[2021] UKFTT 0474 (TC)

TC 08348/V

CORPORATION TAX, INCOME TAX AND NICs – payments to a remuneration trust and loans to director of the Appellant – whether contributions to trust made wholly and exclusively for the purposes of the Appellant's trade – whether HMRC made a discovery – whether amounts lent to director were taxable under Part 7A ITEPA 2003 or as earnings – held that discovery assessments were validly issued, contributions to trust were not deductible and amounts loaned were not earnings but were taxable under Part 7A – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/06099
TC/2018/06613

BETWEEN

STRATEGIC BRANDING LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN

The hearing took place on 21-24 September 2021. With the consent of the parties, the form of the hearing was a video hearing on the Tribunal video platform. A face to face hearing was not held because of the ongoing restrictions resulting from the COVID-19 pandemic. The documents to which I was referred are described in the decision notice.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

Harriet Brown, counsel, instructed by Griffin Law, for the Appellant

Julian Ghosh QC, Barbara Belgrano, Quinlan Windle and Laura Ruxandu, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. Strategic Branding Ltd ("Strategic Branding") has appealed against various assessments, decisions and determinations issued by HMRC which relate to contributions made by Strategic Branding to a remuneration trust, the WUT No. 1 Ltd Remuneration Trust (the "RT"), in circumstances where the amounts contributed (after payment of fees) were then lent to Colin Wilson, the sole director of Strategic Branding. Strategic Branding made contributions to the RT in the accounting periods ending 28 September 2012 and 30 September 2012 to 30 September 2019. The accounting periods ending 30 September 2016 to 2019 are not covered by this appeal.

2. HMRC submit that this was a marketed tax avoidance scheme which was intended to achieve two purposes by way of a series of artificial, contrived and pre-ordained steps, namely:

(1) to engineer a corporation tax deduction for Strategic Branding for payments made to a trust set up for the purposes of the scheme; and

(2) to engineer the extraction of substantially those same funds (by loan), tax free, in the hands of Mr Wilson for his work as sole director of Strategic Branding without incurring any liability for income tax or national insurance contributions ("NICs").

3. HMRC have issued closure notices and discovery assessments to Strategic Branding denying the deductions claimed. HMRC have also issued determinations under regulation 80 Income Tax (Pay As You Earn) Regulations 2003 ("Regulation 80 Determinations" / "the PAYE Regulations") and a decision under s8 Social Security (Transfer of Functions, etc.) Act 1999 (the "Section 8 Decision"), treating as employment income the amounts lent to Mr Wilson.

4. Strategic Branding's position is that the contributions to the RT were made wholly and exclusively for the purposes of its trade, and that the amounts lent to Mr Wilson are not taxable as employment income.

5. For the reasons explained further below, I have dismissed Strategic Branding's appeals.

PRELIMINARY ISSUES

6. Ms Brown served her skeleton argument on 7 September 2021. In setting out Strategic Branding's position on Part 7A Income Tax (Earnings and Pensions) Act 2003 ("ITEPA 2003"), Ms Brown submitted that the loans made by the RT to Mr Wilson were made in breach of trust and that in consequence of this they could not constitute "relevant steps" or, if they were, had nil value for the purposes of Part 7A.

7. In his skeleton argument for HMRC Mr Ghosh submitted that:

(1) This was a new argument being put forward which was outside the Amended Grounds of Appeal dated 3 May 2019, had not been trailed in pre-litigation correspondence and HMRC objected to this argument being raised at a late stage where no explanation had been given as to why it was not raised earlier.

(2) If, despite HMRC's objection, the Tribunal allowed Strategic Branding to raise this new argument, HMRC applied for permission to argue that there had been a diversion of money paid in consideration of Mr Wilson's work as a director and/or employee (a matter on which they had reserved their position in the Statement of Case ("SOC")).

8. Ms Brown addressed this in a short supplemental skeleton, drawing attention to the Amended Grounds of Appeal, and submitted that Strategic Branding was entitled to express its grounds in broad terms (referring to *Ecko Ltd (t/a Subway) v HMRC* [2020] SFTD 335 at [18]

and [19]), and that a party is not at the stage of pleadings actually required to advance its evidence nor put forward its submissions in the detail it will make at the hearing.

9. Paragraphs 6.3 and 6.4 of the Amended Grounds of Appeal state:

> "6.3. Alternatively, no "relevant step" was taken by any "relevant third party" in relation to any director or employee of the Appellant.
>
> 6.4. Again, in the alternative, even if a "relevant step" was taken by any "relevant third party" in relation to any director or employee of the Appellant, the value of that relevant step was nil."

10. Given that both parties had addressed this matter in writing before the hearing, and I had had the opportunity to consider their written submissions, I heard only brief oral argument on the point from both parties at the hearing. I concluded (and informed the parties) that this argument proposed to be made by Strategic Branding was within the Amended Grounds of Appeal (such that no application to amend or introduce new grounds was necessary) and that HMRC may put forward their alternative argument as to diversion of money paid (this having in any event been raised in their SOC and addressed in the skeleton argument, and already responded to by Ms Brown in her skeleton).

BACKGROUND FACTS

11. The description of Strategic Branding, the terms of the legal documentation and the steps which occurred were largely common ground between the parties. To the extent they were not common ground, I have found these matters as facts based on the evidence before me. I make additional findings of fact under the heading "Findings of Fact" at [82] to [131] further below.

Strategic Branding

12. Strategic Branding was incorporated in Scotland on 29 September 2011, and its principal activity was that of business consultants, advising clients on maximising their brand value. Mr Wilson has been the sole shareholder and director since incorporation. He does not have a written employment contract with the company, and Strategic Branding does not have any other employees.

13. Every decision made or action referred to as having been taken by Strategic Branding was made or taken by Mr Wilson.

14. The proposal that Strategic Branding enter into a remuneration trust and make contributions to it was made to Mr Wilson by his advisers, Westwood Trustees. Mr Wilson has known John Chiesa of Westwood Trustees for more than 30 years. The remuneration trust to which Strategic Branding adhered had been designed by Baxendale Walker LLP (or persons or bodies affiliated with that firm).

The RT

15. On 21 February 2011, the RT (the WUT No. 1 Ltd Remuneration Trust) was established by trust deed (the "Original Trust Deed") entered into between WUT No. 1 Ltd (the "Founder") and Bay Trust International Limited ("BTIL") as Trustees.

16. The Original Trust Deed is governed by English Law. The Beneficiaries are defined as:

> "...past and present Providers and the wives husbands widows widowers children step-children and remoter issue of past and present Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue and also means...future Providers and the wives husbands widows widowers children step-children and remoter issue of future Providers and the spouses and former spouses (whether or not remarried) of such

children and remoter issue and "Beneficiary" has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary..."

17. A "Provider" is defined as:

> "...(i) a person who provides or has provided or may in future provide to the Founder services or custom or products or finance (save for items of a capital nature), and (ii) a person who provides or has provided or may in future provide finance to the Trustees or any manager from time to time of the Trust Fund."

18. Schedule 2 defines Excluded Persons as:

> "1.1 the Founder;
>
> 1.2 any person connected with the Founder;
>
> 1.3 any Participator in the Founder;
>
> 1.4 any person connected with the Participator.
>
> 1.5 each and every person who presently or at any future time falls within the definition of "present or former employee" for the purposes of Section 143 and Schedule 24 Finance Act 2003 and section 245 Finance Act 2004."

19. John Chiesa and Colette Chiesa (of Westwood Trustees) were named the Protectors of the RT. By clause 9.1, the Protector (or such person as he may in writing appoint):

> "...shall with the consent in writing of the Trustees have the power at any time by deed to alter or add to all or any of the provisions of this Deed in any respect and such power shall be absolute and shall not be a fiduciary power and may be exercised prospectively or retrospectively."

20. Clause 3.4 provides that the Trustees shall procure that the Trust Fund be invested under the supervision and custodianship of such company as is nominated by the Protector.

Adherence to the RT by Strategic Branding

21. On 21 May 2012 Strategic Branding resolved, by way of what is labelled "Resolution A", to adhere to the RT ("which was established under irrevocable trust dated 21st February 2011") and make contributions to that trust. Those resolutions include:

> "2…it is resolved that contributions by the Company…may be made on a weekly, monthly, annual or other periodic basis as may be appropriate for the commercial cashflow circumstances of the company. It was noted that such periodic contributions would reflect part of the economic cost to the company of earning its profits for that period."

22. Strategic Branding also resolved, in respect of the accounting period ending on 30 September 2012, that a contribution of £14,000 be paid to the Trustees.

23. Attached to Resolution A, but not referred to in the resolution itself, is a list of questions (the "Questionnaire"). The Questionnaire includes:

> "1. Has the Company's trade been conducted in such a way as to place a commercial obligation on the Company to provide benefits for the class of beneficiaries? Yes but the Company does not want to recognise any liability to pay or provide benefits to any particular person, because that could create an actual legal liability.
>
> …
>
> 4. It is intended that the trust be discretionary. That means that no beneficiary can order the trustees to make a payment to him. Why do the directors think

> this is a good idea? Because the obligation to contribute funds arises from commercial, but not legal liability. If fixed benefits were provided, this could constitute an admission of a specific legal liability upon the Company to pay particular persons. By putting monies into a trust, the Company discharges its commercial liability and does not have to take any further action. It allows time for the trustees to consider the provision of specific benefits to specific persons.
>
> 5. Does the company consider that it is possible to allocate any or all of the contribution to any particular beneficiary or that it is desirable to do so? Why? The Company does not want to spend its expensive management time in determining which specific beneficiary should get what. The discretionary trust allows each potential beneficiary to make a case to the trustees for the receipt of a benefit.
>
> 6. The discretionary trust will prohibit the refund of contributions to the Company. Why do the directors think this is a good idea? Because otherwise the Company could be said to have not in reality discharged its commercial liabilities.
>
> 7. Do the directors intend to use a fixed formula for calculating contributions (e.g. 1/3 of profits) or does he intend to look at the performance of the Company and try to reflect that in the amount of contributions made? The directors will consider the performance of the Company.
>
> 8. How and when will potential beneficiaries be informed? That is the Trustees' responsibility."

24. The Deed of Adherence was entered into between the Founder, Strategic Branding and the Trustees on 23 May 2012 (and was executed by Mr Wilson on behalf of Strategic Branding). The recitals refer at (1) to the Deed of Adherence being supplemental to the deed of trust dated 21 February 2011, and refer to the Founder, the Protectors and the Trustees.

Strategic Management Europe Limited and the Fiduciary Services Agreement

25. Strategic Management Europe Limited ("SMEL") had been incorporated in Scotland on 1 May 2012. Mr Wilson is the sole director and shareholder of SMEL, and the company does not conduct any activity other than its involvement in the transactions described herein.

26. On 23 May 2012 (ie the same day that Strategic Branding adhered to the RT), SMEL entered into a Fiduciary Services Agreement with UTW Holdings Limited ("UTW"), a company with a registered office in Belize. As parties to that agreement, UTW is defined as "the Principal" and SMEL as "the Fiduciary". (I did not have a copy of any documentary evidence which may assist with explaining UTW's role; in submissions both parties referred to this company as having been appointed to manage the RT.)

27. The Fiduciary Services Agreement defines the Property as being all and any property real and personal granted by the Principal to the Fiduciary. Clause 2, headed "Declaration of Bare Trust and Fiduciaryship" provides at 2.1:

> "During the Period of Appointment the Fiduciary shall have all rights to apply and deal with the Property and the income and capital thereof … as if it were the beneficial owner thereof".

Deed of Amendment

28. On 21 June 2012 John Chiesa and Colette Chiesa (as Protectors) and BTIL (as Trustees) executed a Deed of Amendment (the "Deed of Amendment") to the Original Trust Deed. The Deed of Amendment purports to have retrospective effect to the date of the Original Trust Deed

(although Ms Brown acknowledged that whilst it was open to the parties to agree to treat this deed as always having had effect this cannot affect a third party, such as HMRC).

29. Clause 2 of the Deed of Amendment provides that the form of the deed set out at Schedule 2 thereto is to replace the Original Trust Deed "as on and from the date" of the original deed (this then being the "Amended Trust Deed", and the Original Trust Deed and the Amended Trust Deed being referred to as the Trust Deed or Trust Deeds).

30. The Amended Trust Deed includes the following definitions:

(1) Clause 1.1.6 defines "the Beneficiaries" as:

> "(a) any individual who during the Trust Period is or has been a Provider (but not including a person who was Provider but has died before the execution of this Deed);
>
> (b) any spouse or civil partner of any person who falls within category (a) above;
>
> (c) any person who was the spouse or civil partner or any person who fell within category (a) above immediately before the death of the latter;
>
> (d) the children and remoter issue of any person, living or dead, who falls, or during his lifetime fell, within category (a) above;
>
> (e) any person who is a spouse or civil partner of any person falling with [sic] category (d) above;
>
> (f) any person who was a spouse or civil partner of any person falling with [sic] category (d) above immediately before the death of the latter (whether or not such person has subsequently entered into marriage or civil partnership with a third party);
>
> and "Beneficiary" has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary."

(2) A "Provider" is defined, by clause 1.1.7(a)(i), as:

> "an individual who is or has been employed in the Particular Trade and who, while so employed, himself has provided or has been involved, whether as principal, partner, employee, independent contractor or otherwise, in the provision of, in either case in the course of the Particular Trade and during the Trust Period, finance to the Founder or to the Trustees or to any manager of the Trust Fund or any part thereof".

(3) Clause 1.1.7(b) defines "the Particular Trade" as "the trade or profession of lending money".

(4) Schedule 2 defines Excluded Persons as "the Founder", being WUT No. 1 Ltd.

31. The declaration of trust is expressly subject to clauses 10, 11, 12 and 13 of the Amended Trust Deed. These are considered further in the Discussion in the context of the application of Part 7A at [234] to [**Error! Reference source not found.**].

Finance Agreement

32. On 3 July 2012 Mr Wilson entered into a finance agreement with SMEL (the "Finance Agreement"), with Mr Wilson as Borrower and SMEL as Lender.

33. The recitals record that the Lender "is acting in its capacity as a nominee of Bay Trust International Limited", and that the Lender has agreed to lend £12,000 to the Borrower (this being the "Original Loan". The advance was for 10 years, at LIBOR plus 2% (with interest rolled-up during the course of the loan).

34. Clause 3 provides that the Lender may make such further advances as it may agree with the Borrower on the same terms and that each such further advance shall be evidenced by a written memorandum between the parties. There were several such memoranda (each being a "Memorandum of Further Advances"), and each was signed by Mr Wilson in his capacity as director of SMEL and in his capacity as borrower.

Contributions and loans

35. The documentary evidence is that the following steps occurred in relation to each contribution by Strategic Branding to the RT (usually in this order):

(1) Strategic Branding would resolve to make a contribution to the RT, using Resolution A for the first contribution and thereafter always using what was labelled as Resolution B. That form of resolution always stated that the company resolved to make a further contribution to the scheme and that "it is resolved that the proposed amount of contribution to the Scheme for the accounting period ending on […] reflects part of the economic cost to the company of earning its profits for that period".

(2) The contribution was paid from Strategic Branding's bank account to the bank account of either Baxendale Walker or Westwood Trustees.

(3) Strategic Branding wrote to the Trustees (ie BTIL) asking that the Trustees give consideration to transferring a specified amount to SMEL's specified bank account (each such letter being a "Letter of Wishes"). That letter always stated that Strategic Branding recognised that the Trustee must exercise its own discretion and was not bound to follow these wishes. The amount requested to be transferred was approximately 90% of the contribution (and exactly 90% in the final three accounting periods).

(4) The difference between the amount of the contribution and the amount requested to be transferred to SMEL was paid as a fee to Westwood Trustees or Baxendale Walker.

(5) SMEL lent all of the funds that were transferred to it to Mr Wilson.

36. The above usually took place in very quick succession, eg on 25 July 2012 Strategic Branding resolved to contribute £7,000 to the RT, the money was transferred to Baxendale Walker that day and the Letter of Wishes in respect of £6,300 is also dated 25 July 2012. The Memorandum of Further Advances is dated 27 July 2012. A more typical pattern became that the Letter of Wishes was dated the day after the resolution and bank transfer, but in any event these steps would usually occur across two days.

37. There were a few occasions where the timing was different, eg:

(1) The first contribution (of £14,000) to the RT was resolved to be made on 21 May 2012. That was before the Deed of Amendment, but no payment was made by Strategic Branding (to Baxendale Walker on this occasion) until 27 June 2012. The Letter of Wishes is dated 28 June 2012, in respect of a transfer of £12,600. There was a Memorandum of Further Advances dated 3 July 2012 for an advance of £12,000.

(2) On 9 February 2015 Strategic Branding resolved to contribute £25,000 to the RT. The Letter of Wishes is dated 10 February 2015 in respect of a transfer of £22,500 but the Memorandum of Further Advances for that amount is dated 9 February 2015.

(3) On 27 May 2015 Strategic Branding resolved to contribute £40,000 to the RT. The Memorandum of Further Advances records that £36,000 was lent to Mr Wilson on that same day, but the Letter of Wishes was not sent until 28 May 2015.

38. The contributions made by Strategic Branding to the RT in each accounting period represented approximately all of what would otherwise have been its net profit for the period

– eg, after making the contributions, for the period ended 30 September 2012 the company had a net loss of £950, and for the period ended 30 September 2013 it had a net profit of £845.

39. The breakdown of contributions in each period is as follows:

Period ended	Contributions to the RT	Loans by SMEL to Mr Wilson	Fees
30/09/12	£34,990	£30,900	£4,000
30/09/13	£125,525	£114,172.50	£11,352.50
30/09/14	£127,000	£114,300	£12,700
30/09/15	£254,750	£229,275	£25,475

40. On 4 April 2019 there was an outstanding loan totalling £1,159,889. That loan was refinanced by Mr Wilson such that the debt is now owed by him to LCS Finance Ltd.

Letters to Potential Beneficiaries

41. Some letters were sent from Strategic Branding to persons who were said to be potential beneficiaries of the RT, eg to "Dave Cooney" dated 15 September 2012.

42. This letter said that "As part of our on-going, legislative obligations to foster continuing relationships with our customers, suppliers and others, the company though its Directors has established and contributes a share of its annual profits to a fund to the trustees, delegated managers or administrators of which you may be able to seek a discretionary reward." It then said that if this was of interest he should write to the Trustees (setting out the address).

43. There was no evidence as to whether any recipient of these letters took any action in relation thereto.

Procedural history – corporation tax enquiries

44. HMRC opened enquiries into Strategic Branding's tax returns for the accounting periods ending 30 September 2014, 30 September 2015 and 30 September 2016.

45. On 8 June 2018, HMRC issued closure notices amending Strategic Branding's corporation tax returns, in respect of unpaid corporation tax regarding the arrangements for the accounting periods ending 30 September 2014 and 2015.

46. On 21 June 2018, Strategic Branding wrote to HMRC appealing against the closure notices. Strategic Branding accepted HMRC's offer of a review and on 21 September 2018, HMRC sent a review conclusion letter upholding the decisions. On 17 October 2018, Strategic Branding notified its appeal against both closure notices to the Tribunal.

Procedural history – discovery assessments

47. On 22 September 2016, HMRC issued corporation tax discovery assessments under paragraph 41 of Schedule 18 Finance Act 1998 ("FA 1998") for the accounting periods ending 28 September 2012 and 30 September 2012 (the "2012 Discovery Assessments"). On 14 October 2016, Strategic Branding appealed against both assessments.

48. On 12 September 2017, HMRC issued a corporation tax discovery assessment for the accounting period ending 30 September 2013 (the "2013 Discovery Assessment" and, together with the 2012 Discovery Assessments, the "Discovery Assessments"). On 9 October 2017, Strategic Branding appealed against the assessment.

49. Strategic Branding accepted the offer of a review and on 17 August 2018, HMRC sent to Strategic Branding a review conclusion letter upholding the decisions in all three assessments. On 13 September 2018, Strategic Branding notified its appeal against the Discovery Assessments to the Tribunal.

Procedural history – PAYE and NICs

50. On 11 August 2016, HMRC issued Regulation 80 Determinations for 2012-13, 2013-14, 2014-15 and 2015-16 in respect of unpaid PAYE. Strategic Branding appealed on 2 September 2016.

51. On 11 August 2016, HMRC issued a Section 8 Decision in respect of unpaid primary and secondary Class 1 NICs for 6 April 2012 to 5 April 2016. Strategic Branding appealed on 2 September 2016.

52. On 8 June 2018, HMRC offered to Strategic Branding a review in relation to the Regulation 80 Determinations and the Section 8 Decision. On 2 July 2018, Strategic Branding accepted the offer of a review. On 17 August 2018, HMRC sent to Strategic Branding a review conclusion letter upholding the decisions in all the Determinations and the Decision. On 13 September 2018, Strategic Branding notified its appeal to the Tribunal.

Tax under appeal

53. The tax years and amounts of additional PAYE, NICs and corporation tax covered by this appeal are as follows:

PAYE

2012/13 – £28,605.60

2013/14 – £34,728.00

2014/15 – £51,911.00

2015/16 – £81,601.50

NICs

Primary and secondary Class 1 NICs

6 April 2012 to 5 April 2013 – £17,597.22

6 April 2013 to 5 April 2014 – £18,398.70

6 April 2014 to 5 April 2015 – £25,156.03

6 April 2015 to 5 April 2016 – £35,668.38

Corporation Tax

Period ending

28/09/2012 – £6,753.00

30/09/2012 – £37.00

30/09/2013 – £25,274.00

30/09/2014 – £25,388.40

30/09/2015 – £51,593.20

54. The amounts set out above differ slightly from some of the amounts in the Discovery Assessments and determinations and decision and reflect one correction (to the amount in the 2013 Discovery Assessment) and apportionments reflecting further information received.

ISSUES

55. The following matters are in issue between the parties:

(1) Corporation tax – whether contributions to the RT are deductible in calculating Strategic Branding's taxable profits. There are three sub-issues:

(a) whether contributions to the RT should have been recognised as an expense in Strategic Branding's profit and loss account under UK GAAP (Strategic Branding did so recognise them); this issue has been stayed by agreement between the parties, to be heard at a subsequent hearing if necessary;

(b) whether contributions to the RT, including any fees payable to Baxendale Walker, Westwood Trustees, BTIL or anyone else in connection with the arrangements, were wholly and exclusively for the purposes of Strategic Branding's trade; and

(c) whether any deductions for contributions are disallowed by s1290 Corporation Tax Act 2009 ("CTA 2009");

(2) Discovery assessments – whether the discovery assessments issued for the accounting periods ending 28 September 2012, 30 September 2012 and 30 September 2013 were valid;

(3) Income tax and NICs – in the alternative:

(a) whether the arrangements give rise to a tax charge by virtue of Part 7A ITEPA 2003; or

(b) whether the contributions to the RT were diverted earnings of Mr Wilson under the principles set out in *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45).

56. It is for HMRC to establish, on the balance of probabilities, that the discovery assessments were valid. Strategic Branding has the burden of proof in respect of all of the remaining issues, also on the balance of probabilities.

EVIDENCE AND WITNESSES

57. I had a hearing bundle of 1893 pages and admitted a supplemental bundle of 61 pages as well as a bundle of authorities. I heard evidence from Mr Wilson, who also provided witness statements (dated 22 October 2019 and 30 July 2021) and Malcolm Cree of HMRC (who had also provided two witness statements, dated 22 October 2019 and 20 August 2021).

58. Both parties provided skeleton arguments and I had the benefit of a supplemental skeleton from Ms Brown addressing certain of the matters raised by Mr Ghosh as well as additional written submissions by both parties (handed up during the hearing, and on 24 September 2021 and 1 October 2021).

59. The evidence from Mr Cree is considered in the context of Discovery Assessments in the Discussion below.

60. In both their SOC and skeleton argument HMRC had expressly reserved their position as to whether the arrangements were a sham. Mr Ghosh cross-examined Mr Wilson on his evidence and during cross-examination put various challenges to Mr Wilson, including as to whether he considered the documentation was important, the reason(s) why certain steps occurred in what was essentially (according to HMRC) the wrong order (eg where the Letter of Wishes was dated after Memorandum of Further Advances) and as to Mr Wilson's honesty in his explanations of the reasons for entering into the arrangements as a whole. This gave rise to the following:

(1) On the first day of the hearing Ms Brown challenged the approach being taken by Mr Ghosh in his cross-examination, and she made submissions on this in closing. Those submissions included that the manner of the cross-examination raised the risk of

procedural unfairness, and that Mr Wilson's answers had to be considered in the context of the questions being put to him.

(2) After Mr Wilson had finished giving evidence, Mr Ghosh confirmed that HMRC's position was that HMRC would not be taking a point that the arrangements were a sham, but they would be arguing that Mr Wilson's evidence had been dishonest and that specified documents in the bundle were a sham.

Evidence of Mr Wilson

61. Mr Wilson had various roles – he is the sole director and shareholder of Strategic Branding, the sole director and shareholder of SMEL (in relation to which Mr Wilson said his duties were both those of a director and as a fiduciary on the basis that SMEL took decisions as "Fiduciary" under the Fiduciary Services Agreement) and he is the borrower under the Finance Agreement.

62. Mr Wilson was sworn in as a witness at 11.40am on the first day of the hearing and Mr Ghosh started his cross-examination very shortly afterwards. The hearing adjourned for lunch on the first day at 1pm. When we resumed at 2pm Ms Brown put forward submissions as to the cross-examination being conducted by Mr Ghosh. Ms Brown submitted that HMRC was using the cross-examination to make submissions, asking questions that had already been answered, and directing the witness as to how to answer questions – this created a risk of the fairness of the process being undermined and, Ms Brown submitted, it was so undermined.

63. Ms Brown had objected to some of the questions put by Mr Ghosh before the lunch break and I had therefore already, during the adjournment, reviewed my own notes of the cross-examination. I explained to the parties that I did not accept Ms Brown's objections. Mr Ghosh was entitled to challenge the witness, and this could involve repeating questions, particularly where the evidence being given did not correspond to the written evidence (including that in Mr Wilson's witness statement), or if the answer was vague or unclear, and this was particularly the case where HMRC had put Strategic Branding on notice that it was reserving its position on whether to argue that the arrangements were a sham. This meant that I was not going to give a direction to Mr Ghosh as to how he was to conduct his cross-examination, albeit that I would remain mindful of the concerns raised as the hearing progressed and would interrupt if I considered appropriate.

64. Ms Brown indicated she would be making submissions on Mr Wilson's evidence in closing; which she did both orally and in written submissions which followed shortly after the hearing concluded. In closing Ms Brown submitted that the responses of Mr Wilson had to be considered in the context of the cross-examination as a whole; and her written submissions identified particular aspects of questioning which illustrated her concern (although emphasising that this was not an exhaustive list).

65. In considering my decision and in making my findings of fact I have had the benefit of not only my own notes of the hearing but also a transcript. The latter has been particularly helpful in ensuring that, as Ms Brown correctly identifies, I focus not just on Mr Wilson's explanations but also the question which he was asked and how that arose.

66. Having considered all of Mr Wilson's evidence, including not only his evidence at the hearing but also his two detailed witness statements, I do not accept all of his evidence as truthful, in particular so far as it relates to his reasons for entering into the transactions. I explain my particular conclusions in the context of my Findings of Fact below, but at this stage I note the following:

(1) There were clearly some areas where Mr Wilson's oral evidence became a little confused. His first witness statement had recorded that when he signed the Deed of

Adherence he did not see the Original Trust Deed; he only obtained a copy of it for the purpose of this appeal. Giving evidence he explained that he had not asked for it at the time because he did not know it existed. (I have some reservations about this, as the Original Trust Deed was referred to expressly in some of the documents which Mr Wilson signed, so he was put on notice that something existed.) However, at one point giving evidence he said he had not previously seen the Deed of Adherence. I consider this was confusion on his part – he had previously confirmed that he had seen that deed – he had signed it - and that was not in dispute; instead I conclude that this was a mistake or confusion; he meant to refer to the Original Trust Deed (or the Amended Trust Deed), and this was not a dishonest answer.

(2) During cross-examination Mr Wilson was asked about his understanding of the explanation recorded in Strategic Branding's resolutions for the making of the contributions, which refer to them as reflecting part of the economic cost to the company of making its profits during the period. Mr Wilson gave somewhat unclear answers as to what this meant, suggesting that this was referring to the fact that the contributions were paid out of the profits of the company, and then changing his mind. Such answers were not credible, but I am mindful that, as Mr Wilson acknowledged, these resolutions were provided to him as part of a document pack of templates to be used; they were not his own words. He was seeking to explain, after the event, the wording used. To the extent that Mr Ghosh was seeking to illustrate that Mr Wilson had not properly considered the explanations set out in the resolutions, I accept that submission. However, this confusion or lack of understanding, which Mr Wilson then sought to clarify in re-examination, is not necessarily indicative of dishonesty. I do not place any weight on this when assessing Mr Wilson's honesty as a witness.

(3) I recognise that some of the relevant transactions occurred eight to ten years ago and that it is understandable that he would not recall specific contributions.

67. As the above illustrates, I was not overly troubled (when assessing honesty) by some of the inconsistencies within Mr Wilson's oral evidence. Instead, I was concerned about the difference between the evidence in his written statements and his oral evidence, and his inability to explain certain of the statements made in his written evidence – in particular in the context of the allegation that certain documents had been fabricated and were a sham, and also his own explanation of the reasons for the transactions.

68. Mr Wilson's first witness statement identifies several advantages of the arrangements. He explained that the RT allowed Strategic Branding to put something aside for the future of the business and protected against financial risk (referring to the risk of potential legal action), but also that the RT would have little impact on his time, could be used to provide loans for his children in the future, had a core benefit that the RT was not managed by him, and that the RT had a track record. By his second witness statement, the explanation was focused on asset protection and what Mr Wilson understood by that. These witness statements appear to give a somewhat blinkered explanation of the arrangements and pay little regard to what actually happened, eg:

(1) the RT was only established in February 2011 and so it is difficult to see what kind of "track record" it could have had by the time of Strategic Branding's adherence the following year and there was no evidence before me as to what Mr Wilson had been shown as being such a track record; and

(2) Mr Wilson referred to the RT as being independent and managed by others, yet although it was legally independent there was minimal evidence of anyone other than Mr

Wilson himself (in various capacities) taking any action, making it hard to understand how it was managed by others or how it could be said to save him time.

69. The evidence in these witness statements thus gave rise to various potential concerns (and HMRC's case included that even if I did accept some of Mr Wilson's explanations, this would not be sufficient to establish that a deduction was available for contributions to the RT). However, Mr Wilson's failure to acknowledge the (almost) inevitability of loans being made to him was difficult to comprehend as an honest answer when this seems to have been almost entirely within his control – as noted above, there was minimal evidence of involvement from anyone else, save, I infer that someone at Baxendale Walker or Westwood Trustees (whichever had received the contribution on each occasion) must have processed the bank transfer to SMEL's bank account. His reluctance to accept that there might even be an "expectation" that this would happen created an impression of a witness seeking to stick to a particular explanation no matter what. His explanation of what he came to rely on as the reason for making contributions to the RT, namely asset protection, was also barely plausible.

70. I concluded that Mr Wilson's evidence was not reliable. This conclusion has meant that when making my findings of fact I have sought to look for documentary evidence in support of his assertions and have been reluctant to rely only on his evidence. I did also conclude that some of his evidence was dishonest, and this conclusion arose in the context of considering whether specified documents in the hearing bundle were a sham.

Documents as a sham

71. After Mr Wilson had finished giving evidence, but before Ms Brown closed her submissions, Mr Ghosh informed the Tribunal that HMRC would be arguing that Mr Wilson's evidence was dishonest and would be arguing that certain documents included in the bundle were a sham – I refer to these documents as the "Disputed Documents".

72. The Disputed Documents were at pages 1704 to 1710 of the hearing bundle, so seven pages in total, and had been exhibited to Mr Wilson's second witness statement. Those documents were headed "Commercial Loan Agreement", "Loan Proposal", "Personal Loan Proposal", "Verstand Assignment Proposal", "Personal Loan Agreement" and "Commercial Loan Agreement". The first and last of those documents (ie pages 1704 and 1710) were identical; the same document had been included in the bundle twice.

73. I have set out below the chronology as to how these documents came to be produced to the Tribunal:

(1) In his first witness statement, Mr Wilson referred to making proposals to the RT that it lend money to him.

(2) On 9 April 2020, HMRC wrote to Strategic Branding's solicitors (Griffin Law) asking a series of questions. Several of HMRC's questions focused on the references to proposals and the Trustees' alleged consideration of them, including noting that Strategic Branding had "provided no documentary evidence of any alleged approach or "proposal"".

(3) On 15 April 2020, Griffin Law wrote to HMRC saying their client was not predisposed to respond to these questions. Giving evidence Mr Wilson explained that he was advised that this was not a proper request in the context of proceedings which were underway.

(4) Nothing happened for several months (and I am content to assume that this lack of activity was related to the pandemic).

(5) On 29 January 2021 HMRC renewed their request, saying:

> "The Questions were asked because Mr Wilson's witness statement contains factual statements that, in our view, are unsupported by the evidence on both parties' list of documents. We would expect documentary evidence to exist supporting these factual statements. The burden of proof in the appeal is on the Appellant and in the absence of such documentary evidence, we expect to invite the Tribunal to reject many of, or all, the factual statements made by Mr Wilson that are unsupported by documentary evidence."

(6) On 3 August 2021 Griffin Law applied to rely on the Mr Wilson's second witness statement. That statement referred to various exhibits, including the Disputed Documents. That witness statement referred to them as, eg, the "commercial loan agreement", or "the further proposals", and as a "Personal Loan" which "has been used" by Mr Wilson personally. The exhibits were paginated, but not marked by reference to the exhibit numbers used in the statement.

(7) On 10 August 2021 HMRC asked that the exhibits be identified. An index was then provided by Griffin Law, and that index includes:

A3	Commercial Loan	170
A4	Loan Proposal	171
A4	Personal Loan Proposal	172
A6	Interest Model	173
A7	Verstand Assignment	174
A8	Personal Loan	175
A9	CW Commercial Loan	176

74. Mr Wilson accepted that he had created the Disputed Documents, but gave evidence that they were draft business plans, or models, and were not intended to have legal effect. (Mr Wilson's oral evidence was more detailed than this, and I have taken into account his full explanations, but it suffices at this stage to record that his position was that the documents did not have the legal effects which they appeared on their face to have.)

75. For a transaction or document to be characterised as a sham in English law, it is necessary to show that the parties intended that the transaction or document should not actually create legal rights and obligations but should merely appear to do so, with the object of deceiving third parties (*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802). The third parties in this instance are HMRC and the Tribunal.

76. In *Khan (trading as Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2006] EWCA Civ 89 the Court of Appeal considered how to approach a question of dishonesty when it is the civil standard of proof that is applicable, at [79], referring to the decision of the House of Lords in *Re H and others (minors)* [1996] AC 563 where Lord Nicholls made clear that account must be taken of the seriousness of the allegation, in that the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence. This does not mean that the standard of proof required is higher, only that the inherent probability or improbability of an event is itself a matter to be taken into account.

77. Referring to the chronology, Mr Ghosh emphasised that:

(1) The Disputed Documents were provided to HMRC and the Tribunal in response to HMRC saying that they had no documentary evidence of proposals that Strategic Branding says were made to the Trustees.

(2) They purported to evidence proposals being made, and binding loan agreements being entered into, and were presented that way in Mr Wilson's second witness statement.

(3) The Disputed Documents are inherently implausible – they contain various inaccuracies, eg they were signed agreements for the loan of £125,000 from SMEL (stated as being on behalf of the RT) to Mr Wilson but at a time when the RT did not have that amount of money.

(4) Mr Wilson sought to explain at the hearing that these documents were business plans or proposals, but that did not correspond either to the labelling of the documents themselves or how he had described them in his own witness statement when he exhibited these documents. On the face of the second witness statement, at [5.2], Mr Wilson calls the first document a commercial loan agreement. At [5.15] he is saying these are actual proposals. Nowhere in that statement does it say that these are part of the business plan, or that they did not happen.

78. HMRC submitted that the only reasonable conclusion is that the three documents within the Disputed Documents headed "loan agreement", which purport to be loan agreements and were signed by Mr Wilson and dated, were not intended to actually create legal rights and obligations but merely to appear to do so with the object of deceiving HMRC and the Tribunal.

79. Ms Brown denied that these documents were a sham, submitting as follows:

(1) Regard should be had to the consistency in Mr Wilson's evidence to the Tribunal – he had explained that he had entered into the RT to protect the assets of the company, and that irrespective of whether I conclude that the RT was suitable, or achieved his aims, the consistency of his explanation supports a conclusion that it was honestly given. This very consistency supported a conclusion that Mr Wilson was a credible and honest witness, not one who had fabricated documents to deceive.

(2) That the documents might be said to be wrongly labelled, or somewhat idiosyncratic, did not mean that they must therefore be fake; I needed to have regard to all of the circumstances.

(3) I needed to have regard to the principles in the authorities that the more serious the allegation, the less likely it is that the event occurred, and the inherent probability or improbability of an event is a matter to be taken into account. Here there were other more likely explanations, ie that given by Mr Wilson that they were business proposals for him to use in his business.

(4) Furthermore, in the context of this appeal, it could be said that it would make little sense, if Mr Wilson were to fabricate documents, only to do so shortly before the hearing rather than years previously; or to include errors (eg referring to Verstand Property Ltd, a company which has never existed, rather than Verstand Properties Ltd, which was later incorporated).

80. I have found this difficult (and Mr Ghosh made it clear that he did not make these submissions lightly) but have concluded that the three loan agreements within the Disputed Documents were a sham, even having regard to the high threshold which is apparent from the authorities:

(1) The three documents within the Disputed Documents which are labelled as loan agreements are somewhat illogical and at odds with the facts:

(a) They are stated to be agreements for the lending of money to Mr Wilson at a time when the RT did not have such money and could not have had certainty (or even a realistic expectation) that it ever would.

(b) Mr Wilson signed each agreement twice, once in his individual capacity as borrower on 1 June 2012 and then on behalf of the RT, as "Fiduciary – Strategic

Management Europe", with a date of 4 June 2012. Mr Wilson was not authorised to sign on behalf of the RT, but more importantly this raises a question as to why would the same individual be signing this document three days apart.

(c) There was no company called Verstand Property Limited (instead, Verstand Properties Ltd was incorporated in 2014).

(2) The Disputed Documents were only provided to HMRC in response to HMRC drawing attention to the absence of evidence of proposals or loans, and had not been provided with Mr Wilson's first witness statement (or earlier).

(3) Mr Wilson's explanation of these Disputed Documents changed dramatically. I do not refer here to inconsistencies or confusion in his oral evidence. Instead, in his second witness statement Mr Wilson refers to the documents labelled loan agreements as actual loan agreements and explains how they came into being. However, at the hearing Mr Wilson's explanations meandered somewhat (and this is an area where I have had regard to Ms Brown's submissions as to the nature of the questioning) but included it being a plan, an administrative document in the background which he had signed to make sure the administration was accurate, and that it was not a "real legal document", but was a draft document, then veering towards it being "part of the business plan" and he did not understand why these documents had been included in the bundle. (I place no weight on the labelling using in the index, as that was provided afterwards and I consider it entirely plausible that the index was produced by Griffin Law with minimal if any input from Mr Wilson.)

81. I have placed no weight on any of the Disputed Documents.

FINDINGS OF FACT

82. These findings address the reasons for Strategic Branding adhering to the RT and making contributions thereto, and submissions as to whether this was a mass-marketed tax avoidance scheme involving pre-ordained steps.

Was this a mass-marketed tax avoidance scheme involving pre-ordained steps?

83. HMRC submitted that on the basis of the evidence I should make a finding of fact that this was a mass-marketed tax avoidance scheme and the steps which occurred were pre-ordained. However, there is no need for me to make findings on facts which are not relevant to the issues before me, and I have considered whether this falls into that category – being a mass-marketed tax avoidance scheme cannot of itself determine the outcome of this appeal. Nevertheless, I am mindful that the issue as to "wholly and exclusively" requires consideration of purpose and the application of Part 7A ITEPA 2003 requires consideration of what the arrangement is, and whether there is a connection with employment, which itself then involves an issue as to whether the steps were pre-ordained.

84. For those reasons, I make these findings:

(1) The remuneration trust arrangement was designed by Baxendale Walker (or persons or bodies affiliated with that firm) and was proposed or marketed to Mr Wilson by his advisers, Westwood Trustees.

(2) Such arrangement included the prospect of Strategic Branding making contributions to the RT, which would have a third party trustee but effective control of the funds contributed to the RT would be granted to a person associated with Strategic Branding. Such person (in this case SMEL) would be able to decide how the contributions should be used. It was Mr Wilson's understanding that amounts contributed to the RT could (after payment of fees) be lent to him.

(3) This arrangement was marketed on the basis that a company could claim a deduction as an expense of making contributions to the trust and there would be no taxable receipts. Mr Wilson understood this.

(4) When contributions were resolved to be made to the RT and were then paid, a fee was payable to Baxendale Walker or Westwood Trustees out of that contribution (of around 10% of each contribution).

(5) Westwood Trustees provided Strategic Branding with a document pack, namely a set of templates to use – these certainly included Resolution A (for adherence to the RT and the making of the first contribution), suggested answers for the Questionnaire and Resolution B (for the making of each subsequent contribution). I also infer, on the basis of the drafting being closely tied in to the terms of the Original Trust Deed which Mr Wilson had not seen, that the document pack included templates for the Letter of Wishes and the letters to potential beneficiaries.

85. On the basis of the evidence before me, the transactions which were entered into by Strategic Branding were part of a marketed scheme, the advantages of which included obtaining a tax deduction for the making of contributions to the RT in circumstances where there would be no tax on any recipient.

86. As to whether the transactions that were entered into were pre-ordained, the steps on each occasion that a contribution was made to the RT were as follows, albeit that they did not always take place in this order:

(1) Mr Wilson, as the director of Strategic Branding, resolved to make a contribution to the RT;

(2) the amount of that contribution was then paid from Strategic Branding's bank account to either Baxendale Walker or Westwood Trustees. The payment instruction can only have come from Mr Wilson;

(3) Mr Wilson, as the director of Strategic Branding, sent a Letter of Wishes addressed to the Trustees, in which he asked the Trustees to consider transferring funds to SMEL;

(4) the net contribution was transferred to SMEL's bank account;

(5) Mr Wilson, as the director of SMEL, decided to lend the amount to himself; and

(6) that net amount was then lent by SMEL to Mr Wilson under the terms of the Finance Agreement.

87. Mr Wilson accepted that all of the contributions made by Strategic Branding to the RT (after payment of fees by the RT) had been transferred to SMEL and then lent to him. However, he explained this as follows:

(1) When it was put to him that Strategic Branding "wanted and hoped" that the money would be lent to him, he initially did not accept that there was such a hope. He said that Strategic Branding wanted the money transferred so that SMEL "could provide a commercial benefit to the trust" and so that SMEL "could invest those funds appropriately".

(2) Later, Mr Wilson's evidence was that Strategic Branding "wanted and expected" the loans to be made to Mr Wilson, but expanded on this saying that the company wanted it "only if SMEL, the fiduciary, which is a separate business, a separate entity, had agreed that commercially that made sense."

(3) However, he did at one point accept that the reason for which Strategic Branding asked the Trustees to transfer the money to SMEL was for SMEL to then make loans to

Mr Wilson, although he then said that Strategic Branding only wished that SMEL would then make loans to him.

(4) Mr Wilson later denied, "vehemently" that there was an expectation if not a certainty that when Strategic Branding made a contribution to the RT then the amount left after fees would be lent to him.

88. I do not accept Mr Wilson's evidence that Strategic Branding had nothing more than a wish that amounts contributed to the RT would be lent to him:

(1) I take account of the fact that such a loan was always made, and was made within a few days of Strategic Branding resolving to make the contribution.

(2) Mr Wilson referred to the need to ensure there was a commercial benefit to the RT and that SMEL needed to invest the assets appropriately. However, the investment that was always made was a loan to Mr Wilson under the terms of the Finance Agreement. There is no evidence of SMEL considering any other course of action.

(3) There is a chronological inconsistency with some of the steps (see [37] above) that, notwithstanding Mr Wilson's explanation that these were administrative errors, support a conclusion that it was inevitable that once a contribution had been made the only use of those funds by the RT would be the transfer to SMEL and loan to Mr Wilson. By way of example, the loan by SMEL to Mr Wilson on 9 February 2015, before Strategic Branding had asked the Trustees to transfer funds to SMEL, is significant as according to the Fiduciary Services Agreement, SMEL is stated to be a fiduciary of funds transferred to it by the RT (and not a fiduciary over all of the funds held by the RT).

(4) There was no evidence before me of anyone other than Mr Wilson making a decision in relation to the funds resolved to be contributed by Strategic Branding – he signed the resolutions of Strategic Branding resolving to make the contribution, he authorised the bank transfer, he signed the Letter of Wishes and he resolved as director of SMEL to make the loan. There was no evidence of any decision-making being required by any third party which could interrupt this chain of events. In particular, there was no evidence of:

(a) what (if anything) the Trustees did upon receiving the Letters of Wishes;

(b) what happened to the funds upon receipt by Baxendale Walker or Westwood Trustees (ie whether they were then transferred to the Trustees, or UTW) other than that the money was transferred to SMEL's bank account. On the basis that Strategic Branding bears the burden of proof, and no evidence has been adduced to the contrary, I have concluded that the funds were transferred from Strategic Branding to Baxendale Walker or Westwood Trustees and then from the relevant recipient directly to SMEL and on to Mr Wilson. The funds therefore bypass the RT and the Trustees (and UTW); and

(c) UTW's role, other than that it was the counterparty to the Fiduciary Services Agreement. In submissions, both counsel referred to UTW as being the manager of the RT, or the person to whom the Trustees had delegated its powers. In any event, there was no evidence of UTW taking any decisions, nor was there any evidence that UTW received those funds itself or had any control over them.

89. I have concluded that when Strategic Branding resolved to make a contribution to the RT it was Mr Wilson's intention (and also that of Strategic Branding) that the amount (after payment of fees) would be lent to him. There was no realistic prospect of anything else occurring. I therefore agree with HMRC that at the time the contributions were resolved to be

made and then indeed paid to the RT, it was pre-ordained that the net amount would be lent to Mr Wilson.

Reasons for entering into the arrangements and making contributions to the RT

90. Mr Wilson's witness statements set out various reasons and explanations for entering into the arrangements and making contributions to the RT. I note at the outset that the focus of these explanations is the decision of Strategic Branding to adhere to the RT and make contributions thereto (and it is my findings in relation thereto that are particularly relevant to the deductibility issue), albeit that some of the reasons then address his use of the money that was lent to him under the Finance Agreement. There is thus a blurring of the different aspects of the transactions that were entered into.

91. The explanations given in Mr Wilson's witness statements include the following:

(1) He started the company in 2012, and was not taking a salary or dividends. He was living off his savings as he had factored in not taking any salary for two to three years as it might take that long for the company to show a profit. Strategic Branding had an unanticipated good year in its start-up year. The RT allowed him to put something aside for the future of the business.

(2) He wanted to protect against the financial risk to the company, and to protect the funds of the company. He was concerned about a potential legal action, which came to nothing, from a former employer of his shortly after Strategic Branding was formed.

(3) He wanted Strategic Branding to remain a one-man company. Anything that was done had to be done by him. He wanted a solution requiring minimal work from him managing funds. He understood that the RT would have little impact on his time.

(4) The RT was about looking to the future, to provide a legacy for future generations of his family. Whilst in the main the RT funds were to be used for commercial activities and investments for Strategic Branding, he wanted to create a trust where his family could, in the future, request funds on relatively favourable commercial terms to enhance their lives. However, this was a secondary benefit and if it transpired that his family could not obtain loans from the trust he would have continued with the adherence as the risks to the business were at the forefront of his mind.

(5) He was concerned about the current economic position and the risk of companies failing.

(6) The RT could be used to assist Strategic Branding in fostering relationships with clients and contacts, and suppliers. He could use funds to invite clients to an event.

(7) The purpose was never supposed to be lending him money. It was to benefit persons who provided or who may in the future provide services, custom, products or finance to the founder of the trust, or who have provided or may provide in future finance to the Trustees. Providing loans to Mr Wilson furthered this aim by his using the funds for commercial advantage items such as websites, purchase of a car to expand relationships with clients, suppliers and others, thus increasing profit and creating new commercial opportunities.

(8) He did not specifically ask about tax, but did recall that the corporation tax payable would be minimal. He has no recollection of employment taxes being mentioned and does not believe they were discussed. As far as he was concerned, he would never take funds for his personal benefit and so employment taxes were not relevant. He did not really consider tax because this was not one of his key drivers – either for Strategic Branding or for him personally.

92. Understandably, these statements do not focus on distinguishing between what might be viewed as a purpose of a transaction or the consequences of taking certain action. I have sought when making findings to use the more neutral term of "reasons".

93. Notwithstanding the varied reasons and explanations given by Mr Wilson in his witness statements for entering into the RT and making contributions thereto, his second witness statement indicated that the main reason was that of asset protection (and he confirmed this at the hearing). His second witness statement says that he had reviewed the option of a trust, been made aware of some of the drawbacks and conducted a lot of research into asset protection "over the years". This was "not something I entered into lightly". He explained what he meant by asset protection - Strategic Branding had a lot of risks. He wanted to protect the cash generated by the company. The trust allowed him to put that into a secure location that could not be attacked by third parties (having referred in his first witness statement to the risk of litigation from his former employer). It was there to protect suppliers and creditors of the business as well as the business itself.

94. Mr Wilson acknowledged that these reasons were not set out or referred to in the resolutions of Strategic Branding or the Questionnaire. He accepted that those were template documents, and he had not thought to amend them.

95. I have considered all of the reasons and explanations given in the light of all of the evidence (and start with those relating to asset protection). Ms Brown sought to emphasise in her submissions that even if I do not agree with the reasons given by Mr Wilson (ie that they were achieved by the steps taken, or that the RT was not suitable for his aims), that does not mean they were not his reasons.

96. HMRC challenged these reasons in cross-examination of Mr Wilson, and submitted that none of these reasons withstand scrutiny; the true main reason (submitted Mr Ghosh) why Mr Wilson implemented the scheme was to extract funds from Strategic Branding without incurring any liability to income tax or NICs and while securing a corporation tax deduction in respect of those extracted funds.

Asset protection

97. Mr Wilson's explanation about protecting the assets of the company focused on protecting the profits and cash of the company for the benefit of suppliers and creditors (as well as the business itself) from attack by third parties, referring in particular to the risk of litigation from his former employer. Mr Wilson said that although it was an action being threatened against him, Strategic Branding was mentioned and the noise from his previous employer was about Strategic Branding. He was given the information about the RT by Mr Chiesa (of Westwood Trustees), and was told that the RT might mitigate the risk.

98. The legal action was being threatened against Mr Wilson in the context of alleged breaches of restrictive covenants by Mr Wilson. Harvey Ingram LLP had been instructed by Chapco Group Ltd (Mr Wilson's former employer) and wrote to Mr Wilson's solicitors on 31 October 2011 referring to activities undertaken by Mr Wilson following a settlement agreement which had been reached with his former employer on 31 August 2011, alleging that Mr Wilson's activities in contacting certain people were in breach of restrictive covenants. That letter referred to the restrictions as applying for three years from 26 August 2010 and asked for immediate information in relation to Mr Wilson's activities as director at Strategic Branding. Mr Wilson's solicitors responded on 3 November 2011 and there was further correspondence in November 2011 but nothing materialised.

99. Mr Wilson's evidence was that he considered that his previous employer was attempting to limit his trade in the company, and he took steps to remove any potential risk by moving all

company profits into the RT. He continued with this due to the risk surrounding his previous company. These risks remained in subsequent years.

100. I accept that Mr Wilson perceived that the threat of legal action was a threat to both himself and to the activities of Strategic Branding when this correspondence was received from his former employer's solicitors. I also accept that it was reasonable to reach that conclusion. However, I do not accept that this was then the reason or driver for adhering to the RT or making contributions to the RT:

(1) Strategic Branding resolved to adhere to the RT on 21 May 2012 and to make the first contribution, which was paid on 27 June 2012. The final contribution which is the subject of this appeal (although more were paid in later years) was paid on 30 September 2015. I do not agree that a potential threat that emerged and faded away in November 2011 can explain the decision to pay all of Strategic Branding's profits to the RT for several years afterwards.

(2) Whilst Mr Wilson said that putting money into the RT was like putting it into a vault, this does not sit with my finding that it was pre-ordained that the money would then be lent to him. The profits of the business arose in Strategic Branding; entering into the RT, contributing those profits to the RT and then lending the funds to Mr Wilson, far from protecting the cash from legal action being threatened against Mr Wilson, instead moved them arguably to a position of greater risk, with the RT being an unsecured creditor of Mr Wilson. If protecting the cash or the profits from legal action had been a reason or driver for the contributions to the RT, then, in circumstances where the illustration of the types of risk was legal action being threatened against Mr Wilson, it makes little sense for the money to have been lent to Mr Wilson.

(3) The RT is a discretionary trust, and the Trustees have power to pay money to beneficiaries of that trust. Mr Wilson knew this – in his evidence he referred to the RT as being for the benefit of these beneficiaries, and he sent letters to potential beneficiaries drawing their attention to the possibility of writing to the Trustees and asking for a payment. This is potentially consistent with the possibility of the assets and cash being available for suppliers and creditors of Strategic Branding (at least those who applied for funds) but not for Strategic Branding to then use those funds, as the Trustees had power to distribute all of the trust assets.

101. Ms Brown submitted that even if I conclude that the stated reason of asset protection was not achieved by the steps which were taken, this does not mean that it was not a genuine reason of Mr Wilson, having regard to his subjective position and knowledge.

102. I recognise that I am required to make findings as to Mr Wilson's reasons; however, factors which indicate that stated aims would not be achieved are relevant in assessing whether those reasons are true, or genuine. On the facts before me, having regard to the facts that Mr Wilson said he obtained advice as to the RT arrangement, as well as conducting his own research, and the fact that the money contributed to the RT (after payment of fees) ended up in his possession and under his control – a matter which was obvious – I consider that the inadequacies of the arrangement for achieving the stated reason are such as to lead me to conclude that it was not a genuine or true reason for Strategic Branding making contributions to the RT.

Put profits aside for the future of the business

103. In his witness statement Mr Wilson explained that the RT allowed him to put something aside for the future of the business.

104. I am not satisfied that this was a reason for making contributions to the RT:

(1) On the basis of the facts as I have found them, the contributions to the RT were lent to Mr Wilson, and under the terms of the Finance Agreement the lender did not have the right to call for early repayment of these loans.

(2) Furthermore, on the face of the Trust Deeds the RT is a discretionary trust under which the Trustees are empowered to make distributions to beneficiaries, a matter of which Mr Wilson was aware (as although he did not see the Original Trust Deed he did have the Questionnaire and did send the letters to potential beneficiaries). The Trustees could theoretically have distributed all of the trust assets, in which case there would have been nothing set aside for the future (albeit that the Trustees did not have the opportunity to make such distributions as the trust assets were lent to Mr Wilson on each occasion).

(3) Furthermore, even if the trust assets had been invested in more liquid assets, and not distributed, Mr Wilson offered no satisfactory explanation as to how this would constitute putting something aside for the future of the business.

Time involved in managing funds

105. In his witness statement Mr Wilson said that he wanted a solution requiring minimal work from him in managing funds and that the RT "is like putting the money in the bank and forgetting about it". The "core benefit to the trust model for me is mainly due to the fact that the Trust was not managed by me. There is governance over the Trust and that I do not have any day to day management of the funds within the Trust. This meant that I did not have to worry about this, nor did I have to waste time."

106. I do not accept this as a reason for adhering to the RT or making contributions thereto. I have already stated that there was no evidence before me of anyone other than Mr Wilson making a decision in relation to the funds contributed by Strategic Branding. There was also little evidence of any action being taken by others, other than that I infer that someone at Westwood Trustees or Baxendale Walker would have been required to give the instruction to process a bank transfer of (approximately) 90% of contributions received to SMEL. Nearly everything that needed to be done in relation to these funds was done by Mr Wilson. Not only does this mean that using the RT did not save him time, but I consider that it increased the time he needed to spend dealing with the amounts involved rather than have Strategic Branding invest the amounts or make direct loans to him, as he had to prepare the resolutions of Strategic Branding to make contributions, send Letters of Wishes, operate the bank account of SMEL and complete Memoranda of Further Advances. This suggested reason is not credible.

Legacy for future generations

107. In his witness statement Mr Wilson said that he wanted to create a trust where his family could, in the future, request funds on relatively favourable commercial terms to enhance their lives. However, this was a "secondary benefit" and if it transpired that his family could not obtain loans from the trust he would have continued with the adherence. He did, however, confirm when giving evidence that one of his purposes was to benefit his family.

108. I accept that Mr Wilson, as director of Strategic Branding, wanted to benefit his family: this was the case when running the business and when making contributions to the RT.

Loans to Mr Wilson provided commercial advantages to company

109. Mr Wilson explained in his witness statement that the purpose was never supposed to be lending him money. It was to benefit persons who provided or who may in the future provide services, custom, products or finance to the founder of the trust, or who have provided or may provide in future finance to the Trustees. Providing loans to him furthered this aim by using the funds for commercial advantage items such as websites, purchase of a car to expand

relationships with clients, suppliers and others, thus increasing profit and creating new commercial opportunities.

110. There is a clear problem within that explanation, which is that it fails to recognise the difference between persons providing services to the Founder, the Trustees and Strategic Branding. It is only the latter which is then addressed by the final sentence. Yet these are direct statements in Mr Wilson's witness evidence (written, not prompted by cross-examination) as to Strategic Branding's purposes.

111. I focus on whether (ignoring the statements about benefitting those who provide services to the Founder or the Trustees) there is any other evidence to support an explanation that the RT lending money to Mr Wilson benefitted Strategic Branding. This is potentially relevant to the reasons for Strategic Branding making contributions to the RT as I have found that it was pre-ordained that such contributions would then (after payment of fees) be lent to Mr Wilson.

(1) In his first witness statement he had said he did not intend to use funds for his personal benefit but that he had an entrepreneurial spirit and wanted to invest the funds by investing them wisely in investment opportunities.

(2) In his second witness statement he emphasised that these were personal loans, agreed at a commercial rate and used by him personally as he sees fit in exactly the same way as any other personal loan from a bank.

(3) The investments that were made by the RT were the making of loans to Mr Wilson, at LIBOR plus 2% under the Finance Agreement. The interest is rolled-up during the term of the loan, only payable on repayment.

(4) Mr Wilson did refer to using some of the money for networking in social situations, and to increase the "gravitas" of Strategic Branding by buying a luxury car (a Porsche 911). He said this helped to grow the business as he was able to foster and build relationships.

(5) Mr Wilson had looked to invest in a rental lodge and he considered that this would offer good returns. He did ultimately identify "Big Husky Lodge" – this was bought by Verstand Properties Ltd ("Verstand"), a company that was jointly owned by Mr Wilson and his brother. His evidence was that some of the loan from SMEL was used for this investment (about £70,000), and that a portion of the loan from SMEL was assigned to Verstand (which agreed to pay a higher interest rate of LIBOR plus 5%). This would have been in 2015. The return to SMEL (and thus the RT) was still the rolled-up interest (rather than any interest in the returns from renting the lodge). There was no evidence of the assignment agreement, the accrual or payment of interest by Verstand, or a direct loan relationship between Verstand and SMEL. Mr Wilson's witness statement recorded that all of the loans from SMEL had been refinanced, such that no money was now owed by him to another company; there was no mention of Verstand's role in all of this. I do not accept that there was an assignment of some of the debt to Verstand; I do accept that Mr Wilson used some of the funds lent to him by SMEL to fund Verstand's purchase of Big Husky Lodge.

112. The RT paid fees at approximately 10% on the contributions received, and invested the balance in loans to Mr Wilson. Mr Wilson did not take a salary or dividends from Strategic Branding. His evidence had been that he had enough savings for two to three years; but he did not produce any documentary evidence that he had only been funding his personal expenditure from his savings, the terms of the Finance Agreement did not restrict how the funds could be used, and his own evidence was that he could use the amounts lent as he chose and he referred to some of this as personal expenditure. There was no evidence that the luxury car had not

been used by Mr Wilson in his personal capacity; and the acquisition of the rental lodge only benefitted Strategic Branding in that the returns from that investment could be used to fund payment of the interest on the loan (when due).

113. Thus whilst I accept that some of the amount lent by SMEL to Mr Wilson was used by him to increase the profile of Strategic Branding, and to build relationships with potential customers, there was insufficient evidence for me to conclude that this was an explanation for all of the contributions made by Strategic Branding to the RT.

Economic cost of earning profits

114. Each resolution of Strategic Branding to make a contribution to the RT referred to the contributions as reflecting part of the economic cost to the company of earning its profits. I have referred (at [66(2)]) to Mr Wilson's somewhat unclear evidence on the meaning of this phrase, or what he understood by it.

115. In his own evidence he did not put this forward as a reason for Strategic Branding making contributions to the RT; instead, I took his explanations as an attempt to explain why this language was not wrong. These resolutions were based on templates which he had not amended. I have concluded that this was not a reason that Strategic Branding made the contributions to the RT.

Tax advantages

116. Mr Wilson's evidence was that he did not really consider tax because this was not one of his key drivers. HMRC's position is that only credible reason for the contributions and the arrangement generally is obtaining the tax advantages (at the very least obtaining the tax deduction for making contributions).

117. Mr Wilson had received and, he said, understood the marketing material from Baxendale Walker in relation to RT arrangements. He took advice to confirm that he could claim a deduction for contributions made by Strategic Branding to the RT. I am satisfied that this was important to him.

118. Mr Wilson's evidence was that he had no recollection of employment taxes being mentioned and does not believe they were discussed. As far as he was concerned, he would never take funds for his personal benefit and so employment taxes were not relevant.

119. Irrespective of whether he can remember what he was told about employment taxes, it is clear that Mr Wilson's expectation was that there would be no tax payable if amounts were lent to him.

Knowledge and understanding of Mr Wilson

120. Mr Ghosh challenged Mr Wilson's knowledge and/or understanding in relation to the RT.

121. Recurring themes in Mr Ghosh's cross-examination of Mr Wilson were whether the documentation was important to him eg SMEL was a "Fiduciary" under the Fiduciary Services Agreement but Mr Wilson said he had not seen the Original Trust Deed; and at least one loan was made to him before the Letter of Wishes had been sent (and there were other examples of the steps being taken in the "wrong" order). Mr Wilson had signed documents without (Mr Ghosh submitted) understanding them, eg the references to contributions being part of the economic cost of earning profits.

122. Mr Wilson's evidence was that he had not seen the Original Trust Deed (or, I infer, the Amended Trust Deed) before the preparation for this appeal, the documentation and correct administration in relation to the RT was important to him, and he was mindful that as a director of SMEL he was acting as a fiduciary (impliedly of the RT).

123. I accept Mr Wilson's evidence that he had not seen the Original Trust Deed at the time that Strategic Branding entered into the Deed of Adherence. His explanation for this was that he did not know this document existed and so he could not realistically have known to ask to see it. However, the documentation which Mr Wilson signed on behalf of Strategic Branding contained various references to the Original Trust Deed, or at least indications that some form of document existed in relation to the RT, eg:

(1) Strategic Branding's written resolution to adhere to the RT refers to the trust "established under irrevocable trust dated 21st February 2011";

(2) the first recital to the Deed of Adherence defines the Trust Deed and it is then referred to again in the document, clause 1 referring to "clause 9 of the Trust Deed"; and

(3) the form of Resolution B, used each time a contribution was made, is a short document and refers in the first paragraph to "the scheme which was established under irrevocable trust by WUT No 1 Ltd by way of Deed on 21st February 2011".

124. The fact that the Trust Deed was a document which was in existence should have been readily apparent to Mr Wilson when he resolved to adhere to the RT, when he signed the Deed of Adherence and each time Strategic Branding resolved to make a further contribution to the RT.

125. I have already referred (in the context of Contributions and Loans) to some steps where the Letter of Wishes was sent to the Trustees after the loan had been made by SMEL to Mr Wilson. Mr Wilson had said these were administrative errors.

126. I have concluded that the evidence supports the conclusions that Mr Wilson had relied on the advice from Mr Chiesa at Westwood Trustees as to the overall arrangements and then sought to prepare and sign the required documentation (using the templates with which he had been provided), but was doing so as this was how he had been told to proceed.

127. I also conclude that Mr Wilson did not fully understand the details of the arrangements, eg the operation of the Fiduciary Services Agreement or what was meant by the various references to the economic cost of earning profits.

128. Mr Wilson had signed the Fiduciary Services Agreement on behalf of SMEL and said he was very familiar with this document, which (he said) gave him fiduciary powers over the funds in the trust and he can approve investments on behalf of the trust. His explanation was that it allows him essentially to act almost as the trustee.

129. The Fiduciary Services Agreement is just one page long and says that the Fiduciary, ie SMEL, shall have all rights to deal with the property (which is defined as the property granted by the Principal to the Fiduciary) as if it was the beneficial owner. The person defined as Fiduciary is not a trustee, they only have responsibilities or control over funds transferred to them and then they have the right to deal as beneficial owner. Mr Wilson did not offer any evidence as to who UTW was, a matter of some significance given that UTW is not the Trustee and it was the person which was defined as Principal and was to transfer the funds to SMEL (at which point SMEL would then have the rights set out in the Fiduciary Services Agreement). Mr Wilson must have known that UTW was not the Trustee as he sent each Letter of Wishes to BTIL, the actual Trustees. Furthermore, the recitals to the Finance Agreement refer to SMEL as a nominee of the Trustees, in circumstances where there is no evidence of the Trustees appointing SMEL as such a nominee and which begs the question as to UTW.

130. All of the resolutions to make contributions to the RT, and the Questionnaire, referred to the economic cost of earning profits, eg Resolution A, used on 21 May 2012 for the first contribution, included that the periodic contributions to be made by the company "would reflect

part of the economic cost to the company of earning its profits for the period", and the Questionnaire refers to their being a commercial but not a legal obligation on the company to contribute funds.

131. Mr Wilson's explanations as to what was meant by this was confusing and contradictory. This supports my conclusion that he had not sought to understand or challenge the phrases used.

LEGISLATION

Corporation tax

132. The requirement that expenses are wholly and exclusively for the purposes of the trade is set out in s54(1) CTA 2009, which provides:

> "In calculating the profits of a trade, no deduction is allowed for—
>
> (a) expenses not incurred wholly and exclusively for the purposes of the trade, or
>
> (b) losses not connected with or arising out of the trade."

133. The limitation on deductions for "employee benefit contributions" is set out in s1290 to s1296 CTA 2009. Section 1290 relevantly provides:

> "(1) This section applies if, in calculating for corporation tax purposes the profits of a company ("the employer") of a period of account, a deduction would otherwise be allowable for the period in respect of employee benefit contributions made or to be made (but see subsection (4)).
>
> (2) No deduction is allowed for the contributions for the period except so far as—
>
> (a) qualifying benefits are provided, or qualifying expenses are paid, out of the contributions during the period or within 9 months from the end of it, or
>
> (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made during the period or within 9 months from the end of it.
>
> (3) An amount disallowed under subsection (2) is allowed as a deduction for a subsequent period of account so far as—
>
> (a) qualifying benefits are provided out of the contributions before the end of the subsequent period, or
>
> (b) if the making of the contributions is itself the provision of qualifying benefits, the contributions are made before the end of the subsequent period.
>
> …
>
> (4) This section does not apply to any deduction that is allowable-
>
> (a) for anything given as consideration for goods or services provided in the course of a trade or profession,
>
> (b) for contributions under a registered pension scheme or under a superannuation fund to which section 615(3) of ICTA applies,
>
> (c) for contributions under a qualifying overseas pension scheme in respect of an individual who is a relevant migrant member of the pension scheme in relation to the contributions,
>
> (d) for contributions under an accident benefit scheme,
>
> (e) under Chapter 1 of Part 11 (share incentive plans),

(f) under section 67 of FA 1989 (qualifying employee share ownership trusts), or

(g) under Part 12 (other relief for employee share acquisitions)."

134. Section 1291 CTA 2009 relevantly provides:

"(1) For the purposes of section 1290 an "employee benefit contribution" is made if, as a result of any act or omission—

(a) property is held, or may be used, under an employee benefit scheme, or

(b) there is an increase in the total value of property that is so held or may be so used (or a reduction in any liabilities under an employee benefit scheme).

(2) For this purpose "employee benefit scheme" means a trust, scheme or other arrangement for the benefit of persons who are, or include, present or former employees of the employer or persons linked with present or former employees of the employer.

(3) Section 554Z1 of ITEPA 2003 applies for the purposes of subsection (2) but as if references to A were to a present or former employee of the employer.

(4) So far as it is not covered by subsection (2), "employee benefit scheme" also means—

(a) an arrangement ("the relevant arrangement") within subsection (1)(b) of section 554A of ITEPA 2003 to which subsection (1)(c) of that section applies, or

(b) any other arrangement connected (directly or indirectly) with the relevant arrangement."

Income tax and NICs – Part 7A

135. Section 554A ITEPA 2003 relevantly provides:

"(1) Chapter 2 applies if—

(a) a person ("A") is an employee, or a former or prospective employee, of another person ("B"),

(b) there is an arrangement ("the relevant arrangement") to which A is a party or which otherwise (wholly or partly) covers or relates to A,

(c) it is reasonable to suppose that, in essence—

(i) the relevant arrangement, or

(ii) the relevant arrangement so far as it covers or relates to A,

is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,

(d) a relevant step is taken by a relevant third person, and

(e) it is reasonable to suppose that, in essence—

(i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement, or

(ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement.

(2) In this Part "relevant step" means a step within section 554B, 554C or 554D.

(3) Subsection (1) is subject to subsection (4) and sections 554E to 554Y.

…

(5) In subsection (1)(b) and (c)(ii) references to A include references to any person linked with A.

(6) For the purposes of subsection (1)(c) it does not matter if the relevant arrangement does not include details of the steps which will or may be taken in connection with providing, in essence, rewards or recognition or loans as mentioned (for example, details of any sums of money or assets which will or may be involved or details of how or when or by whom or in whose favour any step will or may be taken).

(7) In subsection (1)(d) "relevant third person" means—

(a) A acting as a trustee,

(b) B acting as a trustee, or

(c) any person other than A and B.

…

(11) For the purposes of subsection (1)(e)—

(a) the relevant step is connected with the relevant arrangement if (for example) the relevant step is taken (wholly or partly) in pursuance of an arrangement at one end of a series of arrangements with the relevant arrangement being at the other end, and

(b) it does not matter if the person taking the relevant step is unaware of the relevant arrangement.

(12) For the purposes of subsection (1)(c) and (e) in particular, all relevant circumstances are to be taken into account in order to get to the essence of the matter."

136. Section 554B sets out circumstances in which a person takes a relevant step and relevantly provides:

"(1) A person ("P") takes a step within this section if—

(a) a sum of money or asset held by or on behalf of P is earmarked (however informally) by P with a view to a later relevant step being taken by P or any other person (on or following the meeting of any condition or otherwise) in relation to—

(i) that sum of money or asset, or

(ii) any sum of money or asset which may arise or derive (directly or indirectly) from it, or

(b) a sum of money or asset otherwise starts being held by or on behalf of P, specifically with a view, so far as P is concerned, to a later relevant step being taken by P or any other person (on or following the meeting of any condition or otherwise) in relation to—

(i) that sum of money or asset, or

(ii) any sum of money or asset which may arise or derive (directly or indirectly) from it.

(2) For the purposes of subsection (1)(a) and (b) it does not matter—

(a) if details of the later relevant step have not been worked out (for example, details of the sum of money or asset which will or may be the subject of the

step or details of how or when or by whom or in whose favour the step will or may be taken),

(b) if any condition which would have to be met before the later relevant step is taken might never be met, or

(c) if A, or any person linked with A, has no legal right to have a relevant step taken in relation to any sum of money or asset mentioned in subsection (1)(a)(i) or (ii) or (b)(i) or (ii) (as the case may be).

(3) For the purposes of subsection (1)(b) it does not matter whether or not the sum of money or asset in question has previously been held by or on behalf of P on a basis which is different to that mentioned in subsection (1)(b).

137. Section 554C sets out other circumstances in which a person takes a relevant step and relevantly provides:

"(1) A person ("P") takes a step within this section if P—

(a) pays a sum of money to a relevant person,

(b) transfers an asset to a relevant person,

(c) takes a step by virtue of which a relevant person acquires an asset within subsection (4),

(d) makes available a sum of money or asset for use, or makes it available under an arrangement which permits its use—

(i) as security for a loan made or to be made to a relevant person, or

(ii) otherwise as security for the meeting of any liability, or the performance of any undertaking, which a relevant person has or will have, or

(e) grants to a relevant person a lease of any premises the effective duration of which is likely to exceed 21 years.

(2) In subsection (1) "relevant person" —

(a) means A or a person chosen by A or within a class of person chosen by A, and

(b) includes, if P is taking a step on A's behalf or otherwise at A's direction or request, any other person.

(3) In subsection (2) references to A include references to any person linked with A."

138. The charge under Part 7A then arises by virtue of s554Z2, which provides:

"(1) If this Chapter applies by reason of a relevant step, the value of the relevant step (see section 554Z3) counts as employment income of A in respect of A's employment with B—

(a) if the relevant step is taken before A's employment with B starts, for the tax year in which the employment starts, or

(b) otherwise, for the tax year in which the relevant step is taken.

(2) If the relevant step gives rise to—

(a) an amount which (apart from this subsection) would be treated as earnings of A under a provision of the benefits code, or

(b) any income of A which (apart from this subsection) would be dealt with under Chapter 3of Part 4 of ITTOIA 2005,

subsection (1) applies instead of that provision of the benefits code or Chapter 3 of Part 4 of ITTOIA 2005 (as the case may be).

(3) In particular, in a case in which the relevant step is the making of an employment-related loan (within the meaning of Chapter 7 of Part 3), the effect of subsection (2)(a) is that the loan is not to be treated for any tax year as a taxable cheap loan for the purposes of that Chapter."

139. The interpretation clause, s554Z, includes:

"(3) "Arrangement" includes an agreement, scheme, settlement, transaction, trust or understanding (whether or not it is legally enforceable)"

140. Regulation 22B Social Security (Contributions) Regulations 2001 ("SSC Regulations 2001") provides that amounts treated as employment income by Part 7A ITEPA 2003 are also treated as remuneration derived from an employed earner's employment for the purposes of s3 Social Security Contributions and Benefits Act 1992 ("SSCBA 1992").

Income tax and NICs – General earnings and Rangers

141. Section 9 ITEPA 2003 relevantly provides:

"(1) The amount of employment income which is charged to tax under this Part for a particular tax year is as follows.

(2) In the case of general earnings, the amount charged is the net taxable earnings from an employment in the year."

142. Section 62 ITEPA 2003 provides:

"(1) This section explains what is meant by "earnings" in the employment income Parts.

(2) In those Parts "earnings", in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) "money's worth" means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7))."

143. Section 6 SSCBA 1992 imposes a liability for Class 1 NICs in respect of an employed 'earner's' employment. Section 8 SSCBA 1992 provides for the calculation of that liability. Section 3(1) SSCBA 1992 gives the definition of earnings and earner as follows:

"(1) In this Part of this Act and Parts II to V below—

(a) "earnings" includes any remuneration or profit derived from an employment; and

(b) "earner" shall be construed accordingly."

Procedure – enquiries, discovery assessments, decisions and determinations

144. Enquiries were opened into Strategic Branding's company tax returns for the accounting periods ending 30 September 2014 and 2015 under paragraph 24 of Schedule 18 FA 1998 which relevantly provides:

> "(1) An officer of Revenue and Customs may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.
>
> (2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the day on which the return was delivered (subject to sub-paragraph (6)).
>
> (3) If the return was delivered after the filing date, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the return was delivered.
>
> (4) If the company amends its return, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the amendment was made.
>
> …"

145. Discovery assessments were issued to Strategic Branding in respect of the accounting periods ending 28 September 2012 and 30 September 2012 and 2013 under paragraph 41 of Schedule 18 FA 1998 which relevantly provides:

> "If an officer of Revenue and Customs discovers as regards an accounting period of a company that—
>
> (a) an amount which ought to have been assessed to tax has not been assessed, or
>
> (b) an assessment to tax is or has become insufficient, or
>
> (c) relief has been given which is or has become excessive,
>
> they may make an assessment (a "discovery assessment") in the amount or further amount which ought in their opinion to be charged in order to make good to the Crown the loss of tax.
>
> …"

146. Paragraph 42 provides that HMRC may only issue a discovery assessment for an accounting period for which the company has delivered a company tax return if the circumstances in paragraphs 43 or 44 are met. Paragraph 44 provides:

> "(1) A discovery assessment for an accounting period for which the company has delivered a company tax return, or a discovery determination, may be made if at the time when an officer of Revenue and Customs-
>
> (a) ceased to be entitled to give a notice of enquiry into the return, or
>
> (b) in a case where a notice of enquiry into the return was given
>
> (i) issued a partial closure notice as regards a matter to which the situation mentioned in paragraph 41(1) or (2) relates, or
>
> (ii) if no such partial closure notice was issued, issued a final closure notice,

> they could not have been reasonably expected, on the basis of the information made available to them before that time, to be aware of the situation mentioned in paragraph 41(1) or (2).
>
> (2) For this purpose information is regarded as made available to an officer of Revenue and Customs if-
>
> (a) it is contained in a relevant return by the company or in documents accompanying any such return…"

147. The time limits for issuing a discovery assessment are set out in paragraph 46 of Schedule 18 FA 1998. There is no dispute that the discovery assessments (if valid) were issued to Strategic Branding in time.

148. The Section 8 Decision was made pursuant to s8 Social Security (Transfer of Functions, etc.) Act 1999. Rules relating to the making of decisions are set out in the Social Security Contributions (Decisions and Appeals) Regulations 1999, regulation 4(1) of which provides:

> "A decision which, by virtue of section 8 of the Transfer Act or Article 7 of the Transfer Order, falls to be made by an officer of the Board under or in connection with the Social Security Contributions and Benefits Act 1992, the Social Security Administration Act 1992, the Social Security Contributions and Benefits (Northern Ireland) Act 1992, the Social Security Administration (Northern Ireland) Act 1992, the Jobseekers Act 1995 or the Jobseekers (Northern Ireland) Order 1995–
>
> (a) must be made to the best of his information and belief, and
>
> (b) must state the name of every person in respect of whom it is made and–
>
> (i) the date from which it has effect, or
>
> (ii) the period for which it has effect."

149. The Regulation 80 Determinations were made under regulation 80 of the PAYE Regulations 2003, which relevantly provides:

> "(1) This regulation applies if it appears to HMRC that there may be tax payable for a tax year under … regulation 68 by an employer which has neither been–
>
> (a) paid to the Inland Revenue, nor
>
> (b) certified by the Inland Revenue under [various regulations].
>
> …
>
> (2) HMRC may determine the amount of that tax to the best of their judgment, and serve notice of their determination on the employer.
>
> …
>
> (4) A determination under this regulation may–
>
> (a) cover the tax payable by the employer under regulation … 68 for any one or more tax periods in a tax year, and
>
> (b) extend to the whole of that tax, or to such part of it as is payable in respect of–
>
> (i) a class or classes of employees specified in the notice of determination (without naming the individual employees), or
>
> (ii) one or more named employees specified in the notice.

(5) A determination under this regulation is subject to Parts 4, 5, 5A and 6 of TMA (assessment, appeals, collection and recovery) as if–

(a) the determination were an assessment, and

(b) the amount of tax determined were income tax charged on the employer,

and those Parts of that Act apply accordingly with any necessary modifications."

DISCUSSION

150. The Issues, and burden of proof, have been set out at [55] to [56] above. In the Discussion below, I have addressed those matters in that same order.

Corporation tax – wholly and exclusively

151. Section 54 CTA 2009 provides that a deduction is only allowed for expenses incurred "wholly and exclusively for the purposes of the trade".

152. Ms Brown submitted that although the evidence was complex, this point was simple. She acknowledged that both parties would be taking me to the same authorities, and relied on *Scotts Atlantic Management Limited v HMRC* [2015] UKUT 66 (TCC), *Vodafone Cellular Ltd v Shaw* [1997] STC 734 and *Marlborough DP Ltd v HMRC* [2021] UKFTT 304 (TC). In summary, Ms Brown submitted that:

(1) the intentions of those who devised and marketed the arrangements are not relevant to the purposes of Strategic Branding;

(2) Mr Wilson, as director of Strategic Branding and with his fiduciary duty to the company, made contributions to the RT acting in the best interests of the company, and in doing so was acting wholly and exclusively for the purposes of the company's trade;

(3) he had given evidence as to the reasons for entering into the trust, and the benefits of the trust arrangement. The Tribunal must, as is clear from the authorities, determine which are his purposes or objects in contrast to the effects;

(4) something of which a taxpayer is unaware, or the outcome of which he did not understand, cannot be a purpose;

(5) even if Mr Wilson's main motivation had been to avoid tax – which was denied – since the applicability of the deduction relies on the distributions to the RT being made wholly and exclusively for the purposes of the trade, his purpose would always have been wholly and exclusively a trade one;

(6) the mere fact that a choice as to how to benefit the trade is influenced or dictated by the tax consequences does not necessarily mean that the choice involves a duality of purpose as regards the expense; and

(7) even if the Tribunal concludes that the RT was unsuitable or inappropriate for Strategic Branding's purpose, of itself that does not mean that the contributions were not made for the purpose of benefitting the trade, as viewed subjectively by Mr Wilson. It was not denied that Mr Wilson, as director of Strategic Branding, had a view as to the outcome of the decision to make contributions to the trust, ie the possibility that his family could borrow from the trust. The trust achieves Mr Wilson's subjective purpose of protecting the assets of the company; and one outcome is that funds could be available for his family.

153. Mr Ghosh relied in particular on *Strong & Co Ltd v Woodifield* [1906] AC 448, *Vodafone, Copeman (H M Inspector of Taxes) v William Flood & Sons, Ltd* 24 TC 53 and *Scotts Atlantic*. He submitted that:

(1) the reasons given by Mr Wilson for the company making the payments are not themselves credible; but even if they were, they have nothing to do with enabling Strategic Branding to carry on and earn profits in the trade and are not deductible in any event;

(2) in reality, the contributions were intended to form part of a pre-arranged scheme to reward Mr Wilson for his work for Strategic Branding without incurring any liability to tax. The contributions were therefore made for two purposes: to engineer a corporation tax deduction for Strategic Branding; and to reward Mr Wilson for his work as sole director and sole employee of Strategic Branding without incurring any liability for income tax or NICs;

(3) the tax avoidance scheme means the payments were not paid subjectively (in the mind of Mr Wilson, as the sole Strategic Branding director) for the purposes of Strategic Branding's trade or incurred as expenses enabling Strategic Branding to carry on and earn profits in any trade. Therefore, regardless of what other purposes Strategic Branding may have had and regardless of whether the contributions were used to make loans, the contributions are not deductible; and

(4) the recent decision of the Tribunal in *Marlborough* that any payment taxable under ITEPA 2003 is necessarily deductible as an expense which is wholly and exclusively incurred for the purposes of the payer's trade is contrary to the text of s54 CTA 2009 (nothing in which suggests that the taxability of a payment is relevant to its deductibility), contrary to principle (since the taxability or otherwise of a payment in the hands of a payee cannot determine its deductibility in the hands of the payer) and contrary to authority (not all payments of wages are deductible).

154. In *Strong v Woodifield* Lord Davey said at [453] that the phrase "for the purpose of the trade" means "for the purpose of enabling a person to carry on and earn profits in the trade". The Court of Appeal then considered the wholly and exclusively test in *Vodafone*, and Millett LJ set out the following propositions at [742e] to [743a]:

> "The leading modern cases on the application of the "exclusively" test are *Mallalieu v Drummond* [1983] AC 861 and *Mackinlay v Arthur Young McClelland Moores & Co.* [1990] 2 AC 239. From these cases the following propositions may be derived:
>
> 1. The words "for the purposes of the trade" mean "to serve the purposes of the trade". They do not mean "for the purposes of the taxpayer" but for "the purposes of the trade", which is a different concept. A fortiori they do not mean "for the benefit of the taxpayer."
>
> 2. To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment.
>
> 3. The object of the taxpayer in making the payment must be distinguished from the effect of the payment. A payment may be made exclusively for the purposes of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment.
>
> 4. Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

> To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the Commissioners, not for the taxpayer. Thus in *Mallalieu v Drummond* the primary question was not whether Miss Mallalieu intended her expenditure on clothes to serve exclusively a professional purpose or partly a professional and partly a private purpose; but whether it was intended not only to enable her to comply with the requirements of the Bar Council when appearing as a barrister in Court but also to preserve warmth and decency."

155. In *Scotts Atlantic*, in obiter consideration of the question of wholly and exclusively and whether there was duality of purpose (but based on authorities which are binding on this Tribunal), the Upper Tribunal reiterated that:

(1) The word "exclusively" means that if the expense was also incurred for some other purpose, it is not deductible (at [47]).

(2) Citing Millett LJ in *Vodafone* at [742] (and as set out more fully above), the object of the expenditure must be distinguished from its effect. If the sole object of the expenditure was the promotion of the business, the expenditure is deductible, even though it necessarily involves other consequences. Thus, the existence of a private advantage does not necessarily mean that the expenditure is disallowable. A merely incidental effect of expenditure is not necessarily an object of a taxpayer in making it. What the FTT must not do is to conclude that merely because there was an effect, that effect was an object (at [51] and [52])

(3) In addition, at [53], some results are so inevitably and inextricably involved in particular activities they cannot but be said to be a purpose of the activity and as a result the conscious motive of the taxpayer is not decisive.

(4) Neither the statutory provision nor any of the cases indicate that the way in which an expense is incurred will determine whether the expense is deductible. The question is what is the object of the expense, not what was the object of the means of incurring it. A trader may have a choice of the way in which it achieves an end which is exclusively for the benefit of the trade. The mere fact that a choice is influenced or dictated by the tax consequences does not necessarily mean that the choice involves a duality of purpose as regards the expense (at [54] and [55]).

(5) Expenditure is not disqualified because the nature of the activity necessarily involved some other result, in other words that the mere existence or knowledge of that result is not enough to give a dual purpose. But if the fact-finding tribunal concludes that its inquiry into the mind of the taxpayer revealed that the taxpayer actually had that other purpose as an object of the expenditure, then the fact that that result is a natural consequence of the expenditure will not cause that finding to be perverse (at [74]).

156. On the facts in *Scotts Atlantic* the Upper Tribunal concluded that a deduction was not available because "one purpose was to implement a pre-arranged scheme in order to obtain a tax deduction; the purpose was not simply to benefit employees and directors through the medium of an employment benefit scheme" (at [81]).

157. Before applying the principles set out in these authorities to the facts before me, I address the recent decision of the Tribunal in *Marlborough*. The appellant in that case had implemented a remuneration trust arrangement which had been marketed by Baxendale Walker; and on the

basis of the transactions as described in that decision it is clear that the documentation was almost identical to that before me. Both Ms Brown and Mr Ghosh noted that in *Marlborough* the appellant had accepted that, if (as the Tribunal had decided) the relevant sums were not taxable under ITEPA 2003, then no corporation tax deduction should be available in respect of the making of the contributions. The Tribunal went on to consider whether, as HMRC argued in that appeal and as they argue before me, the appellant was not entitled to such a deduction even if the relevant sum was taxable.

158. Judge Morgan agreed with the appellant's submission that the appellant would be entitled to deduct the contributions in computing its profits:

> "145. MDPL accepts that if, as we have decided, the relevant sums are not taxable under ITEPA, it is not entitled to a deduction for the contribution in computing its profits for the relevant accounting periods for corporation tax purposes. However, we have considered whether, as HMRC argue, MDPL is not entitled to such a deduction even if the relevant sums are taxable under ITEPA in case we are wrong in our conclusions that they are not so taxable and as we heard full argument on this point.
>
> …
>
> 158. In HMRC's view, accordingly, the payments were not either (a) paid subjectively (in the mind of Dr Thomas, as the sole director) for the purposes of MDPL's trade or (b) incurred as expenses enabling MDPL to carry on and earn profits in any trade. Therefore, regardless of what other purposes MDPL may have had and, regardless of whether the contributions were used to make loans (the only other apparent purpose was providing entertainment to clients), the contributions are not deductible.
>
> 159. Essentially, I agree with MDPL's contrary view that MDPL would be entitled to deduct the contributions in computing its profits for corporation tax:
>
> (1) At this stage of the analysis, we are acting on the assumption that the relevant sums constitute earnings. On that basis, it follows that:
>
> (a) MDPL's purpose in laying out, expending and incurring the contributions (and thereby funding the loans) must be taken to be to provide Dr Thomas with earnings; and
>
> (b) in choosing to deliver the relevant funds to Dr Thomas as contributions and loans through the RT arrangements, MDPL's purpose must be taken to be to avoid the sums being taxed as earnings on a basis that preserved the usual consequential tax effect of an employer paying such sums, namely, that MDPL would obtain a tax deduction for them in computing its profits for corporation tax purposes.
>
> (2) On that basis, having regard to the decision in *Scotts Atlantic* and, in particular, the comments of the UT at [65] to [74] of that decision, I cannot see that MDPL can be taken to have had a separate object of obtaining a tax deduction in laying out, expending or incurring the relevant expenses. The obtaining of a tax deduction for the relevant sums is, as it was put in *Scotts Atlantic*, the "ordinary, intended or realistically expected outcome" or, as it was put in *Vodafone*, a consequential or incidental benefit of, expending sums, which, according to MDPL's "true" intent, were incurred to reward Dr Thomas for his services as director. Moreover, I do not consider that (on the assumptions on which we must act at this stage of the analysis) the assessment of MDPL's underlying true purpose in making the contributions is affected by the fact that:

> (a) The particular method for extraction of the relevant sums into Dr Thomas' hands was dictated by the desire to ensure that, contrary to Dr Thomas'/MDPL's "true" purpose, the relevant sums are not viewed as earnings.
>
> (b) In order to give effect to and further this objective, MDPL acted ostensibly on the basis of a justification for obtaining a tax deduction for them (as stated, in particular, in the relevant resolutions) which, as Dr Thomas now accepts, was untrue rather than on the basis of the "true" reason, namely, that the contributions were made to reward Dr Thomas for his services as director.
>
> (3) As Mr Firth submitted, HMRC's argument is, in effect, that the existence of inaccurate or untrue statements in the relevant documents as regards the reasons for the routing of the relevant sums through the RT arrangements is a free-standing reason for a corporation tax deduction to be denied. However, the tribunal must simply establish, in all the circumstances, what MDPL's purpose was in making the contributions. Statements in documents (such as those in resolutions for the making of the contributions) which are admittedly untrue do not cast light on the "true" purpose for which the sums were expended.
>
> 160. Mr Woodman does not share the views expressed above. In his view, MDPL pursued a scheme to such an extent that the planned tax efficiency was an object in itself in addition to that of rewarding Dr Thomas. Accordingly, he does not consider that the relevant expenditure was incurred wholly and exclusively for the purposes of its trade."

159. Ms Brown submitted that If I were to conclude that the amounts are taxable under Part 7A, the reasoning in *Marlborough* should be followed such that a corporation tax deduction is available to Strategic Branding. Mr Ghosh disagreed, and also indicated that HMRC would be seeking permission to appeal the decision in *Marlborough*.

160. A decision of this Tribunal is not binding on me. However, as a tribunal of co-ordinate jurisdiction, the later tribunal will follow the decision of the earlier one as a matter of judicial comity unless it is convinced (or "satisfied") that the earlier decision is wrong (see *Gilchrist v HMRC* [2014] UKUT 169 (TCC) at [85] to [101] and *Fiander v HMRC* [2021] UKUT 156 (TCC) at [36]). I do not consider that HMRC's intention to appeal, or even the fact of a pending appeal, is relevant in circumstances where there has been no application to stay the current appeal behind that appeal pending a final determination in respect thereof. I take no account of such an intention.

161. However, I have respectfully decided not to adopt the reasoning of Judge Morgan in *Marlborough*:

> (1) Judge Morgan's conclusion on this point was, as both parties note, obiter. Furthermore, the conclusions reached by the Tribunal in *Marlborough* on the application of ITEPA 2003 mean that there is some uncertainty as to the scope of the conclusion expressed by Judge Morgan in relation to deductibility. At [145] the decision referred to the concession by the appellant which applied if the relevant sums were not "taxable under ITEPA"; this implies taxable under either Part 7A or as earnings (and the Tribunal had found that they were neither). However, the reasoning at [159] then expressly proceeds on the assumption that the relevant sums are earnings. I have concluded in the present appeal that the relevant sums are not earnings but are within Part 7A. I have significant doubts as to whether the reasoning of Judge Morgan is applicable in any event in this situation.

(2) I agree with Mr Ghosh's submission that there is no required connection between the taxability of the receipt and the deductibility of the payment (albeit that I accept that in many situations one would logically expect to see a correlation), and note that the existence of s1290 CTA 2009 (and in particular s1291(4)) means that the legislation contemplates taxable receipts with no deduction).

(3) Moreover, in circumstances where the issue before me requires me to consider the particular purpose(s) of Strategic Branding, I must have regard to my findings of fact rather than those on which the decision in *Marlborough* was based (which is particularly pertinent given that it was as to the purposes of MDPL that Judge Morgan and Mr Woodman reached different conclusions).

162. The expenses for which Strategic Branding claims a deduction are the contributions which were made to the RT (and these were the gross amounts of the contribution as resolved to be made by that company, out of which the fees were subsequently paid). I must therefore consider the principles established by the authorities, in particular:

(1) whether the contributions were for the purpose of enabling Strategic Branding to carry on and earn profits in the trade;

(2) this assessment must be based on the subjective intentions of Mr Wilson at the time of making the payments – these are not limited to his conscious motives, as some consequences are so inevitably and inextricably involved that (unless merely incidental) they must be taken to be a purpose for which the contributions were made;

(3) if the expense was also incurred for some other (non-trade) purpose, it is not deductible;

(4) the object must be distinguished from its effect - payments may be exclusively for the purposes of the trade even though they also secure a private benefit, if the securing of the private benefit was not the object but merely a consequential and incidental effect of the contributions; and

(5) the question is not what was the object of the means of incurring the expense. The mere fact that a choice is influenced or dictated by the tax consequences does not necessarily mean that the choice involves a duality of purpose as regards the expense.

163. For the reasons set out under Findings of Fact:

(1) I am not satisfied that the reason(s) for making contributions to the RT were asset protection, putting something aside for the future of the business, to save Mr Wilson's time, or that they were part of the cost of earning profits.

(2) I do accept that Mr Wilson wanted to benefit his family: this was the case when he was running the business and when making contributions to the RT.

(3) I also accept that some of the amounts lent by SMEL to Mr Wilson were used by him to increase the profile of Strategic Branding, and to build relationships with potential customers, there was insufficient evidence for me to conclude that this was an explanation for all of the contributions.

(4) Obtaining a corporation tax deduction for the making of the contributions was important to Mr Wilson, and it was his expectation was that there would be no tax payable if amounts were lent to him.

164. Viewing these findings in the light of the authorities, I have concluded that Strategic Branding's purposes were to benefit Mr Wilson's family and to enable some of the money to spent on building relationships with suppliers or increasing the profile of the company, and for

this to be done in a manner in which the company could obtain a tax deduction for payments in circumstances where there was no taxable receipt for Mr Wilson. These are not payments which are wholly and exclusively for the purposes of Strategic Branding's trade. I have considered whether the decision to use the RT arrangement could be said to be a (permitted) choice as to the means of incurring the expenditure (having regard to *Scotts Atlantic*). Such an approach does not assist on the basis of the facts as I have found them – the loans to Mr Wilson were pre-ordained steps, inextricably linked to the making of the contributions, and some of these amounts were used on personal expenditure; in addition, there was a purpose of benefitting his family (not just an effect).

165. For these reasons, Strategic Branding's appeal against HMRC's denial of corporation tax deductions for the contributions paid to the RT is dismissed.

Corporation tax – employee benefit schemes and contributions

166. Section 1290 CTA 2009 restricts any deductions that would otherwise be allowable for an accounting period in respect of "employee benefit contributions" made or to be made. I have set out below my conclusions on these rules as both parties addressed this restriction in their submissions.

167. It was common ground that:

(1) this restriction is only relevant if a deduction would otherwise be allowable for the contributions to the RT, ie if they would otherwise be deductible in accordance with s54; and

(2) if the contributions to the RT were employee benefit contributions, no qualifying benefits had been provided out of the contributions during the period or within nine months from the end of it (for the purpose of s1290(2)(a)).

168. The issue is therefore whether the contributions made to the RT by Strategic Branding were "employee benefit contributions" (which involves considering whether the RT was an "employee benefit scheme").

169. Section 1291 CTA 2009 provides:

> "(1) For the purposes of section 1290 an "employee benefit contribution" is made if, as a result of any act or omission—
>
> (a) property is held, or may be used, under an employee benefit scheme, or
>
> (b) there is an increase in the total value of property that is so held or may be so used (or a reduction in any liabilities under an employee benefit scheme).
>
> (2) For this purpose "employee benefit scheme" means a trust, scheme or other arrangement for the benefit of persons who are, or include, present or former employees of the employer or persons linked with present or former employees of the employer.
>
> (3) Section 554Z1 of ITEPA 2003 applies for the purposes of subsection (2) but as if references to A were to a present or former employee of the employer.
>
> (4) So far as it is not covered by subsection (2), "employee benefit scheme" also means—
>
> (a) an arrangement ("the relevant arrangement") within subsection (1)(b) of section 554A of ITEPA 2003 to which subsection (1)(c) of that section applies, or
>
> (b) any other arrangement connected (directly or indirectly) with the relevant arrangement."

170. Ms Brown submitted that irrespective of whether the "trust, scheme or other arrangement" is the RT alone or any wider arrangement (involving consideration of both the contributions to the RT and the making of loans to Mr Wilson), this was not "for the benefit of" Mr Wilson. Mr Wilson was not within the category of Beneficiaries, and furthermore he did not benefit from the scheme - the money advanced to him by SMEL was lent at a commercial rate of interest, and he had an obligation to repay those loans.

171. Mr Ghosh submitted that:

(1) The scheme was an arrangement for the benefit of persons who were employees of Strategic Branding, namely Mr Wilson. Even if Mr Wilson was not defined as a Beneficiary of the RT under the Trust Deeds, he was not an Excluded Person (ie the Protectors had the power to add him as a Beneficiary) and the scheme as a whole (of which the RT simply formed part) was an arrangement for the benefit of Mr Wilson.

(2) Further or alternatively, the RT arrangements were an employee benefit scheme by virtue of s1291(4) because the arrangements were an arrangement to which s554A ITEPA 2003 applies.

172. I have concluded, as set out below, that the RT arrangements are ones to which s554A(1)(b) ITEPA 2003 applies. They are therefore an employee benefit scheme. The contributions to the RT are employee benefit contributions within s1291(1) as the making of them results in property being held or being used under that scheme. The consequence of this is that, even if I had not already concluded that the contributions were not deductible under s54, s1290 prevents any deduction being available.

173. It is not therefore strictly necessary to consider separately whether the arrangement would otherwise be an employee benefit scheme within s1291(2), but I do address it briefly.

174. Section 1291(2) provides that employee benefit scheme means a trust, scheme or other arrangement "for the benefit of" (amongst others) employees. A significant hurdle for HMRC on the present facts is whether the arrangement is "for the benefit of" Mr Wilson in circumstances where he is not a Beneficiary of the RT under the Trust Deeds.

175. In *Dukeries Healthcare Ltd v Bay Trust International Ltd & Ors* [2021] EWHC 2086 (Ch) the claimants sought an order for the setting aside of three trust deeds and the contributions made to the trusts relying upon the doctrine of mistake. Deputy Master Marsh dismissed the claims. His decision was not addressing whether or not the arrangements before him achieved their intended tax consequences, but he expressed the following conclusions:

> "79. I accept Mr Herbert's submission that there are numerous provisions that would have to be disregarded to justify the conclusion that the trusts are employee benefit schemes. These include:
>
> (1) Proviso 1 prohibits an Excluded Person from benefiting and Proviso 2 prohibits the trustee from participating in an employee benefit scheme.
>
> (2) The proviso to clause 3(8) prohibits a loan, including a loan to an Excluded Person from forming part of an employee benefit scheme.
>
> (3) Clause 10.2 prevents the trustees from exercising powers in such a way that contributions to the trusts are not Permitted Contributions. This prevents the trustee's powers from being exercised in such a way as to make a contribution an employee benefit contribution.
>
> (4) Clause 11.1 rules out payments which are emoluments and clause 11.2 prevents anything that would make trust assets potential emoluments.

> 80. It is also right that although the scheme appears to contemplate loans being made to an Excluded Person, such as Mr Levack, there are restrictions that prevent this happening:
>
> (1) Clause 3.8 contains a proviso prohibiting a gift of the money loaned and prevents the trustee from participating in an employee benefits scheme.
>
> (2) Paragraph 1.2.16 of Schedule 1 is restricted by the general principle that administrative powers are only exercisable for the purposes of the trust and its beneficiaries.
>
> (3) Paragraph 1.2.17 is self-contradictory and must be construed in favour of validity rather than invalidity."

176. Given the context in which these conclusions were reached, I do not consider that they are binding upon me. If I were required to consider only the terms of the Trust Deeds, I would agree with Deputy Master Marsh that the RT is not a scheme for the benefit of Mr Wilson. However, I have found that there was a pre-ordained series of steps which involved the making of contributions to the RT and then the lending of money to Mr Wilson; and that the intended tax consequence was that there would be a deductible expense on the making of the contributions and no tax in Mr Wilson's hands. The taking of these steps was of benefit to Mr Wilson; he had the funds available to spend as he wished, and this was still for his benefit even though there was an obligation to repay the loans. I would therefore conclude that the arrangement is within s1291(2).

Discovery assessments

177. HMRC had issued Discovery Assessments for three of Strategic Branding's accounting periods. The burden of proof is on HMRC to establish, on the balance of probabilities, that the conditions for issuing the Discovery Assessments were met.

178. HMRC's position was that:

> (1) A "discovery" within paragraph 41(1) was made - the discovery on which the 2012 Discovery Assessments were based was made by Anne Ireson and the discovery on which the 2013 Discovery Assessment was based was made by Louise Bishop.
>
> (2) As a company tax return had been filed for the relevant periods, they needed to satisfy the conditions in either paragraph 43 or paragraph 44. HMRC were not arguing (at this stage) that the situation discovered was brought about carelessly or deliberately, but relied on paragraph 44 being satisfied.
>
> (3) Following the Supreme Court's decision in *HMRC v Tooth* [2021] UKSC 17, the making of a discovery assessment is, in itself, sufficient evidence that a discovery was made.

179. Ms Brown's challenge was that there was no evidence before the Tribunal from either Ms Ireson or Ms Bishop as to what they had taken into account in making their purported discoveries and thus as to whether their conclusions had been reached reasonably, ie taking all relevant factors into account and not taking irrelevant factors into account.

180. Paragraph 44(1) requires that at the time when HMRC ceased to be entitled to give a notice of enquiry into the return, they could not reasonably have been expected, on the basis of the information made available to them before that time, to be aware of the insufficiency. No challenge was made by Ms Brown as to this condition being satisfied. On the basis of the evidence before me, I agree that this requirement was satisfied – for each accounting period in respect of which HMRC issued a Discovery Assessment, the only information available to HMRC was that contained in the accounts of Strategic Branding, which contained a short statement about adherence to the RT and payments to that trust.

181. The issue before me is thus the logically prior question as to whether there was a relevant discovery within paragraph 41(1).

182. What constitutes a discovery was considered by the Upper Tribunal in *Charlton & ors v HMRC* [2013] STC 866 at [37]:

> "In our judgment, no new information, of fact or law, is required for there to be a discovery. All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight. The requirement for newness does not relate to the reason for the conclusion reached by the officer, but to the conclusion itself."

183. This description was approved by the Supreme Court in *Tooth* at [63] to [65]. It is apparent from this that there must be a new conclusion reached by an officer, and that the officer must be "acting honestly and reasonably".

184. Mr Cree had prepared two witness statements and gave evidence at the hearing. Mr Cree is a technical lead at HMRC working within Counter-Avoidance, and since late 2011 has specialised in tax avoidance schemes. In November 2013 he assumed the role of technical lead for the corporate remuneration trust scheme, and is responsible for ensuring a consistent approach across HMRC's enquiries into scheme users, working with HMRC's caseworkers and specialists. Mr Cree explained that it was HMRC's position that the relevant discoveries were made by members of his team, Ms Ireson and Ms Bishop. He was giving evidence for HMRC as they had both left HMRC and were not available to give evidence.

185. Mr Cree was an honest and reliable witness and carefully acknowledged the actions and decisions which had been taken by him and the decisions and conclusions reached by others. I accept his evidence and on the basis of his evidence I make the following findings:

(1) When he assumed the role of technical lead for the corporate remuneration trust scheme designed by Baxendale Walker, such schemes had by that time been designated by HMRC as tax avoidance schemes.

(2) By April 2015 he had reviewed the enquiry papers in excess of one hundred cases and, based on the commonality of the documents and the practically identical assertions made in correspondence, he had formed a view that the remuneration trust was an undisclosed mass-marketed tax avoidance scheme designed to allow directors of owner-managed close companies to extract funds from their companies in a manner that removed those monies from all forms of taxation.

(3) In August 2016 he had been supervising the work of an employer compliance officer ("ECO") based in Plymouth. He noticed that for certain periods that were subject to employer responsibility-based checks there was no enquiry opened into the corresponding corporation tax return of the company. He considered that the relevant ECO was not qualified to address matters related to corporation tax. Those cases were allocated to his remuneration trust team; Strategic Branding was one of these cases.

(4) For all three accounting periods in respect of which discoveries were made, the only information available to HMRC at the end of the enquiry window was that set out in the company accounts.

(5) Strategic Branding was allocated to Ms Ireson in September 2016 for her to review the accounting periods ending 28 September 2012 and 30 September 2012 to consider the use of HMRC's discovery powers. Ms Ireson was an experienced technical caseworker.

(6) Ms Ireson used HMRC's early review templates when she considered those returns. Those templates, also referred to as "Checklist C", include various headings and questions to be answered, a column for the response to be recorded by the officer, and a third column of notes on the question (which are part of the template itself).

(7) Ms Ireson completed a Checklist C for both periods, and the completed checklists include the following information:

(a) review the return for information supplied – this is marked "checked", with a note that there is no reference/comment in the return other than the amount of contributions;

(b) review correspondence which has been filed – also marked "checked";

(c) review summary – "nothing", and the guidance note is "Following a full review, consider whether there is anything contained in the information which would have alerted an officer of HMRC (the hypothetical officer) to an insufficiency in the returned profits arising from the RT contribution prior to the date the window closed. Also, to confirm that subsequent information indicates an insufficiency of the assessment as made";

(d) conclusion – "confirmed" – the note made is "confirm that a discovery assessment can be made in accordance with FA 98/Sch 18/para 41";

(e) the review officer is Anne Ireson;

(f) date the discovery assessment issued - 22 September 2016 (this being the same for both periods);

(g) there are then two (typed) notes as follows:

> "The discovery here is of an insufficiency relating to the use of a RT. The company has used the scheme and we are currently developing a number of arguments against the effectiveness of the scheme. Whilst we are pursuing enquiries on the basis that the loans from the RT to directors are earnings and that the loans should be treated as employment income by virtue of Part 7A ITEPA, there is a possibility that the earnings argument cannot be sustained, but regardless, that a disallowance of a CT deduction is required on stakeholder input, thereby resulting in an insufficiency of the CT assessment in place.
>
> Tech Lead's Comments – The conditions at FA98/Sch18/Para 43 have not been considered at this time and we are therefore reliant on FA98/Sch18/Para44(1). The above review indicates that there is no barrier to discovery resulting from information made available under FA98/Sch18/Para44(1). A discovery assessment may be issued. Malcolm Cree 14 September 2016"; and

(8) The conclusion that there was an insufficiency of tax was reached by Ms Ireson.

(9) Mr Cree had given support and advice to Ms Ireson in respect of the corporate remuneration trust schemes which had been allocated to her. He did not recall discussing this particular case with her, although he had seen every letter that was sent to Strategic Branding and received from their accountants in the context of the enquiry which had been made by the ECO and he had considered that information. He had not discussed with Ms Ireson the motivations and/or purposes of Strategic Branding. Mr Cree does not know if Ms Ireson looked at anything else which is not recorded or summarised in Checklist C.

(10) Mr Cree's second witness statement addressed the discovery made by Ms Bishop for the period ended 30 September 2013. That witness statement includes the following explanation of his view as to purpose:

> "6. I will add, if not already clear from my first witness statement, that the purpose of the person who purchases the Remuneration Trust tax avoidance scheme is to avoid tax. This is despite claims made by scheme users that the purpose of the trust contributions is to incentivise third-parties who provide services to the company making the contributions. I do not consider that such a nebulous benefit as being the genuine purpose of the expense. If the claim that the purpose was to incentivise third-parties was genuine I would expect to see the Trust funds being used to provide actual benefits to those third-parties, which it has not in this or indeed any scheme user case I have reviewed. The reality is that the director of the contributing company knows before they make any contribution that the money will almost immediately be placed back under their control to spend as they choose, often borrowing the money on uncommercial terms for 10 years. There are no funds available to provide benefits, the director of the contributing company invariably spends all of the trust contribution on themselves. I have reviewed hundreds of cases involving £tens of millions in trust contribution and have yet to see a single penny being applied to benefit a third-party. It follows that the purpose of the expense, being the Remuneration Trust contribution created to facilitate the tax avoidance, is also to avoid tax so that the director has more net funds available to spend that they would if they had e.g. paid themselves a salary or bonus that would be subject to PAYE tax and NIC. Where the purpose of an expense is to avoid tax that expense was not incurred wholly and exclusively for the purpose of the tax avoidance scheme user's trade. That means the expense must be disallowed for tax purposes. When the scheme user's tax position is recalculated to disallow the expense and the tax charge increases an insufficiency is discovered in that tax return."

(11) Ms Bishop had been a member of the flexible resource team within HMRC; she had many years of experience of corporation tax work, including experience specifically relevant to the "wholly and exclusively" test and remuneration trust users.

(12) Ms Bishop completed a Checklist C in respect of the accounting period ending 30 September 2013; it records that the discovery assessment was issued on 12 September 2017, contains notes in substantially the same terms as those made by Ms Ireson, and Mr Cree's comments as technical lead are substantially the same and are recorded as made at 4 November 2016.

(13) The conclusion that there was an insufficiency of tax was reached by Ms Bishop.

(14) Mr Cree did not know if Ms Bishop had taken account of Mr Cree's views (as recorded in his second witness statement) on the purposes of users of corporate remuneration trusts.

186. Ms Brown submitted that it was Mr Cree's view that the purpose of any person who purchases the remuneration trust scheme was to avoid tax, and this ignores the possibility of different subjective intentions. Both Ms Ireson and Ms Bishop had made their discoveries on the basis or assumption that Strategic Branding's position was the same as all of the other cases, whereas in the absence of evidence from Mr Wilson as to the purposes of Strategic Branding, it was impossible to say that there was a discovery of an insufficiency of tax.

187. As a matter of fact, I agree that this Tribunal does not know if the officers making a discovery took into account factors other than those recorded in Checklist C. Those checklists record in the notes that HMRC was currently developing its arguments in relation to the

effectiveness of the scheme. Mr Cree was the technical lead, responsible for ensuring that HMRC took a consistent approach to users of these schemes, and held a clear, firm view that users had a purpose of avoiding tax. I infer that those officers who were working on schemes which had been implemented by various taxpayers, including both Ms Ireson and Ms Bishop, would have been aware of his views on this matter. Ms Brown submitted that as purpose is a subjective test it would have been unreasonable for the officers to take this general, objective opinion as to purpose into account, ie that this would be an irrelevant factor, and that there is no evidence before me as to whether or not they did so.

188. Mr Ghosh submitted that the decision in *Tooth* means that the making of a discovery assessment is, in itself, sufficient evidence that a discovery was made.

189. Whilst the requirements for a discovery are widely drawn by the authorities, I am not convinced that the decision of the Supreme Court goes this far. In *Tooth* the Supreme Court took the following approach:

(1) They approved (at [65]) the description in *Charlton* set out above and accepted HMRC's submission that the question whether there is a discovery for the purposes of s29(1) Taxes Management Act 1970 depends upon the state of mind of the individual officer of HMRC who decides to make the assessment.

(2) An officer makes a discovery that an assessment to tax is insufficient upon reading the form containing a self-assessment and forming the opinion that the assessment it contains is incorrect and too low (at [67]).

(3) Section 29(1) TMA 1970 (which is in the same terms as paragraph 41) confers a power on "an officer of the Board", if he discovers a matter falling within sub-paras (a) to (c) and subject to the conditions therein, to make an assessment in the amount which ought "in his opinion" to be charged to make good the loss of tax (at [68]).

(4) The position remains that, for the "officer" limb of s29(1), the provision is concerned with the state of mind and knowledge of the particular officer who claims to have made a relevant discovery and then purports to exercise the power to make an assessment which arises under that provision when that condition is fulfilled. The officer in question needs to know if a discovery has been made in order to know if they have power under s29(1) to issue an assessment, and reference to their own state of mind enables them to know with confidence whether they have that power. The provision contemplates that a particular officer will personally have full decision-making responsibility in relation to a taxpayer's file (see [69]).

(5) The Upper Tribunal in *Anderson v HMRC* [2018] 4 WLR 90 had derived a series of propositions from the authorities, including that in s29(1) the concept of an actual officer discovering something involves an actual officer having a particular state of mind in relation to the relevant matter, which requires the application of a subjective test. There is also an objective test, in that mere suspicion of an under-assessment of tax is not sufficient and the belief which the officer forms regarding the under-assessment has to be one which a reasonable officer could form. The Upper Tribunal in *Anderson* had rightly acknowledged that s29(1) sets out public law powers and its interpretation was informed by principles of public law (see [72]).

190. Whilst the starting position (referred to in [67] in *Tooth*) is that an officer makes a discovery upon forming the opinion that a self-assessment is incorrect and too low, and is empowered to issue an assessment which "in his opinion" will make good the loss of tax, the Supreme Court approved the acknowledgement by the Upper Tribunal in *Anderson* that s29(1) sets out public law powers, and its interpretation is informed by principles of public law.

191. The Supreme Court had referred to the following paragraphs of the decision in *Anderson*:

> "29 The authorities establish that there is also an objective test which must be satisfied before a discovery assessment can be made. In *R v Bloomsbury Income Tax Comrs*, the judges described the objective controls on the power to make a discovery assessment. Those controls were expressed by reference to the principles of public law. In *Charlton*, at para 37, the UT referred to the need for the officer to act "honestly and reasonably".
>
> 30 The officer's decision to make a discovery assessment is an administrative decision. We consider that the objective controls on the decision making of the officer should be expressed by reference to public law concepts. Accordingly, as regards the requirement for the action to be "reasonable", this should be expressed as a requirement that the officer's belief is one which a reasonable officer could form. It is not for a tribunal hearing an appeal in relation to a discovery assessment to form its own belief on the information available to the officer and then to conclude, if it forms a different belief, that the officer's belief was not reasonable."

192. This statement of principle at [30], when saying that it is a requirement that the officer's belief is one which a reasonable officer could form and that it is not for the Tribunal to form its own belief on the matter and then conclude, if it forms a different belief, that the officer's belief was not reasonable, does not support the conclusion for which Ms Brown argued, namely that it is impossible for a Tribunal to conclude that the officer's belief was reasonable in the absence of hearing direct evidence from that officer.

193. I had the templates or Checklist Cs which were prepared by the relevant officers who made each discovery, the evidence from Mr Cree as to the approach taken within the team and conclude, on the basis of this evidence before me, that both officers acted reasonably and made a discovery of an insufficiency of tax. The conditions for issuing discovery assessments were met; the Discovery Assessments are valid.

Income tax

194. Ms Brown submitted that neither the contributions to the RT nor the loans to Mr Wilson were earnings on basic principles, nor were these arrangements within Part 7A ITEPA 2003. HMRC was pursuing these arguments in the alternative, but it was clear that their primary submission was that the loans to Mr Wilson were employment income within Part 7A.

Earnings and Rangers

195. Section 9(2) ITEPA 2003 provides that the "net taxable earnings from an employment" in the year is the amount of employment income which is charged to tax under that Part for the particular tax year.

196. Section 62 then explains what is meant by "earnings" and at s62(2) states that earnings, in relation to an employment, means:

> "(a) any salary, wages or fee,
>
> (b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or
>
> (c) anything else that constitutes an emolument of the employment."

197. Whilst, therefore, "earnings" is defined (or explained) in s62, the charging provision in s9(2) is also crucial as it brings into charge "earnings from an employment", and there is a significant body of authority which considers the meaning of this phrase.

198. Ms Brown referred to [78] to [98] of the decision in *Marlborough* which summarised the relevant case law and made the following submissions:

(1) In *Kuehne and Nagel Drinks Logistics Ltd v HMRC* [2012] EWCA Civ 34, Mummery LJ (at [32] and [33]) confirmed that the various judicial glosses do not displace the language of the statute, but that in any event there must in actual fact be a relevant connection or a link between the payment to the employee and their employment. Here, Ms Brown submitted, neither the contributions to the RT nor the loans were from Mr Wilson's employment. She emphasised in particular:

(a) In relation to the contributions, Mr Wilson's evidence was that the purpose of making the contributions was to protect the assets of the company, with no suggestion of remunerating himself. Also, Mr Wilson had stated that when he set up the company, he had enough savings to live on for two to three years; he was not expecting to be remunerated. There is no indication of any link to the employment. Ms Brown submitted that in any event the connection which existed was between the making of the contribution and the concern to protect the assets and that this connection was so strong it obliterated any possibility of any other connection.

(b) On the loans, the loans were part of the steps to protect the assets, and were not remuneration for his services. Furthermore, the loans were not to benefit Mr Wilson; they were used for the benefit of the business.

(2) The principles in *Rangers* are irrelevant, since where there is no employment income it cannot, simply put, be redirected. *Rangers* is not applicable because the payments to the RT are not, on the basic principles, Mr Wilson's (or any other person's) remuneration.

(3) Ms Brown referred to *Marlborough*, in particular [126] to [131], submitting that as a matter of judicial comity I should follow this decision.

199. Mr Ghosh submitted that the purpose of the contributions was to channel remuneration to Mr Wilson in a way that avoided any liability to income tax or NICs while preserving Strategic Branding's corporation tax deduction. Mr Wilson went from receiving a salary under his previous employer to working for Strategic Branding and receiving no salary. He was the sole employee and director of Strategic Branding and his work generated significant profits for the business. In these circumstances the most plausible conclusion is that Mr Wilson was being remunerated for his services through another route. There is no other competing link. For these reasons, the contributions to the RT were within s62. Any subsequent actions of the RT, regardless of whether these involved a breach of trust, do not alter this conclusion.

200. In *Kuehne*, Mummery LJ said:

> "[32] When considering the cause of, or the reason for, an event or an act in a particular case, the courts steer clear of involvement in general theories of causation. Instead they apply a mix of general principle, legal policy and good-sense pragmatism to determine whether legal liability in accordance with the conditions set by the relevant rules has been established on the particular facts of the case. For example, Lord Radcliffe avoided the language of causation, of causa causans and causa sine qua non when he said this about the word 'from' in *Hochstrasser v Mayes* (1959) 38 TC 673 at 707, [1960] AC 376 at 391:
>
> 'In the past several explanations have been offered by Judges of eminence as to the significance of the word "from" in this context. It has been said that the payment must have been made to the employee "as such". It has been said that it must have been made to him "in his capacity of employee". It has been said that it is assessable if paid "by way of remuneration for his services", and said

> further that this is what is meant by payment to him "as such". These are all glosses, and they are all of value as illustrating the idea which is expressed by the words of the Statute. But it is perhaps worth observing that they do not displace those words.'
>
> [33] All I need say at this point is that the use of 'from' in the idea expressed in the statutory expression 'earnings from an employment' and 'earnings derived from an employment' in a fiscal context indicates, as matter of plain English usage, that there must, in actual fact, be a relevant connection or a link between the payments to the employees and their employment."

201. Patten LJ added to this (at [59]) with the following:

> "If the employment is a substantial and equal cause of the payment, it becomes open to the judge to say that the statutory test is satisfied. The payment is then from the employment even if it is also substantially attributable to a non-employment cause."

202. It is apparent from *Kuehne* that there must as a matter of fact be a relevant connection or a link between the payments to the employees and their employment; and this can be satisfied even if there is another (non-employment) cause of the payment. However, I agree with Ms Brown's submission that the decision in *Rangers* does not assist on the facts as I have found them. As Judge Morgan clearly set out in *Marlborough* at [109]:

> "It is plain, therefore, that there was no doubt in [*Rangers*] that the relevant sums constituted a reward for the relevant employees' services (as set out at [100] to [102] and [108] above). The issue was whether the sums were prevented from being earnings because they were routed through the trust arrangements; the answer was that they were not. As regards the different circumstances of this case, the decisions tells us only that if the relevant sums constitute a reward for Dr Thomas's services as director, it would be no bar to them being taxed as such that they are paid through the RT arrangements. The decision does not mean, as HMRC seemed to suggest, that sums are taxable as earnings simply because they are routed through such arrangements"

203. In *Marlborough* the Tribunal concluded that the relevant sums did not constitute earnings. Ms Brown submitted that I should follow this decision as a matter of judicial comity. However, in that decision, the reasoning of the Tribunal (at [126] to [131]) was based on their conclusion that "such relevant evidence as there is, points to the conclusion that the relevant sums were not paid to Dr Thomas under the RT arrangements as a reward for his services as director but rather constitute distributions made as a return on his shareholding" (see [129]). The Tribunal set out in detail the factors which supported that conclusion and why they did not accept HMRC's submissions.

204. It was not, however, Strategic Branding's argument before me that the loans to Mr Wilson were distributions made as a return on his shareholding – this was not advanced in the grounds of appeal, the skeleton argument or in opening submissions. Ms Brown did in her oral closing seek to use the language of distributions, putting forward the proposition that if I did not accept the evidence of Mr Wilson then the reasoning in *Marlborough* becomes highly pertinent as the other evidence points to the amounts being received by him as shareholder. No application was made to amend Strategic Branding's grounds of appeal and in any event I would refuse permission at such a late stage when HMRC no longer had the opportunity to cross-examine Mr Wilson on this issue. My findings of fact are very different from those found by the Tribunal in *Marlborough*, and whilst I have found the summary of the authorities therein to be helpful, the reasoning in that decision does not assist me in the present appeal.

205. In the present case I am satisfied that the payment of contributions to the RT by Strategic Branding was intended to deliver payments to Mr Wilson in the form of loans from SMEL to Mr Wilson. I am satisfied that on the facts there is a link between the payments and his employment. There might have also been a causal connection with his shareholding, but (as noted above) I make no findings in relation thereto.

206. However, it was common ground that the money was paid to Mr Wilson by SMEL by way of loan under the Finance Agreement; he therefore had an obligation to repay those loans. HMRC have not established that the loans were emoluments within s62(2) (or any other type of earnings). Accordingly, the amounts lent are not earnings from an employment under general principles.

Part 7A ITEPA 2003

207. The charge under Part 7A ITEPA 2003 arises under s554Z2, which provides that if Chapter 2 applies by reason of a relevant step, the value of the relevant step counts as employment income of A (as defined in s554A(1)) in respect of A's employment with B (also as defined in s554A(1)). The conditions for Chapter 2 to apply are set out in s554A(1):

> "(1) Chapter 2 applies if—
>
> (a) a person ("A") is an employee, or a former or prospective employee, of another person ("B"),
>
> (b) there is an arrangement ("the relevant arrangement") to which A is a party or which otherwise (wholly or partly) covers or relates to A,
>
> (c) it is reasonable to suppose that, in essence—
>
> (i) the relevant arrangement, or
>
> (ii) the relevant arrangement so far as it covers or relates to A,
>
> is (wholly or partly) a means of providing, or is otherwise concerned (wholly or partly) with the provision of, rewards or recognition or loans in connection with A's employment, or former or prospective employment, with B,
>
> (d) a relevant step is taken by a relevant third person, and
>
> (e) it is reasonable to suppose that, in essence—
>
> (i) the relevant step is taken (wholly or partly) in pursuance of the relevant arrangement, or
>
> (ii) there is some other connection (direct or indirect) between the relevant step and the relevant arrangement."

208. Ms Brown submitted that these conditions were not met, and that the arguments put forward by Mr Firth in *Marlborough* at [136] and accepted by the Tribunal in that appeal apply equally here. Her submissions, which I consider in more detail below, focused on:

(1) the meaning of "in essence", which is used in both s554A(1)(c) and (e); and

(2) the relevance of actions being taken in breach of trust and the resulting impact on whether there was a relevant step, a relevant third person and value.

209. Mr Ghosh emphasised in his submissions:

(1) s554A applies where there is an arrangement, a term which is defined broadly and, in this case, involves a plan for a contribution and a loan back to Mr Wilson;

(2) the statutory use of "in essence" is not restricting the definition;

(3) the loans made to Mr Wilson are made "in connection with" his directorship, relying on *Barclays Bank plc v HMRC* [2007] EWCA Civ 442 at [18] to [26];

(4) it is irrelevant whether any of the steps were in breach of trust; and

(5) the conclusion reached in *Marlborough* at [136]-[137] is untenable; the whole point of Part 7A is that it is not the same test as that for earnings.

Section 554A(1)(a)

210. Condition (a) is met because Mr Wilson ("A" for this purpose) is an employee of Strategic Branding ("B").

Section 554A(1)(b)

211. Condition (b) applies if there is an arrangement to which A is a party or which otherwise "covers or relates to" A. Section 554Z(3) provides that "arrangement" includes an agreement, scheme, settlement, transaction, trust or understanding (whether or not it is legally enforceable).

212. An arrangement is thus widely drawn. It is apparent that, looking at matters narrowly, there is at the very least an arrangement to provide loans to Mr Wilson, and he is party to that arrangement as borrower under the Finance Agreement. There is also a wider arrangement on the facts as I have found them. The scheme involves Strategic Branding making contributions to the RT which are then transferred to SMEL and lent to Mr Wilson; I found that these steps were pre-ordained and, as such, amount at the very least to an understanding that these steps would occur. Mr Wilson was party to that wider arrangement (again, in his capacity as borrower under the Finance Agreement) and I consider that this arrangement also "covers or relates to" Mr Wilson for this purpose as the contributions to the RT by Strategic Branding are to be provided to him by way of loans.

213. The "relevant arrangement" therefore includes not only the loans to Mr Wilson by SMEL but also the making of contributions to the RT by Strategic Branding.

Section 554A(1)(c)

214. Condition (c) will be met if it is reasonable to suppose that, in essence, the relevant arrangement or the relevant arrangement so far as it covers or relates to Mr Wilson was:

(1) (wholly or partly) a means of providing rewards or recognition or loans; and

(2) those rewards or recognition or loans were provided "in connection with" Mr Wilson's employment with Strategic Branding.

215. It was in the context of this condition that Ms Brown addressed the meaning of "in essence" and "in connection with". Ms Brown made the following submissions:

(1) "Essence" is an ordinary English word and is not defined in ITEPA 2003. The Cambridge Dictionary (online version) defines essence to mean:

> "The basic or most important idea or quality of something"

It goes on to define "in essence" as meaning:

> "Relating to the most important characteristics or ideas of something"

(2) In order for the RT to pass through this "gateway" it must be reasonable to suppose that the most important characteristic of the RT and the wider arrangement was that it was a means of providing loans in connection with an employee's employment.

(3) Mr Wilson has set out many reasons why Strategic Branding established the RT; none of these was to provide loans to anyone in connection with an employee's

employment. The emphasis was to protect the assets of the company, and for the funds to be available for the benefit of the company through the loans to him. While loans have been provided, no reasonable person could suppose that the central characteristic of the RT and associated arrangements was to provide loans. Their essential nature – their most important characteristic – was to benefit the company's trade.

(4) Thus, the failure to come within this condition is twofold:

(a) the Trust is not "in essence" a means of providing loans (though of course it can provide such loans); and

(b) any loans provided were clearly not linked in connection with the employment of Mr Wilson, but were instead in connection with the purpose of furthering Strategic Branding's trade. They were made to Mr Wilson; but this is not enough.

(5) Mr Ghosh's argument in reliance on *Barclays* was the same as that which had been put to the Tribunal in *Marlborough* and expressly rejected by them (see [135] to [137]) and judicial comity requires that I should follow that decision unless convinced it is wrong.

216. Mr Ghosh made the following submissions:

(1) Section 554A as a whole is drafted to cast a wide net. This can be illustrated by the approach taken in s554A(11) and (12), the latter of which provides that "all relevant circumstances are to be taken into account in order to get to the essence of the matter". The use of the phrases "it is reasonable to suppose" and "in essence" instruct the Tribunal to take a realistic view of the structure of the arrangement and what it is intended to achieve. They do not have the narrowing effect for which Strategic Branding contends.

(2) It is clear from the events that transpired that the scheme was a means of providing Mr Wilson with loans. The question for the Tribunal is therefore whether the loans were provided "in connection with" Mr Wilson's employment with Strategic Branding, having regard to the propositions which can be drawn from *Barclays*. Further and alternatively, the Scheme was a means of providing rewards or recognition in connection with Mr Wilson's employment by transferring funds to SMEL.

217. Addressing the parties' submissions as to the use of the words "in essence", I note that s554A(6) states that for the purpose of this condition it does not matter if the relevant arrangement does not include details of the steps which will or may be taken; and that s554A(12) states that all relevant circumstances are to be taken into account in order to get to the essence of the matter. This latter provision in particular reinforces the obvious point that no part of the statutory language (in this case the words "in essence") should be ignored.

218. The dictionary definition cited by Ms Brown refers to the "most important characteristics" of something; but in the context in which these words are used I consider it is also apt to focus on the central characteristic of the arrangements. I consider that in part this language is there to ensure that, when considering an arrangement involving a multitude of parties and transactions, the fact that several of the intervening steps appear to have nothing to do with providing rewards, etc, does not prevent the arrangement from being within this condition.

219. In *Marlborough* the submissions by Mr Firth (on behalf of the appellant) included that the connection test is not met (on the basis that Dr Thomas' employment with the appellant was not "part of the reason" for the contributions/loans) and even if there is the requisite connection, the arrangement is not a "means of providing" and is not "concerned with

providing" reward, recognition or loans with that connection (on the basis that this test is satisfied only if the purpose of the arrangement is to achieve the relevant connection) (at [136]). Having summarised Mr Firth's submissions, the Tribunal concluded:

> "137. We agree with MDPL's view that, reading s 554A(1)(c) in context, for there to be a "connection" of the required kind with Dr Thomas' employment, the employment must be part of the reason for the reward, recognition or loan. On that basis, an assessment of whether is reasonable to suppose that, in essence the RT arrangement so far as it relates to Dr Thomas is (wholly or partly) a means of providing or, is otherwise concerned (wholly or partly) with, the provision of, rewards or recognition or loans in connection with Dr Thomas' employment requires essentially the same analysis as that set out in relation to whether the relevant sums constitute earnings. Accordingly, we have concluded that this test is not met as regards the connection test for all the same reasons as are set out above."

220. I respectfully disagree with the conclusions reached by the Tribunal in *Marlborough*. I do not agree that the consideration of this condition requires "essentially the same analysis" as that in relation to whether the relevant sums constitute earnings. Section 554A(1) sets out the conditions which are required to be satisfied for amounts to be within Part 7A in language which is different from that used for earnings (and certainly is more prescriptive); and s554Z2(1) provides that if Chapter 2 applies then the value of the relevant step "counts as employment income". It does not require that the value is earnings, or even treat it as earnings – and to have imposed such a requirement would appear to deprive Part 7A of any purpose.

221. The meaning of "in connection with" was considered (in a different statutory context) by the Court of Appeal in *Barclays* at [18] to [26] and the following propositions can be drawn from that decision:

(1) The phrase "*in connection with*" needs to be construed by reference to other parts of the provision in which it appears and the surrounding provisions of the legislative scheme (at [18] and [19]).

(2) A connection can be both direct or indirect, and this is likely to be the case whenever the phrase "*in connection with*" is used (at [19] to [20]).

(3) Something can be in connection with more than one other thing, in which case it is necessary to see if the connections can co-exist or whether one will actually exclude the other (at [20] and [25]).

(4) Once a connection has been established, it is unlikely to be displaced by other factors or connections (at [22] to [23]).

(5) A payment made to every member of a class of people is likely to be made in connection with that class (at [22] and [26]).

222. It can be seen that the phrase "in connection with" must be construed by reference to the rest of s554A and surrounding provisions of Part 7A. HMRC submit that as Part 7A is anti-avoidance legislation it is intended to be construed broadly; I am wary of accepting that submission (and do not do so), as the conditions are carefully crafted and I see no reason to construe them other than by reference to the language actually used.

223. Mr Ghosh submitted that, given the guidance in *Barclays*, the loans were clearly provided in connection with Mr Wilson's employment with Strategic Branding. The connection is that the RT would only lend money if it had the funds available to it, and its funds were from Strategic Branding, with contributions being approved by Mr Wilson as director. All of the Letters of Wishes were signed by Mr Wilson as director of Strategic Branding. As director of

SMEL he then approved the making of loans to himself. These steps occurred in circumstances where all of the money contributed to the RT had been generated by Mr Wilson's work, and he was not taking a salary or dividends from the company.

224. I agree with Mr Ghosh's submissions as to the connection with Mr Wilson's employment with Strategic Branding.

225. Considering the whole of this condition, I readily agree with HMRC that it is reasonable to suppose that the central or most important characteristic of the arrangement (whether that be the making of contributions to the RT and the lending of amounts to Mr Wilson or the loans themselves) is a means of providing loans in connection with Mr Wilson's employment with Strategic Branding. This is what actually happened.

Section 554A(1)(d)

226. This limb requires only that "a relevant step is taken by a relevant third person", and at the relevant time a "relevant step" was defined as a step within s554B, s554C or s554D.

227. Mr Ghosh submitted that there were many such steps taken by relevant third persons, (with relevant third persons being Mr Wilson acting as trustee or persons other than Mr Wilson and Strategic Branding):

> (1) immediately on receipt of each contribution the recipient (whether that be Baxendale Walker or Westwood Trustees), or BTIL or UTW earmarked, or started holding specifically, the money that was subsequently transferred to SMEL and then loaned to Mr Wilson with a view to a later relevant step being taken;
>
> (2) each payment to SMEL by or on behalf of the Trustees was a sum of money being earmarked within s554B(1)(a);
>
> (3) each payment to SMEL by or on behalf of the Trustees was a payment of money to a person chosen by Mr Wilson and which was linked with Mr Wilson (within the meaning of s554C(3)); and
>
> (4) each loan to Mr Wilson was a payment of money to Mr Wilson, since payment of a sum of money includes payment of a sum of money by way of loan (s554Z(7)).

228. Ms Brown submitted that to the extent that any action that would otherwise be a relevant step constituted a breach of trust, it is not a relevant step. She relied on the amendment which was made to s554A(2) by Finance Act 2017 with effect for relevant steps taken on or after 6 April 2017, submitting that this is important additional language which did not apply for the periods in issue. This provision was amended to read:

> "(2) In this Part "relevant step" means a step within section 554B, 554C or 554D, or paragraph 1 or 1A of Schedule 11 to F(No. 2)A 2017]4 (including such a step where the taking of the step, or some aspect of the taking of the step, constitutes a breach of trust or is a constituent part of a breach of trust, and even if the step or aspect is void as a result of breach of trust)"

229. I do not agree with Ms Brown's submission that a step which is taken in breach of trust (and which is thus either void or voidable) cannot be a "relevant step" for the purposes of s554A(1)(d) for the reasons explained below.

230. Mr Ghosh referred to various provisions to illustrate HMRC's submission that the enforceability of the transactions involved in a scheme or arrangement is irrelevant. Some of these provisions apply for the purposes of other limbs of s554A(1) (eg s554A(11) applies for the purposes of s554A(1)(e)) and I take no account of those. There are others which are potentially more informative in the present context, eg:

(1) s554B(2)(c) provides it does not matter if the employee has no legal right to have a relevant step taken in relation to any sum of money or asset; and

(2) s554C(5) provides that for the purposes of s554C(1)(d) it does not matter if the person has no legal right to have the sum of money or asset used

231. These provisions support a conclusion that s554A(1) is not concerned with whether a person has a legal right to an action being taken. This is reinforced by the definition of "arrangement" in s554Z(3), which also indicates that the draftsman is not concerned with whether the scheme is legally enforceable – Mr Ghosh submitted that "relevant steps" take their colour from this. However, this is not a complete answer to Ms Brown's submissions on this point, as her submission was that an action which is void has not had legal consequences, or is taken not to have occurred, and therefore cannot be a step, relevant or otherwise, for the purposes of s554A(1)(d).

232. It is notable that the language used in s554A and in the interpretative provisions relating thereto looks at the practical reality of what has taken place. It uses the language of "steps", "takes a step", "earmarked (however informally)". It is not using legal terminology; I consider this is deliberate.

233. In the present case, the actions which are identified by HMRC (at [227] above), and which I agree would (unless I accept Ms Brown's submission) otherwise constitute relevant steps taken by relevant third persons, did actually take place. There was no submission or evidence that any of these actions have been unwound, and whilst it was asserted that Mr Wilson has refinanced the amounts lent to him by SMEL, he accepts he now owes a debt to another company. In these circumstances, I agree with Mr Ghosh that the actions were relevant steps for this purpose.

234. In any event, there was insufficient evidence for me to conclude that the actions did constitute breaches of trust which rendered the transactions void or voidable. Ms Brown relied on the first contribution (the only one made under the Original Trust Deed) not being a permitted contribution under that deed, and submitted that all of the loans to Mr Wilson were breaches of trust (with some arguments applying differently to the various loans).

235. Addressing these submissions by Ms Brown (and taking account of the submissions made in response thereto by Mr Ghosh):

(1) Was the first contribution a Permitted Contribution under Original Trust Deed?

The definition of a "Permitted Contribution" applies "in respect of any contribution from the Founder to the trusts hereof". All contributions were made by Strategic Branding, whereas this restriction only applies to contributions from the Founder, ie WUT No 1 Ltd. The first contribution which was made by Strategic Branding was therefore not prevented from being a Permitted Contribution.

(2) Was the first loan made by SMEL to Mr Wilson, on HMRC's argument, in breach of clause 10.1 of the Original Trust Deed?

Clause 10.1 provides that "no power or discretion…shall be exerciseable nor exercised by the Trustees in such manner as to cause any part of the Trust Fund or the income thereof to be used to provide a Prohibited Benefit …". "Prohibited Benefits" means "(1) any holding or use of the Trust Fund for or in connection with the provision of benefits to or in respect of present or former employees of the Founder…(4) any money or benefit in kind which would otherwise fall within paragraph 1(2) Schedule 24 Finance Act 2003…".

The restriction in (1) of this definition only applies to employees of the Founder and is therefore inapplicable.

The restriction in (4), which refers to now-repealed rules relating to employee benefit contributions, is not so limited. This is a restriction on the powers of Trustees, who may not exercise their powers "in such manner as to cause" the fund to be used to provide a Prohibited Benefit. The Trustees have power to appoint someone to manage the Trust Fund. Consideration of this submission highlights the areas on which there was no direct evidence before me, eg as to whether there were any meetings or actions of the Trustees, whether they ever received the contributions themselves (I found they did not) and whether they appointed someone to manage the Trust Fund (where I infer that they did appoint UTW on the basis that UTW appointed SMEL under the Fiduciary Services Agreement; I take no account for this purpose of the reference in the recitals to the Finance Agreement of SMEL being a nominee of the Trustees). On the basis that the contributions were used to provide a Prohibited Benefit to Mr Wilson, it is arguable that the Trustees' powers had been used in a manner in which to cause that to happen, or at least that they had failed to prevent it. However, on the basis that the only positive evidence before me is the existence of the Fiduciary Services Agreement, under which it is agreed that amounts were lent to Mr Wilson, Strategic Branding have not satisfied the burden of establishing that the Trustees breached the terms of clause 10.1 of the Original Trust Deed.

(3) Were the loans made to Mr Wilson under the Amended Trust Deed (ie the second loan onwards), on HMRC's argument, in breach of clauses 12 and 13?

The scope of those clauses is somewhat unclear. Clause 12 is headed "Overriding Clause: Employee Benefit Contributions Rule and Trust Fund not to become Employee's Remuneration". Clause 12.1 provides that the RT shall not constitute an "employee benefit scheme" in relation to the Founder; and that it shall not constitute a trust, scheme or arrangement for the benefit of present or former employees of the Founder. This sub-clause is therefore irrelevant. Clause 12.2 then provides that no part of the trust fund shall be payable in circumstances such that it would become employee remuneration for UK tax purposes. There is no express reference to the Founder in this sub-clause; Mr Ghosh submitted that this provision takes its colour from clause 12.1 (whilst indicating that HMRC were indifferent given their position on it being irrelevant whether there was a breach of trust). Reading the whole of clause 12, I consider that clause 12.2 is a standalone requirement and therefore it is not restricted to employees of the Founder; accordingly, payments to employees of Strategic Branding are within scope (and thus prohibited). However, on the facts as I have found them, I am not satisfied that the Trustees have breached the terms of the Amended Trust Deed; simply put, it is not clear to me, even on the balance of probabilities, what (if anything) they have done.

I read clause 13 differently. That clause is headed "Overriding Clause: Employment Income provided through Third Parties". Clause 13.1 provides that the RT shall not be an arrangement which (wholly or partly) covers or relates to any person who is an employee, or a former or prospective employee of the Founder. Clauses 13.2 to 13.4 each begin "Without derogating from the generality of the foregoing, and go on to provide that the Trustees shall have no power to take, or to concur in any other person taking, any "relevant step" within s554B, the Trustees shall have no power to take, or to concur in any other person taking, any "relevant step" in relation to any person within s554C and the Trustees shall have no power to take, or to concur in any other person

taking, any "relevant step" within s554D. Whilst clauses 13.2 to 13.4 are silent as to whose employees, given that clause 13.1 expressly refers to employees of the Founder and the following sub-clauses are stated to be without prejudice to the generality of clause 13.1, I have concluded that clauses 13.2 to 13.4 do take their colour from clause 13.1 and do not apply to restrict steps in relation to employees of persons other than the Founder. No steps have been taken which breach clause 13.

(4) Were all loans made to Mr Wilson in breach of the Trust Deeds as he was not a Beneficiary under those deeds?

Mr Wilson is not a Beneficiary under the terms of the Trust Deeds, and whilst the Protectors had power to add him as such they had not done so; he is not therefore a Beneficiary. The loans were made to him by SMEL. Ms Brown submitted that under clause 2 of the Fiduciary Services Agreement SMEL is akin to a trustee or has a duty not to breach the underlying trust; and the transfer to SMEL may be a breach in any event, because it is not a payment that can be made (as SMEL is not a Beneficiary either).

The Fiduciary Services Agreement does not have the effect for which Ms Brown contends; it does not include any obligation on SMEL to comply with the terms of the Trust Deeds, but instead states that SMEL has power to deal with all property transferred to it by UTW as if it were the beneficial owner thereof. I am not satisfied that SMEL is breaching any obligations when it makes the loans to Mr Wilson.

The result of the steps taken is that all of the assets of the RT have been lent to Mr Wilson, who has (or at least had until he re-financed) an obligation to repay those loans, which were accruing interest. The Trustees held the trust assets on trust to be applied for the benefit of the Beneficiaries; but they also had power to invest the assets of the RT. Strategic Branding has not established that the amounts lent to Mr Wilson constituted payments for the benefit of a non-Beneficiary. Accordingly, I am not satisfied that all of the loans did represent breaches of trust, or that these were breaches by the Trustee.

236. Strategic Branding has not established that any or all of the matters relied upon by HMRC as relevant steps constituted breaches of trust by the Trustees.

237. In respect of each contribution to the RT and each loan to Mr Wilson there was a relevant step taken by a relevant third person for the purposes of s554A(1)(d).

Section 554A(1)(e)

238. Section 554A(1)(e) will be satisfied if it is reasonable to suppose that, in essence, the relevant step was taken (wholly or partly) in pursuance of the relevant arrangement.

239. I am satisfied, on the basis of the facts as I have found them that it is so reasonable to suppose. My conclusions as to the loans to Mr Wilson being pre-ordained are particularly significant in this respect.

240. I have therefore concluded that Chapter 2 of Part 7A applies to each of the loans made by SMEL to Mr Wilson, with the result that the value of those steps (being the amount lent) counts as employment income of Mr Wilson. Strategic Branding's appeal against the Regulation 80 Determinations is dismissed.

NICs

241. On the basis of my conclusion that the loans to Mr Wilson are employment income of Mr Wilson under Part 7A ITEPA 2003, those amounts are treated as remuneration derived from

an employed earner's employment for the purposes of s3 SSCBA 1992 (by virtue of Regulation 22B SSC Regulations 2001).

242. Paragraph 1 of Part 10 of Schedule 3 SSCR provides that the payments listed in that part are disregarded in the calculation of earnings. Ms Brown sought to rely on paragraph 5 thereof, which lists a payment of or in respect of a "gratuity or offering" which satisfies the condition in either 5(2) or 5(3) and is not within 5(4) or 5(5). However, I agree with Mr Ghosh that the amounts lent to Mr Wilson are not gratuities or offerings and that this paragraph applies to exclude money which is pooled and not attributed to particular employees by the employer. It is not applicable here.

243. Strategic Branding's appeal against the Section 8 Decision is dismissed.

CONCLUSION AND DIRECTIONS

244. The appeals are dismissed. The assessments, decisions and determinations issued by HMRC are affirmed, save that the quantum is as set out at [53] above.

245. The question of the correct accounting treatment of the contributions to the RT had been deferred to be heard, together with any relevant evidence, if necessary, at a subsequent hearing (in accordance with direction 3 of the directions endorsed by Judge Poole on 30 August 2019). On the basis of my decision, no such further hearing is necessary. The parties shall apply for further directions within 30 days of the expiry of the time limit for applying for permission to appeal as referred to below.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

246. 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 Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

Release date: 01 DECEMBER 2021