsequently on the same day by Ardmore in the United Kingdom.

Drawdown under 5 July Loan Facility Agreements

(29) On 5 July 2005:

(a) Zeus paid £1,350,000 to PBT by way of loan.

(b) Halmyre paid £1,350,000 to CBT by way of loan.

(30) These payments were each funded by Zeus and Halmyre from a further £1,350,000 paid to each of them by Ardmore on 23 June 2005 by way of further part payment of the outstanding premiums on the April 2005 share subscriptions. Ardmore in turn obtained the total £2.7m of funds from its working capital, that is the profit from its United Kingdom trade, and from the June loan monies.

(31) On 12 July 2005:

(a) CBT lent £1,350,000 to Ardmore pursuant to the 5 July 2005 loan facility.

(b) PBT lent £1,350,000 to Ardmore pursuant to the 5 July 2005 facility.

(32) These funds were held in the Trustee's client account in Gibraltar on behalf of the Trusts from the time of receipt from Zeus and Halmyre on 5 July 2005 until paid to Ardmore on 12 July 2005 when they were paid into

Ardmore's United Kingdom bank account with National Westminster Bank plc, Piccadilly, London.

29 July 2005 Loan Facility Agreements

(33) On 29 July 2005 further agreements were made between (1) Ardmore and (2) each Trust, under which each Trust undertook to lend £1.3m to Ardmore ("the 29 July 2005 Loan Facility Agreements").

(34) The terms of the 29 July 2005 Loan Facility Agreements were the same as the June 2005 Loan Facility Agreements.

(35) The 29 July 2005 Loan Facility Agreements were signed on 29 July 2005 by the Trustee in Gibraltar and immediately afterwards by Ardmore.

Drawdown under 29 July 2005 Loan Facility Agreements

(36) On 29 July 2005:

(a) Zeus paid £1,300,000 to CBT by way of loan.

(b) Halmyre paid £1,300,000 to PBT by way of loan.

These payments were each funded by Zeus and Halmyre from a further £1,300,000 paid to each of them by Ardmore on 18 July 2005 by way of final payment of the amount at that time remaining outstanding (being £1,299,000 in each case) of the premiums on the April 2005 share subscriptions. Ardmore in turn obtained the £2.6m of funds from its working capital, that is the profit from its United Kingdom trade, and from the 12 July 2005 loan moneys.

(37) On 2 August 2005:

(a) CBT lent £1,300,000 to Ardmore pursuant to the 29 July 2005 loan facility.

(b) PBT lent £1,300,000 to Ardmore pursuant to the 29 June 2005 loan facility.

These funds were held in the Trustee's client account in Gibraltar on behalf of the Trusts from the time of receipt from Zeus and Halmyre on 29 July 2005 until paid to Ardmore on 2 August 2005 when they were paid into Ardmore's United Kingdom bank account with National Westminster Bank plc, Piccadilly, London.

November 2005 share subscriptions

(38) On 1 November 2005 Ardmore entered into:

(a) a subscription agreement entitled '*Subscription Agreement relating to Zeus Development Limited'*, stated to be entered into by Ardmore with Halmyre (defined therein as the **'Company')** (but recording the registered number of the 'Company' as 606349 and its date of incorporation as 15 July 2004) but signed by Zeus, under which Ardmore subscribed for an "A" Redeemable Share in the 'Company'; and

(b) a subscription agreement with Halmyre (defined again therein as the **'Company'**) (again recording the registered number of the 'Company' as 606349 and its date of incorporation as 15 July 2004) and signed by Halmyre, under which Ardmore subscribed for another "A" Redeemable Share in the 'Company'.[2]

The rights and incidents attaching to each "A" Redeemable Share were as set out at (10)(a) to (d) above. Each share had a nominal value of 1p and was issued at a premium of one half of 45% of Ardmore's pre-tax trading profit for the year ended 30 September 2005 or £4,000,0000 if less.

(39) Ardmore was to pay £1,000 on the issue of each share. The balance was left outstanding.

(40) Apart from the premium, the terms of the November 2005 share subscription agreements were the same as the April 2005 share subscription agreements. They were signed by Ardmore in the United Kingdom on 24 October 2005 and then by the BVI companies in Gibraltar on 1 November 2005.

The 2007 Loans

(41) On an unspecified date in May 2007, Ardmore confirmed that the premiums due to the two Companies under the subscription agreements referred to in (38) above were £1,595,474 in each case and asked the directors of each Company to consider lending Ardmore the balance of that amount over the amounts already paid (i.e. £1,594,474 in each case) to be offset against the unpaid premium.

(42) On 22 May 2007 loan agreements were made between (1) Ardmore and (2) each BVI company, under which each company undertook to lend £1,594,474 to Ardmore ("the 2007 Loan Agreements").

(43) The 2007 Loan Agreements were signed by the directors of Ardmore in the United Kingdom on or before 22 May and then by the BVI companies in Gibraltar on 22 May.

(44) The terms of each of the 2007 Loan Agreements were similar to the 2005 Loan Facility Agreements save that:

(a) The interest rate was 1.5% above the Bank of England base rate;

(b) There was no reference to the loan being made for any particular purpose;

(c) Each loan was repayable within 30 days of receipt by Ardmore of a written demand from the Lender (the relevant BVI company), and Ardmore was not permitted to prepay the loan within the period of 365 days after the date when the loan was advanced to it; and

[2] On 2 May 2006 Ardmore gave notice to convert the "A" Redeemable Shares into Deferred Shares

(d) The advance to Ardmore was to be satisfied by way of offset against the outstanding sum due from Ardmore under the November 2005 share subscriptions.

The 2008 Supplemental Agreements

(45) On 28 March 2008, Ardmore proposed amendments of the earlier loan agreements to permit prepayment of interest, and notified the Trustee on behalf of each Trust, and each BVI company, that it proposed to pre-pay five years of interest to 28 February 2013 under each loan agreement. On Ardmore's proposal, agreements were made between Ardmore and the Trustee on behalf of each Trust, and between Ardmore and the BVI companies (together "the Supplemental Agreements"), which varied accordingly the earlier loan agreements.

(46) The Supplemental Agreements amended the earlier loan agreements to permit Ardmore at any time to pre-pay (i.e., make an advance payment of) interest on the loans due to accrue for a defined period commencing on the date of such payment and ending on a future date of Ardmore's choosing. The rate of any such pre-paid interest was to be calculated with reference to the Forward Curve Rate per the Bloomberg Rate Analysis.

Accrual of interest

(47) The interest on the loans was accrued in Ardmore's accounts as follows:

(a) £123,838 for the year ended 30 September 2005;

(b) £545,865 for the year ended 30 September 2006;

(c) £838,849 for the year ended 30 September 2007;

(d) £672,896 for the year ended 30 September 2008 (this gives a total of £2,181,448 for the four years to 30 September 2008); and

(e) £2,900,769 for the period 1 October 2008 to 28 February 2013, which was "held on [the] balance sheet" (i.e. shown as a liability on Ardmore's balance sheet as at 30 September 2008)

This gives an overall total accrued of £5,082,217.

Payment of interest

(48) The following amounts (plus CHAPS charges of £21 in each case) were paid from Ardmore's United Kingdom National Westminster Bank Account:

(a) £669,524 paid 27 September 2007 to Fidecs in Gibraltar:

(i) for the account of the CBT as to £334,762; and

(ii) for the account of PBT as to £334,762;

(b) £1,052,240.76 paid 14 March 2008 to Fidecs in Gibraltar:

(i) for the account of the CBT as to £452,350.64;

(ii) for the account of the PBT as to £452,350.64;

(iii) for the account of Zeus as to £73,769.74; and

(iv) for the account of Halmyre as to £73,769.74;

(c) £1,447,035.49 paid 27 March 2008 to Fidecs in Gibraltar:

(i) for the account of the CBT as to £527,910.57;

(ii) for the account of the PBT as to £527,910.57;

(iii) for the account of Zeus as to £195,607.18; and

(iv) for the account of Halmyre as to £195,609.17; and

(d) £1,913,416.66 paid 3 April 2008 to Fidecs in Gibraltar:

(i) for the account of the CBT as to £698,056.75;

(ii) for the account of the PBT as to £698,056.75;

(iii) for the account of Zeus as to £258,651.58; and

(iv) for the account of Halmyre as to £258,651.58.

(49) The total interest paid in 2007/08 was £5,082,216.91.

(50) The payments of interest were funded from the income of Ardmore's United Kingdom trading activities.

Principal amounts due

(51) The principal amounts advanced under the loan agreements all still remain outstanding; none has been repaid.

Assessments and appeal

(52) HMRC opened an enquiry into Ardmore's tax return for the period ended 30 September 2006 by letter dated 19 October 2007. One of the questions raised by HMRC in the enquiry related to the payment and deduction of tax in relation to the interest.

(53) On 9 March 2011 HMRC issued three assessments to income tax under s 957 ITA for the following amounts and periods:

Period	**Assessment**
1 July 2007 - 30 September 2007	£133,904.80 on payments of £669,524
1 January 2008 - 31 March 2008	£499,859.40 on payments of £2,499,297
1 April 2008 - 30 June 2008	£382,683.40 on payments of £1,913,417.

(54) The total tax assessed is therefore £1,016,447.60 on interest of £5,082,238.

(55) Ardmore appealed against the assessments by letter dated 23 March 2011.

(56) The amounts of the interest and the amounts of the assessments are not disputed.

Legislation

5. Insofar as it applies to this appeal s 874 ITA provides:

> (1) This section applies if a payment of yearly interest arising in the United Kingdom is made—
>
> (a) by a company,
>
> (b) by a local authority,
>
> (c) by or on behalf of a partnership of which a company is a member, or
>
> (d) by any person to another person whose usual place of abode is outside the United Kingdom.
>
> (2) The person by or through whom the payment is made must, on making the payment, deduct from it a sum representing income tax on it at the basic rate in force in the tax year in which it is made.
>
> (3) But see –
>
> (a) sections 875 to 888 as to circumstances in which a duty to deduct a sum under this section is disapplied, and
>
> (b) …

6. Sections 949 and 951 ITA provide for the collection of the tax deducted under s 874 and impose an obligation on the person required to deduct the tax to make payment to HMRC. If no payment is made by that person under s 957 ITA an officer of HMRC may, as in this case, make an assessment to recover the tax due.

7. It is agreed that the exceptions to the obligation to deduct, to which s 874(3)(a) refers, are not relevant to this appeal. This includes the exception relating to "relevant foreign income" which, in accordance with s 989 ITA has the meaning given by s 830(1) of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA") which provides:

> In this Act "relevant foreign income" means income which:
>
> (a) arises from a source outside the United Kingdom, and
>
> (b) is chargeable under any of the provisions specified in subsection (2) [which include those relating to interest] (or would be so chargeable if section 832 did not apply to it).

Neither party sought to make anything of the difference in the use of words "arising in the United Kingdom" in s 874 ITA and "arises from a source outside the United Kingdom", it being common ground that if the conditions for deduction under s 874 ITA are met (on the basis that interest arises in the United Kingdom), the interest cannot be "relevant foreign income".

Perrin v HMRC

8. The above legislation and relevant authorities were recently considered by Judge Charles Hellier in the case of *Perrin v HMRC* [2014] UKFTT 223 (TC).

9. As in the present case, the issue before Judge Hellier was whether interest paid to an overseas recipient arose in the United Kingdom and whether income tax at the basic rate should have been deducted. However, during the course of that case an unpublished decision of the Special Commissioner, *Poldi (UK) Limited v Inland Revenue Commissioners* ("*Poldi*"), was cited to Judge Hellier who subsequently referred to it in his decision.

10. Indeed, after an analysis of the relevant authorities, including *Poldi,* and before setting out the conclusions drawn from them, Judge Hellier, at [68], acknowledged his "indebtedness to the Special Commissioner in *Poldi* in relation to Lord Hailsham's speech in the Greek Bank Case".

11. Although it is accepted that if we adopt the same approach to the law as Judge Hellier in *Perrin* Ardmore's appeal cannot succeed Mrs Hardy contended that it would be wrong to do so as the reliance on *Poldi* by Judge Hellier had resulted in a "serious procedural impropriety". She submitted that there were three main reasons why an unpublished decision should not be cited: first to ensure a fair trial (equality between HMRC and the taxpayer); secondly, the rule of law dictates that the law should be known; and thirdly the practice of the courts.

12. However, Mr Vallat, for HMRC, contended that there was no bar on reliance on an unpublished decision as such cases have been previously cited before the Tribunal and in *Perrin* (in which he had appeared for HMRC) no objection had been raised by the appellant to *Poldi* being cited. He submitted that there was no "inequality of arms" as HMRC had provided a copy of the unpublished decision to the appellant together with an assurance that none of the officers or lawyers with responsibility for this case nor any of the applicable policy leads, nor HMRC's counsel was aware of any other relevant unpublished decision, helpful or unhelpful to HMRC and should they become aware of any such other decision it would be placed before the Tribunal.

13. No such other unpublished decision has been placed before us.

14. Despite it being proposed by the Report of the Royal Commission on Income Tax in 1920, publication of decisions of the Special Commissioners did not take place until 1994. As HMRC's Revenue Interpretation 125 (19 October 1995) states:

> … the Special Commissioners are now publishing their decisions (for appeals where the notice of the hearing was given on or after 1 September 1994). …
>
> The Special Commissioners have indicated that they will expect, in future, to have their attention drawn in appropriate cases, to any of their previous published decisions which are relevant (but not to unpublished decisions), where that decision has not been superseded by that of a higher court.

15. In *Lloyds TSB Bank Plc (Antrobus Deceased) v Inland Revenue Commissioners* [2002] STC (SCD) the Special Commissioner (Dr Nuala Brice) said, after listing the authorities cited before her, at [37]:

> "In addition reference was made to an unpublished decision of the Special Commissioners given in September 1994. Because this decision was unpublished, and so cannot be identified in this Decision, I have not relied upon it in reaching my decision."

16. Similarly the Special Commissioner (John Clark) in *Henke v HMRC* [2006] STC (SCD) 561 said, in a case concerning capital gains tax, at [118]:

> "Although the capital gains tax legislation has existed since 1965, there appears to be no published decision dealing with the issue arising in this case. I understand that there may have been a decision on the point made by one of my predecessors, at a time before Special Commissioners' decisions were required to be published. Any such decision is not strictly binding on me, although it may be assumed that HMRC's practice would be based on it, as information on non-published Special Commissioners' decisions was circulated within HMRC, while not necessarily available to taxpayers or their advisers. To refer to such decisions would cause difficulty, as it would not be possible to publish details because the hearings took place in private. I therefore consider the question afresh, without reference to any other decision."

17. Although not obviously apparent from these decisions it would seem that the reason for not citing an unpublished decision of the Special Commissioners was that before 1994 these were confidential (as then required by schedule 1 of the Taxes Management Act 1970) and known only to the parties involved. In the present case, as in *Perrin*, permission has been sought and received by HMRC from the appellant in *Poldi* for that case, which would otherwise be confidential, to be cited.

18. Despite an occasional reference to an unpublished decision of the Special Commissioners in the First-tier Tribunal ("FTT") and Upper Tribunal ("UT"), eg *Matthews & Sidwick v HMRC* [2011] UKFTT 23 (TC) and [2014] STC 297 (UT) (where neither party had been represented by counsel in the FTT and only HMRC in the UT), we are told that the propriety of citing an unpublished decision of the Special Commissioners has not previously been raised or considered.

19. This is relevant to the present appeal as although decisions of the Special Commissioners, like decisions of the FTT (which replaced the Special Commissioners in 2009), are not binding on the FTT they do constitute persuasive authorities which would be expected to be followed by the FTT. For example in *HMRC v Abdul Noor* [2013] UKUT 71 (TCC) the Tax and Chancery Chamber of the UT, in relation to the decision of one High Court Judge on another (but equally applicable in the case of any persuasive authority), said, at [82]:

> "… although the decisions were not binding on him in the way that a decision of the Court of Appeal would be binding, the decision of a

> High Court Judge ought to be followed by another [High Court] judge unless that judge thinks that the earlier decision was clearly wrong”

As Lord Goddard CJ put it in *Huddersfield Police Authority v Watson* [1947] KB 842, at 848:

> “I can only say for myself that I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance, unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity.”

20. As HMRC (or its predecessor, the Inland Revenue) would always have been a party to a tax appeal the position would be as stated in the letter, of 6 June 2013, sent by HMRC to the directors of Poldi, under its new name, seeking consent to rely on the unpublished decision of the Special Commissioner, ie that:

> HMRC has copies of all decisions made in the various tax courts, because, of course, it is always a party to such proceedings. … This means that HMRC has the ability to draw upon some decisions of the tax courts that are not freely available to the general taxpayer

This clearly raises the question of fairness and whether HMRC should be permitted to rely on an unpublished (as opposed to an unreported) decision not freely available to the general taxpayer, especially as we are obliged to give effect to the overriding objective, contained in Rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the “Tribunal Rules”), to “deal with cases fairly and justly” which includes dealing with a case in ways which “are proportionate” to the “resources of the parties”.

21. Given that the judicial function of the Special Commissioners was originally derived from s 130 and s 131 of the Income Tax Act 1842 there must be thousands of unpublished decisions known by and available only to HMRC. In our view, given that a persuasive authority, unless considered to be wrong, will as a matter of judicial comity be followed by the FTT, it cannot be right or just for HMRC to have such an advantage over a taxpayer. As Lord Diplock said in *Fothergill v Monarch Airlines Limited* [1981] AC 251 at 279

> “Elementary justice or, to use the concept often cited by the European Court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible.”

22. Therefore, irrespective of any assurance that may be given, we do not consider that it is proper for HMRC to cite an unpublished decision of the Special Commissioners before the FTT.

23. However, HMRC did just this in *Perrin* and, as we have previously mentioned (at paragraph 10, above), it would appear that *Poldi* was relied on at least to some extent by Judge Hellier in his decision. Therefore, given his reference and apparent reliance on *Poldi*, which for the reasons above we consider to be wrong, we decline to

follow *Perrin* and, like the Special Commissioner in *Henke*, consider the issue raised by this appeal, namely whether interest paid to an overseas recipient arose in the United Kingdom, "afresh, without reference to any other decision" of the Special Commissioners or the FTT.

Whether Interest "arising in United Kingdom"

24. Each of the parties advocated a different approach to this issue. Mr Vallat submitted it was a matter of balancing various factors including, eg the residence of the debtor, the substantive origin of funds out of which the interest was paid, the situs or location of the debt and the jurisdiction in which proceedings might be brought to enforce the interest obligation. However, Mr Kessler invited us to reject such a multi-factorial approach and conclude that the source of interest is located in the place where credit is provided. Despite these differences in approach it was common ground that the test for the source of interest is distinct from source of trading income and also distinct from situs of the debt. It is also not disputed that no guidance is to be found in the legislation and therefore it is necessary to examine the relevant authorities.

25. In what is accepted to be the leading authority, *Westminster Bank Executor and Trustee Co (Channel Islands) Limited v National Bank of Greece SA* (1970) 46 TC 472 (the "Greek Bank Case") the House of Lords considered whether the coupons on certain Greek Bank debts, which could only be enforced and paid in London, comprised "income arising from securities out of the United Kingdom" (within Case IV of Schedule D) and not liable to income tax or comprised income from a source in the United Kingdom (which was chargeable under Case III) and liable to a deduction of income tax.

26. Lord Hailsham LC, with whom Lords Upjohn, Donovan, Pearson and Viscount Dilhorne agreed, said, at 493-494:

> "We thought it right to invite Mr. Warner (instructed by the Commissioners of Inland Revenue) to address the House as amicus curiae. He submitted that the only question of substance in the case was whether or not the source of the payments by the appellants (as guarantors in default of payment of interest by the principal debtors) was or was not situated within the United Kingdom. He went on to submit that if this source were within the United Kingdom the income would be taxable under Case III and so subject to deduction under section 170 but that if it were not it would not be so taxable under Schedule D or indeed under the Income Tax Acts at all in the hands of the respondents since it would then be either a foreign security within Case IV or a foreign possession within Case V and not taxable in the hands of a recipient not resident in the United Kingdom. In short it would be caught by the territorial limitation laid down by Lord Herschell in the passage quoted above.
>
> For my part, I accept the simple view of the matter as submitted by Mr. Warner, although it is in some ways simpler than the reasons which commended themselves either to Donaldson J. or to the members of

> the Court of Appeal, both of whom decided the case against the present appellants on grounds which were not identical either with the above view or with one another.
>
> I have come to the conclusion that the source of the obligation in question was situated outside the United Kingdom. This obligation was undertaken by a principal debtor which was a foreign corporation. That obligation was guaranteed by another foreign corporation which, as was conceded before us, had at no time any place of business within the United Kingdom. It was secured by lands and public revenues in Greece. Payment by the principal debtor of principal or interest to residents outside Greece was to be made in sterling and either at the offices of Hambros Bank or Erlangers Ltd. or (at the option of the holder) at the National Bank of Greece in Athens, Greece, by cheque on London. Whichever method of payment was selected, it was pointed out before us that, whatever use were made of the option, discharge of the principal debtor's obligation would have involved in the ordinary course either a remittance from Greece to the paying agents specified in the bond or, at the option of the holder, a cheque issued within Greece, though drawn on London and presumably payable there out of funds remitted by the debtors from abroad. It was also pointed out that the bond contained no provision for payment by the guarantor at any particular place or in any particular country.
>
> The only circumstances relied on by the appellants as supporting their contention that the obligation was located inside the United Kingdom were as follows. Although the original guarantor had no branch in the United Kingdom, the present appellants had acquired one on the universal succession comparatively recently in London. Moreover it was urged that, since discharge of the obligations under the bond in Greece had been caught by the moratorium enacted by the Greek Government, it followed that the only place at which the obligation could have been discharged or enforced was in London. Speaking for myself, I do not see how an obligation originally situated in Greece for the purposes of British income tax could change its location either by reason of the fact that one guarantor had been substituted for another, or by reason of the fact that the second guarantor so substituted subsequently acquired a London place of business or by reason of the fact that the Government of Greece had by retrospective legislation altered, by moratorium and substitution of a new guarantor for the purposes of Greek law, the obligations imposed upon the principal debtor and the guarantor. The appellants acquired no obligation different from that of the original guarantors, and that was the obligation imposed on the original guarantors by the terms of the bond. In my view, the bond itself is a foreign document and the obligations to pay principal and interest to which the bond gives rise were obligations whose source is to be found in this document."

27. *Hafton Properties Limited v McHugh (HM Inspector of Taxes)* (1986) 59 TC 420 was a pre-1994 decision of Special Commissioner that was reported because of an appeal to the High Court on a different point. In this case under an original loan agreement an American company borrowed from an American bank with the loan being secured on property in the United States. Hafton, a United Kingdom resident

company, purchased the property subject to the mortgage and the debt remained in the name of the original debtor and payments were made from income arising from the United States property. The Special Commissioner (Brian O'Brien), having considered the Greek Bank Case, said, at 472:

> "Mrs. Picard [for the Inland Revenue] submitted, (rather at the last moment) that the proper inference to be drawn from the evidence before me, and in particular the fact that Hafton was servicing the debt, was that there was a novation of the personal debt: so that Hafton became vis-a-vis the Dollar Bank, the debtor under the Note. Mrs Picard accordingly submitted that Hafton is the ultimate debtor, that Hafton is resident in the United Kingdom, and therefore that the debt is located in the United Kingdom. The situs of the debt locates, in her submission, the source of income, and therefore the source of income is a United Kingdom source.
>
> For my part I would have great difficulty in accepting Mrs. Picard's approach, even if I accepted that Hafton had become the debtor under the Note. It is true that in one respect the Greek Bank Case is different from this one, in that in that case the debtors (both original and substituted) were at all times essentially Greek in character. Nevertheless I collect from Lord Hailsham's speech a clear disinclination to regard sources of income as being peripatetic. He looked to the nationality (if I may so put it) of the document creating the obligation, and, applying the sentence which I have already read from that speech to the present case, there can be no doubt that the obligation here was American in character."

28. We were also referred to *Inland Revenue Commissioner*s *v Viscount Broome's Executors* (1935) 19 TC 667 in which the executors of a Kenya resident debtor who were resident in the United Kingdom paid the interest in the United Kingdom out of United Kingdom funds. Finley J decided "with hesitation" in "the very special facts" of the case that interest arose in the United Kingdom. However, the case was not cited before the House of Lords in the Greek Bank Case or the Special Commissioner in *Hafton Properties* and we agree with Mr Vallat who, in his skeleton argument, submitted that this case "has to be read carefully in the light of the Greek Bank Case (in particular to the extent that Finlay J held that the source of the obligation changed when it was acquired by the United Kingdom resident executors)."

29. In addition to these authorities, which Mr Kessler submitted failed to provide us with any satisfactory guidance on the approach to be adopted in determining the location of the source of interest and did not support the multi-factorial approach advanced by HMRC, we were referred to Privy Council and Commonwealth authorities which, Mr Kessler contended, did provide a satisfactory solution to the question of identifying the source of interest.

30. In *Studebaker Corporation of Australasia v Commissioner of Taxation* (1921) 29 CLR an Australian company paid interest on a trade debt arising on the purchase of cars from America under an agreement made in the USA with an American company. Under the relevant legislation income means "*income derived from any source in the State or earned in the State*", and "*nothing in the Act shall apply to….*

income derived from sources outside the State." In its judgment the High Court of Australia stated, at 233:

> "Thus in *Nathan's Case* and in *Murray v Federal Commissioner of Taxation* the fact that the income was payable and paid out of Australia did not negative the fact that its source was within Australia. So, here, the attribution of locality to the obligation to pay interest is not decisive. The facts must be examined, and when we find the interest arises from business transacted and wholly carried out in America the conclusion must be that it was not derived from any source in New South Wales."

31. The South African case of *IRC v Lever Brothers* [1946] AD 441 considered the principles to be applied in determining the source of income in circumstances in which an English company had sold assets to a Dutch company but had not been paid. The assets of the Dutch company were purchased by a South African company which undertook to pay the debt and interest to the English company. The statutory provision with which the South African court was concerned provided:

> "gross income" means the total amount which has been received by or which has accrued to a taxpayer from a source within the Union or which is deemed to be within the Union …

32. In his judgment in the case Watermeyer CJ said, at 451:

> "As a rule, the lender either gives credit to the borrower or transfers to him certain rights of obtaining credit which had previously belonged to the lender and this supply of credit is the service which the lender performs for the borrower, in return for which the borrower pays him interest. Consequently, this provision of credit is the originating cause or source of the interest received by the lender."

Looking at the facts of that case Watermeyer CJ went on to say, at 455-456:

> "No business was carried on by Levers in South Africa, no contract was made by them in South Africa, no services were rendered by them in South Africa and no obligation rested on either party was performed or was to be performed in South Africa. In fact there were no activities of any sort by Levers in South Africa except possibly those connected with the flotation of Overseas Holdings in South Africa. Consequently, according to the meaning which, in my opinion has been given to the word "source" by the decisions of the Privy Council and of this Court, the source of income which the Commissioner wishes to tax was not located in South Africa."

33. A similar issue came before the New Zealand Court of Appeal in *Commissioner of Inland Revenue v NV Philips Gloeilampenfabrieken* [1955] NZLR 868 (NZ CA). In that case a New Zealand company owed a trading debt to a Dutch company ("the old debt"). It borrowed to pay the old debt and a new debt ("the new debt") which arose under a loan agreement made in the Netherlands and governed by Dutch law came into existence. The money was not received in New Zealand but was set against the old debt. The New Zealand Revenue sought to tax the Dutch company under legislation that provided that "*all income derived from New Zealand shall be*

assessable for income tax, whether the person deriving that income is resident of New Zealand or elsewhere ". Also subject to income tax under the statute was "*income derived from money lent in New Zealand*" and "*income derived directly or indirectly from any source in New Zealand*."

34. Gresson J after concluding (at 882) it to be "a strained and unnatural construction to treat this particular loan as "money lent in New Zealand" went on to consider whether it was derived directly or indirectly from a New Zealand source saying, at 883:

> "The ordinary meaning of "source" is the starting-point which, when used in relation to physical things, eg a river, is a matter of location. But it is a word of flexible meaning, especially when used of something non-material or abstract. It can, and often does, mean the chief or prime cause of something. What has to be determined is the sense in which the Legislature used the word in [the legislation]. The test – what a practical man would regard as the real source as a practical hard matter of fact – which was formulated in Nathan v Federal Commissioner of Taxation ((1918) 25 CLR 183), approved as it has been by the Privy Council in Liquidator, Rhodesia Metals Ltd (In Liqd) v Commissioner of Taxes ([1940] AC 774) must be adopted. The answer which I should expect the "practical man" to make to a question – What was the source of the money which was received by the Dutch Company? – would be the loan it made which means in effect the lending of the money – the transaction. The money was paid because the New Zealand company had contracted to pay it; so that, in some sense it can be said that the obligation which had been entered into was the source of the payment made. But one must look behind that. It is seldom that a person makes a payment except under an obligation to do so, and it is, I think, unreal and incompatible with a practical approach to regard the obligation as the source. It is what produced the obligation that is important. … An obligation is seldom, if ever, accepted in vacuo: it requires some transaction to give it birth. The obligation arises from something which has been, or will be, done to warrant it, eg rendering services, making land or other property available. The practical man, in regarding the loan as the source of the payment, would mean, I think, the conduct or the action which was the reason for the obligation being accepted. That was the view taken by Watermeyer, CJ in the South African case of IRC v Lever Brothers that "source" does not mean the quarter whence the moneys come, but the originating cause of the payment being made – the quid pro quo which the recipient of the money gave to entitle him to receive payments from time to time; that in the case of a loan, the lender provides money for the borrower, who, in return, pays interest until such time as he makes repayment."

He then cited the passage from *IRC v Lever Brothers* which we have set out in the first part of paragraph 32, above, before referring to the dissenting judgment of Davis AJA in that case. He continued, at 884:

> I think the decision of the majority is to be preferred. It appears to me that in interpreting [the legislation] proper regard must be paid to the

> word “derived”; it should not be read as “received”. The word “derived” means more than received; it connotes the source or origin, rather than the fund or place, from which the income was taken. It means flowing, springing, emanating from, or, as was said in *Commissioners of Taxation v Kirk* ([1900] AC 588,592), arising from or accruing. To be a “source” of the income within the meaning of the subsection, it is necessary, I think, to look to the originating cause. It is not sufficient to ascertain the fund out of which the income was in fact paid, which is no more than the reservoir from which it was drawn. It is not whence it was paid, but why it was paid, that is the determining factor. The emphasis is not upon the receipt, but upon the derivation of the income. Consequently, it does not constitute the source within the meaning of the section that the money was drawn from or provided by the trading profits in New Zealand. The New Zealand company was free to obtain the funds with which to perform its obligation anywhere it chose, from deposits in England, if it had any, or from borrowing in England, or from the profits of its trading in New Zealand. That was a domestic matter. The money could “come from” any of these “sources”, but none of them would be the source from which the Dutch company derived what it received as income. The combination of the words “derived” and “source” import, I think, some causative link. In my view, therefore, the originating cause being that the Dutch company had lent moneys or provided a credit in London, from which sprang the obligation to pay interest, the “source” of the Dutch company’s income, was not in New Zealand, even though the borrower resorted to its New Zealand funds to pay the interest. Where it got the money with which it in fact paid the interest is, I think, irrelevant. In the physical sense the money came from the trading activities in New Zealand; but that was a domestic matter. Looking at the real substance of the facts with the eyes of a practical man, it was from the provision of the loan moneys that the income was derived.”

35. North J, who agreed with Gresson J, also cited the passage from the judgment of Watermeyer CJ in *IRC v Lever Brothers* to which we have referred before concluding, at 890:

> “In my opinion, applying the “practical hard matter of fact” test, no one can really doubt that the actual source of the income was the credit made available by way of loan under the agreement made in the Netherlands in the course of the respondent’s business in that country. I do not think it can be said that the respondent owned “property” in New Zealand. What it owned was a debt due under a contract made in the Netherlands, and to be performed in that country. It is true that, in order to recover its debt, the respondent probably would find it convenient to commence proceedings in New Zealand, but would not be obliged to do so, and presumably could sue for its debt in its own Courts; and, if it so happened that the New Zealand company possessed assets in the Netherlands, no doubt execution could be levied against those assets.”

36. Lord Bridge giving the judgment of the Privy Council in *Commissioner of Inland Revenue v Hang Seng Bank Limited* [1990] STC 733 (Hong Kong), which

considered legislation which provided for taxation of profits "*arising in or derived from Hong Kong*" which included "interest" derived from Hong Kong, said, at 739-740:

> "Their Lordships were referred in the course of the argument to many authorities on different taxing statutes in different common law jurisdictions raising a variety of questions as to the geographical source to which income or profits should be ascribed. But the question whether the gross profit resulting from a particular transaction arose in or derived from one place or another is always in the last analysis a question of fact depending on the nature of the transaction. It is impossible to lay down precise rules of law by which the answer to that question is to be determined. The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question. If he has rendered a service or engaged in an activity such as the manufacture of goods, the profit will have arisen or derived from the place where the service was rendered or the profit making activity carried on. But if the profit was earned by the exploitation of property assets as by letting property, lending money or dealing in commodities or securities by buying and reselling at a profit, the profit will have arisen in or derived from the place where the property was let, the money was lent or the contracts of purchase and sale were effected."

37. The Australian Appeal Court in *Commissioner of Taxation v Spotless Services Limited* (1995) 62 FCR 244 (Victoria District Registry) concerned a bank deposit, by an Australian creditor (Spotless) to a Cook Islands bank, guaranteed by a UK guarantor (Midland, London). The Australian elements in the arrangement were not significant and consisted of pre-contract negotiations, an Australian creditor, and the fact that the security (a letter of credit from Midland Bank, London) was received in Australia. Under the relevant legislation income derived by a resident from sources out of Australia was exempt income where it was not exempt from income tax in the country where that income was derived provided that there was a liability for tax in the country where that income was derived and the Commissioner was satisfied that tax had been, or would be, paid.

38. Although Beaumont J gave the dissenting judgment in that case, his test regarding the attribution of the "source" was applied by the Court. He said, at 262:

> "To attribute source is a matter of judgment, and of assessment, of the relative weight of all of the relevant surrounding circumstances."

39. *Commissioner of Inland Revenue v Orion Caribbean Limited (in voluntary liquidation)* [1997] STC 923, a Hong Kong case, was concerned with the same statutory provisions that had been considered in *Hang Seng Bank*. Lord Nolan giving the judgment of the Privy Council said, at 930-931:

> "Lord Bridge speaks of profit earned 'by the exploitation of property assets as by letting property, lending money or dealing in commodities or securities'. The reference to 'property assets' in relation to the letting of property or the lending of money may have been intended to refer

simply to the exploitation of property or money owned by the taxpayer. If ORPL lent its own money to a borrower in, say, New York, then other things being equal there might be little difficulty in saying that the location of the source of the interest on the loan was New York. If, on the other hand, Lord Bridge was intending to cover, by his examples, a case such as that of OCL where the money has to be borrowed before it can be lent—like the commodities which have to be bought before they can be resold—it would be surprising if he were suggesting that regard should be had solely to the place of lending, to the exclusion of the place of borrowing.

Secondly, and more generally, the proposition that Lord Bridge was laying down a rule of law to the effect that, in the case of a loan of money, the source of income was always located in the place where the money was lent, is one that cannot stand with the opening words of Lord Bridge quoted above, nor with the explanation of his remarks by Lord Jauncey in the *HK-TVB* case, nor with the whole range of authority starting from the judgment of Atkin LJ in *F L Smidth & Co v Greenwood* (*Surveyor of Taxes*) onwards, to the effect that the ascertaining of the actual source of income is a 'practical hard matter of fact', to use words employed, again by Lord Atkin, in *Rhodesia Metals* (*in liq*) *Ltd v Comr of Taxes* [1940] AC 774 at 789. No simple, single, legal test can be employed.

Thirdly, even if the activities of ORPL, before the involvement of OCL, could be regarded as simple loans of money of the kind which Lord Bridge intended to exemplify, it by no means follows that the profit-making activities of OCL can be seen in the same light. The suggestion that OCL's business was participation in syndicated loans was expressly rejected by the Board of Review at para 10.3 of the stated case. Its business in fact, as found, was borrowing and on-lending money with a view to profit. The borrowing and on-lending, on the findings of the Board, were carried on for OCL by ORPL, acting for OCL on each side of the transaction. If one asks what OCL did to earn the profits in question, and where OCL did it, the answer is that OCL allowed itself to be interposed between ORPL and the ultimate borrowers. It did so by allowing itself to be used as a channel for loans of funds raised or provided by ORPL in Hong Kong and passed through OCL to the ultimate borrowers under loan agreements negotiated, approved and serviced by ORPL. The present case is far removed from the simple type of loan transaction contemplated by Lord Bridge in *Hang Seng Bank*."

40. In considering these Commonwealth and Privy Council cases it is necessary to bear in mind that these are based on legislation and jurisdictions other than that of the United Kingdom. As Barrowclough CJ, the judge at first instance in *Commissioner of Inland Revenue v NV Philips Gloeilampenfabrieken* said in that case, at 875:

"The scheme of taxation in England is so different from the New Zealand scheme that an examination of English cases is not very profitable."

41. Clearly the reverse is equally as true in relation to an examination of the Commonwealth and Privy Council cases. However, as with the domestic authorities including the Greek Bank case, it appears that the court concerned did consider and weigh a variety of, albeit different, factors including, eg the residence of the debtor, the place of enforcement of the debt against the debtor, the residence of any guarantor, the location of any security, the situs of the debt, the proper law of the contract and the place of payment of the interest.

42. Applying such a multi-factorial approach to the facts of this case, in particular given that Ardmore was resident for all purposes in the United Kingdom, the situs of the debt, although not a determinative factor, is also located where Ardmore is resident. The United Kingdom, in addition to being the source or origin of the funds for payment, would be the place of enforcement of the debt. We therefore conclude that the interest arose in the United Kingdom.

43. It is accepted that Ardmore's appeal cannot succeed if we were to adopt a multi-factorial approach. Having done so it must follow that its appeal fails.

44. We therefore dismiss the appeal.

Costs

45. This case was allocated as a "Complex case" under rule 23 of the Tribunal Rules and, in the absence of any request by the taxpayer, under rule 10(1)(c)(ii) of the Tribunal Rules, for the proceedings to be excluded from potential liability for costs, the Tribunal has a general discretion as to costs which were sought by both parties if successful.

46. In view of our conclusion we find that it is appropriate to award HMRC its costs of and incidental to and consequent upon the appeal on the standard basis with such costs to be assessed if not agreed. In the circumstances we also direct that the requirement contained in rule 10(3)(b) of the Tribunal Rules, for the provision of a schedule of costs to allow a summary assessment, be waived.

Right to Apply for Permission to Appeal

47. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 21 May 2014