Neutral Citation: [2023] UKFTT 17 (TC)

Case Number: TC08679

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/02328, TC/2018/03598
TC/2018/05452, TC/2018/05453

Tax avoidance scheme – purchase of gold for employees who met the cost thereof through sale proceeds, creating credits in directors' loan accounts alongside an obligation taken on by the directors to satisfy the company's undertaking to make payment in the future to an EBT – whether earnings – s62 ITEPA – Rangers *applied - whether deductible expenses for the company – correct treatment under GAAP - wholly and exclusively for the purposes of the trade –* Vodaphone *applied.*
Procedure – application to admit further evidence; application to admit a new ground of appeal.

Heard on: 11-22 July 2022
Judgment date: 06 January 2023

Before

TRIBUNAL JUDGE BOWLER
MR DUNCAN MCBRIDE

Between

WIRED ORTHODONTICS LIMITED
IAN HUTCHINSON
SUSAN BESSANT

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Andrew Thornhill KC, of counsel, instructed by Levy and Levy Solicitors

For the Respondents: Mr Adam Tolley KC and Mr Charles Bradley of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Wired Orthodontics Limited ("the Company") established an employee benefits trust ("the Trust") to which it undertook to contribute £300,000 within the next 10 years. The Company then entered into agreements with a company called Asset Hound Ltd ("Asset Hound") for the purchase of £300,000 worth of gold bullion for Ms Bessant and Mr Hutchinson ("the Directors"), who were its shareholders and directors as well as employees of it. The gold was immediately sold and the Directors satisfied the Company's obligation to Asset Hound to pay for the gold by the use of the proceeds of its sale. In so doing a corresponding credit was created on their directors' loan accounts which they later drew upon by payments in cash to them. At the same time as the purchase of the gold the Directors agreed to assume the obligation entered into by the Company to pay £300,000 to the Trust. We refer to the transactions taken together as "the Scheme".

2. HMRC say that the Directors received money or money's worth as a reward for the provision of the services which constituted "earnings" in relation to their employment with the Company, notwithstanding their obligation to pay sums to the Trust. As a result HMRC say that:

(1) Either:

(a) the Company was obliged to account for PAYE income tax and NICs on the earnings; and

(b) the Directors, having failed to make good the income tax in question to the Company are liable to a further income tax charge under s222 Income Tax (Earnings and Pensions) Act 2003 ("ITEPA");

Or:

(c) the Company is liable to tax on the value of the benefit (the gold) conferred on the Directors pursuant to s464A Corporation Tax Act 2010 ("CTA 2010");

(2) the Company is not entitled to a corporation tax deduction for the relevant expenses in the relevant accounting periods because:

(a) the expenses were not recognised in accordance with generally accepted accounting practice ("GAAP");

(b) the expenses were not incurred wholly exclusively for the purposes of the Company's trade; and/or

(c) any deduction for the expenses was deferred pursuant to section 1290 and/or s1288 Corporation Tax Act 2009 ("CTA 2009").

3. Finally, HMRC say that if their assertions regarding the taxation of the Directors and the Company are not correct, the general anti-abuse rule ("GAAR") applies such that the tax advantages arising from the arrangements should be counteracted.

FORM OF HEARING

4. With the consent of the parties, the form of the hearing was video using the Tribunal video hearing system. 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.

STRUCTURE OF THIS DECISION.

5. We first set out the procedural background to this appeal and the grounds of appeal before turning to two procedural matters: an application for the admission of further evidence and an application to rely on an additional ground of appeal. We then turn to the substantive decision, setting out the agreed facts as well as our findings of fact, the law relating to the basis of our decision and the application of the law to the facts.

BACKGROUND

6. On 19 May 2016, HMRC opened enquiries into the self-assessment returns of Mr Hutchinson and Ms Bessant for the year ended 5 April 2015.

Closure Notices

7. On 5 April 2018, HMRC issued a partial closure notice to Mr Hutchinson and a closure notice to Ms Bessant, and amended their returns to include charges under s222 ITEPA in the following amounts:

(1) Mr Hutchinson – £34,120.58

(2) Ms Bessant – £31,876.50

8. On 4 May 2018, Mr Hutchinson and Ms Bessant appealed to HMRC against the partial closure notices. On 20 July 2018, HMRC concluded the reviews and upheld the closure notices. The Appellants notified their appeals to the Tribunal on 8 and 9 August 2018.

9. On 26 June 2015 and 28 January 2016 HMRC opened enquiries into the Company's self-assessment returns for the years ended 30 April 2014 and 2015 respectively. On 11 January 2018, HMRC issued closure notices to the Company and amended its returns for the periods ended 30 April 2014 and 2015 to deny the deductions sought in respect of these arrangements. The amendments assess the Company to additional corporation tax as follows:

(1) Period ended 30 April 2014 – £35,417.46

(2) Period ended 30 April 2015 – £117,192.25

10. On 9 February 2018 the Company appealed and HMRC carried out a statutory review of their decisions. On 19 April 2018, HMRC concluded their review and upheld the closure notices. On 11 May 2018, the Company notified its appeals to the Tribunal.

PAYE Determinations and NIC Decisions

11. On 24 October 2017, HMRC issued determinations under Regulation 80 Income Tax (Pay As You Earn) Regulations 2003 ("Regulation 80") and decisions under s8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 ("s8 decisions") for the years ended 5 April 2015 and 2016 in the following amounts:

(1) Year ended 5 April 2015 – PAYE: £35,254.00; NIC: £23,227.70

(2) Year ended 5 April 2016 – PAYE: £59,286.00; NIC £32,743.68

12. The Company appealed to HMRC on 21 November 2017. On 23 February 2018, HMRC concluded its review and upheld the determinations and decisions. The Company notified its appeals to the Tribunal on 23 March 2018.

GAAR Advisory Panel opinion

13. On 11 January 2017, HMRC sent the Company a notice of proposed counteraction of tax advantage. HMRC referred the arrangements to the GAAR Advisory Panel ("the Panel") who issued three opinion notices (one to the Company and one to each of the Directors) on 18 July 2017.

14. In summary, the Panel concluded that abnormal and contrived transactions had been entered into in implementing the Scheme; the Scheme was designed to exploit a loophole in complex anti-avoidance legislation contained in Part 7A ITEPA ("Part 7A"); and entering into the Scheme and carrying it out were not reasonable courses of action in relation to the relevant tax provisions. The most likely comparable commercial transaction, without the overlay of contrived or abnormal steps, would be a funding by the Company of the EBT followed by a loan from the trustees of the Trust to the Directors (the terms of repayment mirroring those in the existing agreement). That would give rise to a charge to income tax under Part 7A and the associated PAYE and NICs charge with no reduction being available under section 544Z8. The time of the corporation tax deduction would be linked to the time when the Directors suffer tax on the reward.

15. The Panel specifically did not address whether the Directors intended to meet their obligations to pay money's to the Trust in 2024.

16. On 22 August 2017, HMRC issued a notice of final decision ("NoFD") to the Company determining that the tax advantages arising from the arrangements were to be counteracted under the GAAR and making consequential adjustments.

GROUNDS OF APPEAL

17. The grounds of appeal (so far as relevant) are as follows:

(1) The value of the gold purchased for each of Ms Bessant and Mr Hutchinson was not liable to income tax or NICs;

(2) No payment of earnings within s62 ITEPA had been made. In particular, each of them received the gold subject to the obligation to make payment to the Trust of an amount equal to the market value of the gold;

(3) HMRC was wrong to rely on the redirection of earnings principle recognised in *Smyth v Stretton* (1904) 5 TC 36;

(4) Section 710 ITEPA does not apply in the present case. Section 710 concerns the operation of PAYE where there is income that ought to be subject to PAYE. It does not, however, determine whether there has been a payment of taxable earnings for PAYE purposes;

(5) Expenses equivalent to the value of the assets purchased by the Company for the relevant employees were properly recorded (in accordance with UK Generally Accepted Accounting Practice ("GAAP")) in its profit and loss account as staff costs. Therefore s46 CTA 2009 results in those amounts being properly deductible;

(6) The expense recognised by the Company properly reflected expenditure incurred in order to incentivise its employees. It was made wholly and exclusively for the purposes of the Company's trade for Section 54 CTA 2009. There was no dual purpose in the expenditure;

(7) Section 1290 CTA 2009 does not apply to disallow the deduction because:

(a) there is no "employee benefit contribution";

(b) in any event, the purchase of the Property by the Appellant is within the exception in s1290(4)(a) CTA 2009;

(c) qualifying benefits have been provided under s1292(6A) CTA 2009;

(8) Section 1288 CTA 2009 does not apply: this is not a case in which an amount is charged in respect of employees' remuneration in the Company's accounts;

(9) No benefits were conferred on a participator pursuant to s464A in respect of the arrangements; and

(10) In the event that the Tribunal concludes (contrary to the Appellants' case in relation to the Determinations and Decisions) that taxable earnings have been paid by the Company for income tax and NIC purposes then, on any view (and regardless of the outcome of the issues identified above in relation to the corporation tax treatment of these arrangements) the Company should be entitled to corporation tax deductions in respect of the expenses recognised in relation to the above arrangements in its profit and loss account. On any view, it would be contrary to principle, in the event that the Company is held to have paid taxable remuneration to its employees, for no corporation tax deduction to be available to the Company.

18. The grounds of appeal do not identify a ground of appeal in relation to the GAAR. Instead, it is said that the Appellants "request that the GAAR matter is heard and determined alongside the substantive tax matters".

APPLICATION TO RELY UPON A FURTHER GROUND OF APPEAL

19. On the last scheduled day of the hearing during Mr Thornhill's closing submissions it became apparent that he was relying upon a new ground of appeal addressing the jurisdiction of the Tribunal in relation to the application of the GAAR. Mr Tolley objected. We decided that an application for the new ground to be admitted should be made on the next day, which we agreed should be added to the listing.

20. Mr Thornhill submitted that it was for HMRC to identify the adjustments which should be made and the Tribunal's jurisdiction was confined to deciding whether or not those identified adjustments were just and reasonable. It did not have power to decide that a different counteraction should apply. While it was recognised by Mr Thornhill that the application was very late, it was submitted that it should be admitted given that it raised a pure point of law on legislation which had not previously been considered by the courts.

21. The amendment sought was to enable the Appellants to appeal on the basis that the counteraction under the GAAR is limited to an increase in the amount of general earnings and does not comprehend a Part 7A charge. Mr Thornhill submitted that the NoFDs issued by HMRC solely envisaged reasonable adjustments on the basis that the gold should be treated as earnings and not on any other basis including, in particular, the application of Part 7A. Furthermore, HMRC's statement of case stated:

> "As set out in the NoFDs, the just and reasonable counteraction on the Company is that the amount of employment income and earnings for which the Company should account for income tax under PAYE and Class 1 NICs for the year ended 5 April 2015 should be increased by including the value of the gold at the time it was provided to the Employees, and that for the Employees, that the amount of employment income for the year ended 5 April 2015 should be increased by including the value of the asset(s) at the time they were provided to them."

22. Mr Thornhill submitted that under s211 Finance Act 2013 ("FA 2013) the jurisdiction of the Tribunal is limited to considering the counteraction of the tax advantages made by HMRC as a result of the interaction of s209, s211 and paragraph 12 of Schedule 43 FA 2013. The matter before the Tribunal is whether the adjustments are just and reasonable. Those adjustments are identified through a combination of the NoFD and the Regulation 80 determination. Section 209 says that the officer can make the adjustments by way of an assessment but the process is extended under paragraph 12 of Schedule 43 FA 2013. That paragraph requires the officer to give the NoFD and set out the required adjustments.

23. HMRC should therefore be limited to the adjustments as identified in the NoFD, although Mr Thornhill recognised that the Tribunal had power to increase or decrease the Regulation 80 determination. Mr Tolley's skeleton provided on 1 July 2022 had, for the first time, stated that the counteraction was based either on a general earnings charge or a Part 7A charge, but even then it was not explained under what head of Part 7A the charge/adjustment arises. The Appellants had noted in closing submissions that "the basis on which earnings are to be increased is not explained". Consequently HMRC had not sufficiently identified reliance on Part 7A in its pleadings.

24. Mr Tolley conceded that if the Tribunal considered that the matter raised went to its jurisdiction then it should properly be considered, albeit by way of written submissions after the hearing. However, Mr Tolley submitted that this was not a matter of jurisdiction. He submitted that the prospects of success for the new ground of appeal could not be properly assessed as the basis of it had not been properly articulated. Whilst it was asserted that the counteraction under the GAAR was limited to an increase in the amount of general earnings and does not include a Part 7A charge, there is no further explanation of the basis for this assertion.

25. Mr Tolley submitted that it appeared that the application was made by Mr Thornhill on the basis of a misunderstanding as to the status of the NoFDs. Instead, he submitted that the relevant appeal lay against the Regulation 80 and section 8 decisions and not against the NoFDs themselves. The adjustments were made through the Regulation 80 and section 8 decisions. Mr Tolley referred to the statutory provisions providing the Tribunal's jurisdiction in relation to both the Regulation 80 and section 8 decisions. He submitted that the relevant elements in appeals involving an issue under GAAR are essentially the same as in all tax appeals:

(1) There are provisions imposing liability to tax: s209(1)-(2) Finance Act 2013 ("FA 2013");

(2) There are provisions conferring power to assess a person to that tax: s209(5) FA 2013, together with, in this case Regulation 80 and s8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 ("SSC(TF)A");

(3) There are provisions conferring rights of appeal against those assessments (s31 Taxes Management Act 1970 ("TMA"), s11 SSC(TF)A 1999;

(4) There are provisions conferring jurisdiction on the Tribunal to increase or decrease the assessments and providing that otherwise the assessments stand good (s50 TMA 1970, Regulation 10 of The Social Security Contributions (Decisions and Appeals) Regulations 1999).

26. Mr Tolley submitted that an NoFD issued by an HMRC officer under paragraph 12 Schedule 43 FA 2013 (Paragraph 12") does not in itself create any debt owing by the taxpayer to HMRC. That requires the issue of an assessment or other step permitted by s209(5) FA 2013. Consistently, a notice under Paragraph 12 is not itself an appealable decision. It is simply a procedural step required before the assessment is made.

27. There was no basis for limiting the jurisdiction of the Tribunal by reference to the reasons given by HMRC prior to the making of the assessments, any more than there is in a non-GAAR tax appeal. Furthermore, in the context of the GAAR, it was for the Tribunal to consider what just and reasonable adjustments are required under s209(1)-(2) FA 2013 to counteract the tax advantage. HMRC's contemporaneous reasons for making the assessments are not relevant to jurisdiction.

28. In any event, as a matter of construction, the 'adjustment' in the Notices is simply that Mrs Bessant and Mrs Hutchinson's employment income for the relevant year is increased by

the value of the gold. That is the adjustment in the Regulation 80 determinations and s8 decisions and is the adjustment contended for by HMRC during the hearing.

29. The principles set out in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) should be applied to the late application to amend the grounds:

(1) There was no acceptable explanation for the timing of the application or the delay in making it. The grounds of appeal merely requested that the application of the GAAR should be addressed by the Tribunal. HMRC's skeleton argument had specifically referred to counteraction by reference to Part 7A. The Appellants' skeleton argument had specifically referred to the possibility of counteraction by reference to Part 7A, without any suggestion that such counteraction was not open to the Tribunal. Mr Thornhill's opening submissions had referred to counteraction by reference to Part 7A without any reference to the content of the NoFDs limiting the ability to do so. The Appellants' closing submissions similarly made no reference to the issue;

(2) The prospects of success were difficult to assess given the paucity of explanation for the assertions made; and

(3) If it were not for the fact that the Tribunal made available an additional hearing day, it would not have been possible even to hear the Appellants' application for permission to amend without an adjournment. The lateness of the application had already caused prejudice to HMRC, in the form of additional time and effort directed to the preparation of this response and a further half-day hearing which would not otherwise have been necessary. If permission to amend were granted there would need to be an adjournment of the hearing, with the necessarily consequent disruption and cost to the parties, the Tribunal and other tribunal users.

Our decision

30. We decided to refuse the application to amend the grounds of appeal for the following reasons.

31. We have been guided by the principles in *Quah*, giving paramount consideration to the overriding objective to act in the interests of justice and fairness.

32. A very late application is recognised by *Quah* and similar authorities as carrying a very heavy burden of justification, and costs may not be an adequate compensation for a late amendment. There must be a good explanation for the delay, and the Tribunal must respect the need for litigation to be conducted proportionately. In this case the application was made at the end of what was scheduled to be the last day of the hearing, after skeletons had been exchanged, opening submissions had been made by Mr Thornhill, closing submissions had been made by Mr Tolley and, indeed, Mr Thornhill was himself part way through his own closing submissions. It was initially simply referred to without any application to amend the grounds, with Mr Thornhill recognising that he had only just identified the point. It is hard to think of a later point in litigation for a new ground to be raised. There has been little, if any, explanation of the reason for the delay.

33. It is not for us to consider the merits of the new ground of appeal. What we must not do is conduct a mini−trial. Instead we must reach some assessment as to whether the proposed new ground is one that is very weak - in which case when conducting the balancing exercise involved in deciding this application it is unlikely to favour it being admitted; or very strong, which may tilt the balance in favour of the Appellants. If the strength of the grounds cannot be ascertained by us without a mini−trial, or it is apparent it is somewhere in-between those two positions, then the strength of the grounds is unlikely to affect the outcome of the application either way.

34. We have been particularly concerned to satisfy ourselves that we have jurisdiction to hear HMRC's case about adjustments made on the basis of Part 7A to counteract the alleged tax advantages. If we considered that this was a matter raising real concern as to whether or not we have jurisdiction, we would consider that it would be of such magnitude that the significance of the ground would have every potential for counterbalancing the very significant delay. Indeed, that was recognised by Mr Tolley. However, we are satisfied that we have the necessary jurisdiction in this case.

35. The Tribunal only has such jurisdiction as it is given by statute. Our jurisdiction in this case derives from the TMA and the Social Security Contributions (Decisions and Appeals) Regulations as a result of the assessments and determinations issued by HMRC. Section 211 FA 2013 addresses the burden of proof on HMRC and the matters which the Tribunal must and may take into account in determining any issue in connection with the GAAR. It does not provide the source of the Tribunal's jurisdiction. Paragraph 12 of Schedule 43 is a procedural step which can affect the validity of the process but, again, does not generate our jurisdiction. (We set out the relevant statutory provisions in an annexe to this decision.)

36. So that leads us on to considering whether HMRC had sufficiently identified its case in its pleadings such that the Appellants were not caught unawares at the hearing. We are satisfied that the reliance on Part 7A was sufficiently at large for there to be no unfairness if this application is denied. Part 7A has been identified at various stages. It was identified in HMRC's statement of case and Mr Tolley's skeleton argument of 1 July 2022.

37. The matter for us to determine would be whether the burden of proof has been discharged in relation to reliance on Part 7A: in other words, whether HMRC has identified that the adjustments it seeks to make to counteract the tax advantages are just and reasonable by reference to Part 7A. That would be addressed if, and to the extent that, we needed to address the application of the GAAR in our decision.

APPLICATION TO ADMIT FURTHER EVIDENCE

38. At the start of the hearing we heard an application made by Mr Thornhill for the admission of a supplementary evidence bundle. Mr Thornhill said this was prompted by statements made in Mr Tolley's skeleton argument; in particular, an assertion that £40,500 paid to Asset Hound was not commission for the purchase of gold by it; an assertion that there was no real intention on the part of the two directors to pay sums into the Trust and no practical likelihood of their being required to do so; and the nature of Asset Hound's business.

39. Mr Tolley objected on the basis that:

(1) there was, in fact, nothing new in the issues identified in his skeleton argument; and

(2) there was no sensible opportunity to test this new material in cross-examination because none of the witnesses would be able to speak to it; or, if they did, HMRC had not been pre-informed about it as their Witness Statements were silent on the materials;

(3) materials said to relate to evidence of intention to pay the money's were not in fact such; and

(4) in relation to Asset Hound, the statement of agreed facts was dated 10 April 2019 and the Witness Statements were served at the end of June 2019, so there had been ample opportunity to provide further evidence about the company.

Our decision

40. We decided to refuse the application to admit further evidence for the following reasons.

41. We applied the principles set out in *First Class Communications v HMRC* [2013] UKFTT 342 (TC) by Judge Mosedale which were approved of by the Upper Tribunal. In particular, Judge Mosedale identified that the process of consideration of whether to admit new evidence is a question of degree. The longer the delay, the more likely there will be procedural prejudice; the greater the procedural prejudice, the less likely it will be admitted. It is also clear that the importance of the evidence a person is seeking to rely on must be weighed in the balance. Evidence critical to one party's case is more likely to be admitted than evidence of any peripheral relevance.

42. We applied those principles, having regard to the paramount requirement to give effect to the overriding objective.

43. We consider that the accounts of Asset Hound included in the supplementary bundle add little to the evidence which was already before us and the agreed facts. The fund management accounts for the Trust and correspondence relating thereto included in the supplementary bundle related to periods significantly after the relevant transactions were entered into, and, notably, after a change in law which had precipitated action by Ms Bessant and Mr Hutchinson. Furthermore, those documents related to periods after not only the decisions made by HMRC but also the appeals had been lodged by the Appellants. Therefore the evidence in those documents would be of very little relevance to the matters before us.

44. Furthermore, we take into account that the matters which Mr Thornhill has identified as being the causes for the evidence in the supplementary bundle were already at large given the provisions contained in HMRC's statement of case. There was little reason given for the delay and the application had been made at a very late stage in the litigation.

45. Therefore when we carried out the balance, we concluded that it was not in favour of admitting the evidence in the supplementary bundle.

BURDEN OF PROOF

46. The parties agreed that the burden of proof rests with the Appellants on all of the grounds of appeal, but the burden of proof rests with HMRC as provided in s211 FA 2013 in relation to the GAAR.

AGREED FACTS

47. The parties prepared a statement of agreed facts which we set out below.

48. The Company is a company incorporated in England and Wales and resident in the UK. The Company's principal activity is the provision of dental products and supplies to the dental industry.

49. At all material times including the years ended 5 April 2014 and 2015, the Company had two directors, Susan Bessant and Ian Hutchinson. Susan Bessant and Ian Hutchinson were also employees of the Company.

50. Prior to 31 July 2015, the shares in the Company were held by:

(1) Straight and Bright Dental Limited (51%), of which Ian Hutchinson was the 100% shareholder; and

(2) Susan Bessant (49%).

51. From 31 July 2015, 51% of the share capital of the Company was held by Assure Holdings Ltd, of which Mr Hutchinson was the 100% shareholder. The remaining 49% continued to be held by Susan Bessant.

52. The Company was a close company in which the Directors were participators as defined by s439 CTA 2010.

53. At all material times Asset Hound was a business trading as a holder and purchaser of gold.

54. On 25 April 2014, a meeting of the Board of the Company was held, at which the only attendees were Susan Bessant and Ian Hutchinson. The Minutes of the Board Meeting state:

(1) If the Company deemed it suitable, then it would discuss rewarding employees for the period ending 30 April 2014 with an incentive, albeit in a manner that would not constitute remuneration;

(2) It was proposed that the value of this incentive/award would be approximately £120,000;

(3) At this stage the Company would consider the following employees for benefit: Susan Bessant and Ian Hutchinson; and

(4) The Company would receive advice from Qubic Tax Ltd on the most appropriate manner for achieving this, including a review of discretionary trusts for the benefit of employees where appropriate.

55. On 3 October 2014, a meeting of the Board of the Company was held, the only persons in attendance being Susan Bessant and Ian Hutchinson. The Minutes of the Board Meeting state:

(1) The Company discussed the current market conditions it was operating in and the ongoing challenge that it was facing to remain competitive to ensure the Company could be profitable and continue as a going concern. It was stated that one of the major factors which would influence this was the need to retain key services of employees and therefore the Company needed to identify a suitable means to motivate them;

(2) The Board had separately become aware of the existence of the mechanisms that existed to help to meet this purpose, specifically those that were able to encourage loyalty and hard work of employees going forward. One mechanism which had been identified and was considered was that of the Company creating an employee benefit trust;

(3) The Board recorded that advice had been received from Qubic Tax Ltd on the flexibility of structures to align a trust's usage to meet the aims of the business including the need to incentivise employees on an ongoing basis. The Board were particularly interested in structuring any arrangement in a manner such that it could provide an immediate reward to certain employees, albeit whilst still ensuring that a wider class of beneficiaries could potentially be incentivised longer term according to the sole discretion of the trustees of the trust;

(4) The Board resolved to have a trust deed drafted by Mortons Solicitors;

(5) Additionally, it was decided that the Company would seek to appoint Qubic Trustees Ltd ("the Trustee") as trustee of the trust and request that they hold £1,000 on trust.

(6) It was acknowledged that, by the Company not wishing to retain any control, nor make requests to the trustees in respect of assets held in and/or contributed to the trust, any such amounts could be applied in a manner solely that the trustees deemed acceptable. The Company was content that it would not wish nor be able to make any further requests in respect of these funds once contributed;

(7) Following the establishment of the trust and the initial contribution, it was stated that the Company wished to consider making a further contribution to the trust. The

Company wished to increase the value within the trust by £300,000 at a point in the next ten years.

56. On 8 October 2014, The Wired Orthodontics Limited Employee Trust 2014 ("the Trust") was established by a trust deed of that date. The settlor was the Company and the Trustee was the sole trustee of the Trust. The beneficiaries included the employees and office holders of the Company. The protector of the Trust was Susan Bessant. As protector, Susan Bessant had the power to appoint and remove the Trustees. Under Schedule 4 of the trust deed, the Company undertook to make a further contribution of £300,000 (adjusted by reference to RPI) to the Trust within 10 years. The Company was entitled to provide a third party to satisfy that obligation, but would remain fully liable until such time as the obligations were actually performed by the third party.

57. On 8 October 2014, a meeting of the Board of the Company was held, solely attended by Susan Bessant and Ian Hutchinson. The Minutes of the Board Meeting state:

(1) The Board noted that the trust deed creating the Trust had been signed and executed on 8 October 2014;

(2) The Company wished to consider using an approach, advised by Qubic Tax, whereby the Company could purchase assets for the employees as reward and/or incentives for their performance. It was stated that this approach would allow the employees to have the flexibility to sell or retain the assets as they wished, albeit the purchase of the assets would be conditional on the employee fulfilling the Company's obligation to make a contribution of £300,000 to the Trust in the same proportion as the proposed rewards;

(3) The Company resolved to purchase gold with a total value of £300,000 from Asset Hound who would provide title as follows:

(a) Ian Hutchinson - £153,000

(b) Susan Bessant - £147,000

(4) Of this reward/incentive, £120,000 related to the Company's profits for the accounting period ended 30 April 2014 and £180,000 related to the Company's profits for the accounting period ended 30 April 2015.

58. On 9 October 2014, an agreement was entered into between Susan Bessant and the Company. Under the terms of the agreement Susan Bessant agreed to pay the sum of £147,000, increased by reference to RPI and by any increase necessary in order that no amount of corporation tax would be chargeable under section 464A(3) Corporation Tax Act 2010, to the Trustee in consideration for receiving a quantity of gold bullion from Asset Hound. That sum did not carry interest and was to become due and payable on 8 October 2024, subject to certain circumstances in which it would become immediately payable.

59. Also on 9 October 2014, an agreement was entered into between Ian Hutchinson and the Company. Under the terms of the agreement Ian Hutchinson agreed to pay the sum of £153,000, increased by reference to RPI and by any increase necessary in order that no amount of corporation tax would be chargeable under section 464A(3) Corporation Tax Act 2010, to the Trustee in consideration for receiving a quantity of gold bullion from Asset Hound. That sum did not carry interest and was to become due and payable on 8 October 2024, subject to certain circumstances in which it would become immediately payable.

60. On 20 October 2014, a deed was entered into between Susan Bessant and the Trustee under which Susan Bessant undertook to pay the sum due under the agreement she had entered into on 8 October 2014.

61. Also on 20 October 2014, a deed was entered into between Ian Hutchinson and the Trustee under which Ian Hutchinson undertook to pay the sum due under the agreement he had entered into on 8 October 2014.

62. On 21 October 2014, an agreement was entered into between Asset Hound and the Company under which Asset Hound was appointed to supply assets for designated employees and agreed to transfer title to those employees on payment of the purchase price by the Company.

63. Also on 21 October 2014, an agreement was entered into between Asset Hound and Susan Bessant under which Asset Hound was appointed as agent for the management of gold bullion purchased for her. On the same day, an agreement was entered into between Asset Hound Ltd and Ian Hutchinson under which Asset Hound was appointed as agent for the management of gold bullion purchased for him.

64. By 23 October 2014, Asset Hound held the following:

(1) 5.897kg of gold for and on behalf of Susan Bessant;

(2) 6.138kg of gold for and on behalf of Ian Hutchinson.

65. On 23 October 2014, Asset Hound issued an invoice to the Company for £340,500, made up of £300,000 for 12.035kg of gold plus £40,500 gold dealing fees.

66. On 23 October 2014 Asset Hound advised Susan Bessant by email that it had purchased 5.897kg of gold for her at a total cost of £147,000 and had subsequently sold that gold for £145,963.74. Asset Hound further advised that, in accordance with instructions received from her, £144,791.23 was being retained as payment towards Asset Hound's invoice to the Company and that the balance of £1,172.51 was to be transferred to her requested bank account.

67. On 23 October 2014 Asset Hound advised Ian Hutchinson by email that it had purchased 6.138kg of gold for him at a total cost of £153,000 and had subsequently sold that gold for £151,929.13. Asset Hound further advised that, in accordance with instructions received from him, £150,708.77 was being retained as payment towards Asset Hound's invoice to the Company and that the balance of £1,220.36 was to be transferred to his requested bank account.

68. The Company's nominal ledger for the year ended 30 April 2015 records credit entries on the directors' current accounts of £144,791.23 in respect of Susan Bessant and £150,708.77 in respect of Ian Hutchinson.

69. In its profit and loss account for the year ended 30 April 2014, the Company recorded an expense of £136,200 described as 'employee costs'. The balance sheet also includes an amount of £136,200 under the heading 'other creditors'.

70. In its profit and loss account for the year ended 30 April 2015, the Company recorded an expense of £205,300 described as 'employee costs'.

AGREED ACCOUNTING

71. The expert accountants agreed that:

(1) an expense of £120,000 was correctly recognised in the Company's profit and loss account for the year ended 30 April 2014. However, Mr Orrock (HMRC's expert) considers that the amount should have subsequently been reversed;

(2) the entirety of the £40,500 paid to Asset Hound should have been recognised in the year ended 30 April 2015.

EVIDENCE

72. We were provided with a bundle of 2294 pdf pages and heard oral evidence from Ms Bessant, Mr Hutchinson and Mr Neil Devapal, a representative of Qubic. We also heard expert accounting evidence from Mr Stephen Brice (for the Appellants) and Mr Andrew Orrock.

Our assessment of the evidence

73. The quality of witness evidence from the Directors was unusually poor. Despite this being a very significant transaction for both her and the Company of which she was director and shareholder, Ms Bessant repeatedly claimed that she had no memory of what had happened. It became clear during Ms Bessant's evidence that she knew very little about the content of documents attached as exhibits to her Witness Statement, such as the board minutes for meetings she attended, or Company accounts which she had approved. She was similarly unable to explain numerous statements in her Witness Statement. At one point in cross-examination she was asked how she recalled a telephone call described in her Witness Statement. When she struggled to answer and was asked whether someone had suggested what the content of the call might have been for the purposes of producing her Witness Statement, Ms Bessant said "maybe yes". She was a poor historian and at times evasive; for example, when asked about management charges paid to a partnership of which she was a partner she was unable to identify who the other partner in that partnership was.

74. We have consequently decided that the weight to be given to Ms Bessant's Witness Statement should be reduced.

75. Mr Hutchinson was similarly unable to explain the contents of the board minutes and other documents for implementing the Scheme in any meaningful way. However, he expressly recognised that the documents had been provided as a package to him and Ms Bessant and they had simply signed them.

76. Various statements made by him in his Witness Statement could not be sensibly explained by him. For example, he says in his Witness Statement that the formation of the Trust would help motivate key employees such as himself but he could not explain what this really meant. Similarly, his Witness Statement describes the fact that he lent the Company the money to purchase the gold but in cross examination he could not comprehend that loan. He repeatedly said that he simply "followed the advice". We conclude that the weight given to Mr Hutchinson's Witness Statement should be reduced.

77. Quite extraordinarily Mr Hutchinson was unable to say why the now dormant Company (of which he is currently sole director) is pursuing this appeal or who is paying for it to do so.

78. When asked about whether there had been any written advice from either Qubic or the Company's accountant, Ross Martin, Mr Hutchinson was evasive, saying that he could not remember. When asked in cross examination about checking emails he admitted that he had not searched for emails from Qubic and Ross Martin. It is clearly for the Appellants to make their case and to choose what evidence they rely upon, but the Appellants have repeatedly said that there was no written advice from Qubic or Ross Martin relating to the Scheme. This seems highly unlikely in the context of implementing such a very significant set of transactions for the Appellants. Moreover, in assessing the weight of Mr Hutchinson's evidence his responses on this matter call into question his reliability as a witness.

79. We were left with the very clear impression that both of the Directors had entered into the Scheme with little understanding or knowledge of it beyond the idea that they would receive money tax-free and the Company would claim a corporation tax deduction for the amounts paid to them. Evidence provided by them beyond that is therefore given reduced weight by us.

80. Mr Devapal's evidence was expressly limited by him at the hearing:

(1) he had no specific knowledge of the facts of this case beyond what he had learnt from reading the documents in the bundle;

(2) his Witness Statement describes him as giving evidence in his capacity as an authorised signatory of Qubic Managers Ltd (formerly a director of Qubic Trustees Ltd) but that simply meant that he had signed the Deed of Settlement for theYtrust but had no other involvement with the operation of the Trust or the Scheme more generally in this case;

(3) his Witness Statement describes him as having a wider knowledge in respect of Qubic Trustees Ltd and its role as trustee of the EBT, but in fact he had no input into the Trustees' decision making and could not give evidence about how the trustee operated or how it might approach requests from the Company;

(4) he had checked the paper file held by Qubic Trustees for the Appellants which showed matters such as a "payability" check in 2016 but he had not looked at the electronic file and could not explain this omission;

(5) his evidence in his Witness Statement that the Company engaged Qubic Tax to provide it with advice on the provision of incentives/awards in a tax efficient manner was based on conversations with a colleague who was involved with the Scheme in this case;

(6) he was not able to say how the arrangements were expected to work technically beyond a broad understanding that the arrangements were designed to provide rewards without tax or NICs;

(7) he had limited ability to comment on the fees (including an inability to say why such large fees were paid for what was described as a deferral of tax) beyond saying that in his experience the fee charged by Asset Hound was based upon the circumstances of clients and was not a fixed formula.

81. These limitations mean that his ability to give evidence of the facts in this case was limited.

82. However, he was able to confirm that Qubic Tax would provide pro forma agreements, board minutes etc. It would then be for the client or their accountant to tailor the documents appropriately. He also confirmed that it was Qubic Tax's standard practice to provide written advice in relation to the Scheme even though in this case it has been denied by the Appellants that there was any written advice.

83. Although his Witness Statement did not address the role of Asset Hound, Mr Devapal was able to provide some insight into the operation of that business which we have taken into account in our findings.

84. He also maintained that there was an expectation in the Scheme that the money's provided to, in this case, the Directors would be paid to the Trust and then the tax position would depend upon the form of the money subsequently leaving the Trust and the circumstances of the individuals receiving the money.

85. In relation to certain matters we have identified inherent implausibility of the evidence. We recognise that a matter may seem implausible but still have happened. However, in line with the general approach of the courts to evidence, the more implausible a description is, the more evidence is expected by us to rely on the statement in our findings.

86. We have relied on the evidence in the documents to show what transactions took place and when. However, we have reduced the weight given to descriptions of the participants' intentions or motives in those documents given that we were told that they were pro forma

documents and the Directors involved in signing them, either in their capacity as directors of the Company or in their personal capacity, could not explain them.

THE TRIBUNAL'S FINDINGS OF FACT

87. Having considered the evidence as we have described we have made findings which we set out in this section in addition to the agreed facts. For ease of reference we have set out the relevant agreed facts in italics.

Overview

88. In summary, the Directors were awarded £300,000 worth of gold bullion by the Company which was paid for by its immediate sale by the Directors. That created credits on the Directors' loan accounts of approximately the £300,000. They subsequently extracted that value through cash drawings from the Company. Those transactions took place in the context of the Directors entering into agreements under which they undertook to pay the £300,000 (plus an RPI uplift) to the Trust (an employee benefits trust) 10 years later in 2024.

89. We now proceed to set out more detail about the participants and the transactions.

The Company

90. *The Company is a company incorporated in England and Wales and resident in the UK. The Company's principal activity is the provision of dental products and supplies to the dental industry.*

91. The Company ceased to trade in 2019. Its employees have all moved to other jobs.

92. In 2014 and 2015 the Company had 5 or 6 employees in addition to the Directors.

93. At the time of the Scheme transactions the Company had realised profits for its 2014 accounting period of £120,000 and expected profits for the 2015 accounting period of £180,000. These amounts were used as the basis for the £300,000 value of the gold purchase and subsequent loan account credits as well as the Company's commitment to fund the Trust.

Accounting policy

94. Neither of the Directors was involved in formulating the new accounting policy referred to in the 2014 accounts and neither of them understood why it had been introduced.

Historic payments made by the Company to the Directors

95. The 2014 and 2015 accounts state that no directors' remuneration and other benefits were paid for the 2013, 2014 and 2015 years.

96. Unaudited accounts show that the Company paid dividends of £32,000 in 2013, £20,000 in 2014 but none in 2015.

97. In 2014 prior to the Scheme transactions, the directors' loan accounts showed a balance of £13,496 for Ms Bessant and £14,180 from Mr Hutchinson.

98. Ms Bessant was also a partner in a partnership called Oral Concept Prosthetics. During the year 2014 the Company sold goods to Oral Concept Prosthetics to the value of £27,091 and in 2015 to the value of £12,290. In 2013 goods had been sold to that partnership to the value of £31,390. In 2014 the Company purchased services from that partnership to the value of £35,632 and in 2013 it purchased services from the partnership to the value of £52,494. In 2015 no services were purchased from that partnership.

99. Mr Hutchison is the sole shareholder of Straight and Bright Dental Ltd through which he held his shares in the Company. In 2015 the Company sold goods to Straight and Bright Dental Ltd to the value of £4848, in 2014 to the value of £6660 and in 2013 to the value of £4099.

The company purchased no services from Straight and Bright Dental Ltd in 2015 or 2014 but purchased services to the value of £2234 in 2013.

100. The 2014 accounts also show management charges of £35,632 in 2014 and £58,126 in 2013. In cross-examination we learnt that the first of those charges was paid to Ms Bessant via Oral Concept Prosthetics. There were no management charges paid in 2015.

101. We conclude that the Directors received payment from the Company in relation to services provided by them through a combination of a partnership, management charges and dividends (in the case of Mr Hutchinson paid to his wholly owned company) prior to the implementation of the Scheme. Once that was implemented those payments ceased.

Communications about the Scheme between the Company and the Directors

102. On 8 October 2014 the Company wrote to Ms Bessant saying:

> "the Board and Company, after considering your performance across the year as well as how you have contributed to the Company's financial position, are delighted to announce that they are considering the following for you. The Company are prepared to fund the purchase of gold for you worth [approximately £150,000]…. There are significant conditions attached to this reward… You will be required to fulfil an obligation that the Company currently has to contribute the sum of [approximately £150,000] to the Trust on the terms set out in the attached agreement… If you are clear about the proposed terms of this reward we would be grateful if you could sign the enclosed agreement and return it to us.

103. The Company therefore clearly described the provision of a reward to each Director relating to their performance across the year and their contribution to the Company's financial position.

104. *On 9 October 2014, an agreement was entered into between Susan Bessant and the Company. Under the terms of the agreement Susan Bessant agreed to pay the sum of £147,000, increased by reference to RPI and by any increase necessary in order that no amount of corporation tax would be chargeable under section 464A(3) Corporation Tax Act 2010, to the Trustee in consideration for receiving a quantity of gold bullion from Asset Hound. That sum did not carry interest and was to become due and payable on 8 October 2024, subject to certain circumstances in which it would become immediately payable.*

105. *Also on 9 October 2014, an agreement was entered into between Ian Hutchinson and the Company. Under the terms of the agreement Ian Hutchinson agreed to pay the sum of £153,000, increased by reference to RPI and by any increase necessary in order that no amount of corporation tax would be chargeable under section 464A(3) Corporation Tax Act 2010, to the Trustee in consideration for receiving a quantity of gold bullion from Asset Hound. That sum did not carry interest and was to become due and payable on 8 October 2024, subject to certain circumstances in which it would become immediately payable*

106. There was no obligation or requirement imposed in the letter of 8 October 2014 or the agreements of 9 October 2014 or otherwise on the Directors to direct an immediate sale of the gold purchased for them or to use the proceeds of sale of the gold to satisfy Asset Hound's invoice to the Company.

107. These two agreements state that the Company procuring the acquisition of the gold and the transfer of it to the Directors was consideration for their undertaking to pay the £300,000 to the Trustees. In fact, the gold was transferred to them on the basis that they used that gold to pay for its purchase by the Company. By using the proceeds of the sale of the gold to pay for its purchase the Directors were left with just a few thousand pounds plus credits in their

favour on their directors' loan accounts. The description of the Company providing consideration for the undertaking must therefore be considered in that context.

108. On 20 October 2014, a deed was entered into between Susan Bessant and the Trustee under which Susan Bessant undertook to pay the sum due under the agreement she had entered into on 8 October 2014.

109. Also on 20 October 2014, a deed was entered into between Ian Hutchinson and the Trustee under which Ian Hutchinson undertook to pay the sum due under the agreement he had entered into on 8 October 2014.

110. These documents were written on the basis that the Directors undertook, upon the gold passing beneficially to them, to pay the sum agreed by each of them under the 8 October 2014 agreement to the Trustee upon the terms of those agreements.

111. The drafting of these agreements and deeds is at times not entirely clear, but the parties have agreed that the effect of the 20 October 2014 deeds was that the Directors undertook to pay the agreed sums to the Trust on 8 October 2014.

Asset Hound and the gold transactions.

112. *At all material times Asset Hound Ltd was a business trading as a holder and purchaser of gold.*

113. However, after hearing the evidence it was conceded on behalf of the Appellants that the payments made to Asset Hound did not qualify to be treated as consideration for goods or services provided in the course of a trade. (This meant that s1290(4)(a) CTA 2009 was no longer relied upon.)

114. A director of Asset Hound is also a director of Qubic Tax.

115. Asset Hound was paid £40,500 for the purchase and sale of the gold. That commission was just under 15 times the amount paid to Qubic Tax for its advice. The evidence was insufficient to explain the basis of this disparity or indeed the basis on which Asset Hound charged so much. It was clear that Asset Hound did not take any real risk when buying the gold. It did not buy the gold itself but instructed a dealer or broker called Bullion Vault to do so. It received orders from the Company and the Directors and, as Mr Devapal confirmed, Asset Hound ensured that it had an instruction to sell before it made the purchase so that Asset Hound was not at risk.

116. The documents show that:

(1) *On 21 October 2014, an agreement was entered into between Asset Hound Ltd and the Company under which Asset Hound was appointed to supply assets for designated employees and agreed to transfer title to those employees on payment of the purchase price by the Company*;

(2) In the agreement it was stated that:

(a) title to the gold would vest in Asset Hound and Asset Hound would transfer the title in the gold to the appropriate Director;

(b) the Company was to pay Asset Hound a "deposit" of £45,000 within seven days of the date of the agreement;

(c) the Company was required to reimburse Asset Hound for the price charged by it for the gold calculated by reference to the market price of the gold on the date on which title to the gold was transferred to the relevant Director; and to pay the commission of £40,500 to Asset Hound;

(d) subject to payment of the price charged for the gold and the commission Asset Hound would transfer title to the gold to the relevant Director;

(3) Also on 21 October 2014, an agreement was entered into between Asset Hound Ltd and Susan Bessant under which Asset Hound was appointed as agent for the management of gold bullion purchased for her. On the same day, an agreement was entered into between Asset Hound Ltd and Ian Hutchinson under which Asset Hound was appointed as agent for the management of gold bullion purchased for him.

(4) Under the agency agreements it was stated that:

(a) the Directors could instruct Asset Hound in writing to sell some or all of the gold in their portfolios or to purchase additional gold using any cash within the portfolios. Cash could be withdrawn by the Directors from their portfolios at any time*;*

(b) any transaction request (including a request to sell the gold) received by Asset Hound before 10 a.m. on a business day would lead to Asset Hound instructing the completion of the transaction on the same business day, but if the request was received by it after 10 a.m. the completion of the transaction would take place on the next business day.

(5) on 22 October 2014 the Company wrote to each of the Directors saying that it was understood that each of them may be prepared to make payment on behalf of the Company towards its liability to Asset Hound. A letter was enclosed for each director to notify Asset Hound of that intention;

(6) on 22 October 2014 the Company wrote to Asset Hound saying that the Directors may be willing to make payment towards the Company's liability for the purchase of gold and asking that the letter should be taken as written confirmation that the Company was happy for this to take place;

(7) on 22 October 2014 each of the Directors wrote to Asset Hound in each case instructing that "upon the sale of my gold you will hold funds for me… I wish to instruct that these net proceeds be paid against your invoice to the Company, albeit specifically in relation to that element concerning the purchase made for me";

(8) On 22 October 2014 the Company paid £45,000 to Asset Hound as the deposit for the gold purchase.

(9) By 23 October 2014, Asset Hound held the following:

(a) 5.897kg of gold for and on behalf of Susan Bessant;

(b) *6.138kg of gold for and on behalf of Ian Hutchinson.*

(10) On 23 October 2014, Asset Hound issued an invoice to the Company for £340,500, made up of £300,000 for 12.035kg of gold plus £40,500 gold dealing fees.

(11) On 23 October 2014 Asset Hound advised Susan Bessant by email that it had purchased 5.897kg of gold for her at a total cost of £147,000 and had subsequently sold that gold for £145,963.74. Asset Hound further advised that, in accordance with instructions received from her, £144,791.23 was being retained as payment towards

Asset Hound's invoice to the Company and that the balance of £1,172.51 was to be transferred to her requested bank account.

(12) *On 23 October 2014 Asset Hound advised Ian Hutchinson by email that it had purchased 6.138kg of gold for him at a total cost of £153,000 and had subsequently sold that gold for £151,929.13. Asset Hound further advised that, in accordance with instructions received from him, £150,708.77 was being retained as payment towards Asset Hound's invoice to the Company and that the balance of £1,220.36 was to be transferred to his requested bank account.*

(13) at 09:35 on 23 October 2014 Ms Bessant wrote on behalf of the Company and directed Asset Hound to purchase gold bullion worth £300,000 to be allocated to Ms Bessant (49%) and Mr Hutchinson (51%);

(14) at 18:19 on 23 October 2014 Asset Hound wrote to the Company confirming that the purchase of gold had been made. Asset Hound also confirmed the payment of £295,500 to be made by the Directors towards Asset Hound's invoice. *The Company's nominal ledger for the year ended 30 April 2015 records credit entries on the directors' current accounts of £144,791.23 in respect of Susan Bessant and £150,708.77 in respect of Ian Hutchinson*;

(15) at 18:20 on 23 October 2014 Asset Hound wrote to each of Ms Bessant and Mr Hutchinson confirming that the purchase and sale of the gold had been made;

(16) given that the emails show that the sales of the gold took place on 23 October 2014 and the terms of the Asset Hound agreement regarding the timing of transactions, the direction to sell must have been given before 10 a.m. on that day or on the previous day.

117. Accordingly, it is clear that Asset Hound took no real commercial risk in the gold purchase and sale transaction. While no sale instruction has been provided in the exhibits it is clear from the arrangements overall and the timing on 23 October 2014 involving emails confirming a purchase and then a sale within one minute, that Asset Hound worked on the basis that it had been instructed immediately to resell the gold.

118. This is consistent with other evidence before us. The evidence from the Directors at the hearing was that there was about £100,000 cash in the Company's bank account at the time of entering into the Scheme transactions. It was therefore unable to pay the amount due to Asset Hound for the purchase of the gold. The gold had to be sold in order to pay for its purchase; and Mr Devapal's evidence confirmed that Asset Hound did not take risk.

119. Given evidence regarding the gold transactions we are clear that there was never any real intention that the Directors held the gold for more than a scintilla in time. The Board Minutes of 8 October 2014 stating that the Company would purchase assets for the employees as reward and/or incentives for their performance and the employees could sell or retain the assets as they wished, subject to the condition of fulfilling the Company's obligation to fund the Trust, were disingenuous.

120. On the face of it the cash payments made by Asset Hound to the Directors are surprising when the gold was sold for less than the amount for which it was purchased. The payments and loan reflect the following:

(1) Asset Hound received the deposit of £45,000 from the Company and the Sale Proceeds of £297,892.87 totalling £342,892.87 but had invoiced £340,500 (comprising the £300,000 purchase price for the gold and the £40,500 commission). It had therefore been overpaid by the £2392.87 which it paid the Directors in cash by paying them £1220.36 and £1172.51;

(2) The Directors had taken on the obligation to pay £340,500 less the deposit paid by the Company of £45,000; i.e. £295,500 which was the total of the amounts credited to their loan accounts.

(3) In each case the amounts credited to the Directors and paid to them in cash reflected their respective shareholdings in the Company of 51% and 49%.

121. As noted earlier, at the time that the transactions were entered into with Asset Hound the Company did not have the cash available to pay out £300,000. After the payment of the Asset Hound invoice that value was translated into an equivalent value in the directors' loan accounts and the Directors were then able to draw cash from the Company as cash was later received by it. Therefore the transactions generated value for the Directors who were put in the position of having a £300,000 asset (the credits on their loan accounts) which they later realised by receiving cash as and when the Company was able to pay it. On the other side of the Directors' "balance sheets" was the undertaking to the Trust, the value of which we address later.

The fee paid to Asset Hound

122. We have found that Asset Hound took no real risk in buying and selling the gold given that it had received the sale instruction prior to the purchase instruction and could affect the transactions within the space of one minute. Yet it has charged £40,500 or 13.5% for doing so, whereas Qubic Tax (a company to which it is related via a common director at least) charged only £2750 plus VAT for providing and advising on the Scheme. This is simply not plausible and the evidence provided is insufficient for the Appellants to discharge the burden of proof on them to show that such an implausible scenario was fact. Mr Devapal was unable to address the fee in any depth beyond saying that the percentage charge was not a fixed percentage and varied from customer to customer. The Directors had nothing to contribute on this matter to support the allocation of fees. Indeed, Ms Bessant acknowledged in cross-examination that it was quite possible that she did not query the size of the commission paid to Asset Hound as it was all just seen as part of the overall package of charges for implementation of the Scheme.

123. If the £40,500 was paid for Asset Hound's purchase and sale of the gold it should have been possible for the Appellants to produce evidence supporting that claim such as evidence of someone with knowledge of how Asset Hound operates and how the fee is calculated, or comparative information showing that is a market rate for buying and selling gold.

124. We therefore conclude that much of the fee paid to Asset Hound in fact related to the provision of the scheme by Qubic and their tax advice.

The Trust

125. *On 8 October 2014, The Wired Orthodontics Limited Employee Trust 2014 ("the Trust") was established by a trust deed of that date. The settlor was the Company and the Trustee was the sole trustee of the trust. The beneficiaries included the employees and office holders of the Company. The protector of the trust was Susan Bessant. As protector, Susan Bessant had the power to appoint and remove trustees. Under Schedule 4 of the trust deed, the Company undertook to make a further contribution of £300,000 (adjusted by reference to RPI) to the Trust within 10 years. The Company was entitled to provide a third party to satisfy that obligation, but would remain fully liable until such time as the obligations were actually performed by the third party.*

126. The Trust was set up on terms that the beneficiaries were the employees of the company, their spouses, children and remoter issue (and their spouses and remoter issue) and any dependents of employees. Employees were defined to mean every employee and officeholder and former employee and office holder of the Company (including a person who has ceased to be such an employee or officeholder before the execution of the Deed of Settlement).

127. Ms Bessant's evidence showed that the Directors understood that they could, in fact, choose who would benefit under the Trust.

128. The Directors have said that one key employee was considered by them for potentially benefiting under the Trust, but decided that it was not worth doing so as he was only going to be paid a cash bonus of about £2000. No other employee has been considered for, or offered participation in, the Scheme.

129. No employee share scheme or bonus scheme has been set up by the Company.

THE OBLIGATION TO PAY THE TRUST

130. *On 9 October 2014, an agreement was entered into between each of Ms Bessant and Mr Hutchinson and the Company. Under the terms of the agreements the Directors agreed to pay the sum of £147,000 and £153,000 respectively, increased by reference to RPI and by any increase necessary in order that no amount of corporation tax would be chargeable under section 464A(3) Corporation Tax Act 2010, to the Trustee in consideration for receiving a quantity of gold bullion from Asset Hound. That sum did not carry interest and was to become due and payable on 8 October 2024, subject to certain circumstances in which it would become immediately payable.*

131. The money's (excluding the RPI element) were in fact paid by the Directors to the Trust in April 2019 in order to avoid the application of the loan charge provisions contained in Finance Act (No 2) 2017. However, in order to do this both Ms Bessant and Mr Hutchinson needed to borrow money from elsewhere. Ms Bessant had used the cash extracted from the Company following credits to her loan account to refurbish her home. Mr Hutchinson had used the cash similarly extracted by him to pay for courses and to buy properties to let. Both of them therefore had to deal with paying the amounts to the Trust when they no longer had the cash in the form of liquid assets.

132. Indeed, as at October 2014 when this Scheme was first entered into by the Appellants Ms Bessant would have needed to sell both of the properties (one of which was her home) in order to pay the £147,000 due from her or to borrow the money to do so. Mr Hutchinson would also have expected to borrow or sell property to fund the £157,000 due from him.

133. A "payability" questionnaire was supposed to be sent to the Directors by the Trustees bi-annually to ensure that the Directors were able to satisfy their obligation to the Trust. The evidence shows that this happened once in 2016 for Ms Bessant and once in 2017 for Mr Hutchinson. The exercise was not repeated even though it is required under the terms of the 20 October 2014 deeds of undertaking entered into between the Directors and the Trustees as the Directors continue to owe the RPI uplift amount.

134. Indeed, the fact that the RPI uplift amount remained outstanding was clearly something of a surprise to Mr Hutchinson when the point was put to him in cross-examination. There is no reference to this amount in the Witness Statements and we are satisfied that the Directors had previously been operating on the basis that they have no remaining liability.

135. However, the Directors and Mr Devapal were consistent about repeatedly saying that there was an expectation that the money's received by the Directors would be paid by them to the Trust after 10 years. We have reduced the weight of the evidence of the Directors and we have considered this claim in the context of other evidence and the plausibility of the claim:

(1) Mr Devapal's evidence was consistent regarding the Directors' obligation to pay the Trust. Although he was not involved in this set of transactions (other than as a Trustee signatory) he had enough knowledge of the Scheme's operation generally to be able to give reliable evidence on this matter;

(2) Ms Bessant told us that she understood the Trust to be a pension pot which could be drawn on by her subject to the rates of tax at the time. That implies the money would be paid to the Trust and then paid out once more or, as was described at the hearing, "recycled" by it to her in some way;

(3) We recognise that it is an agreed fact that the minutes of a board meeting on 3 Octobers 2014 state that it was acknowledged that, by the Company not wishing to retain any control, nor make requests to the trustees in respect of assets held in and/or contributed to the Trust, any such amounts could be applied in a manner solely that the trustees deemed acceptable. The Company was said to be content that it would not wish nor be able to make any further requests in respect of these funds once contributed. However, Ms Bessant was appointed "Protector" for the Trust. It was recognised by Mr Devapal that the Trustees can be removed by the Protector and as a practical matter they would follow the guidance from the Protector about the use of money's held by the Trust. Ms Bessant said in cross-examination when asked what she understood by the distinction between "benefit" and "eligible" (in the context of wording in her own Witness Statement saying that Qubic had advised that not every [employee] needs to benefit , merely that they are eligible):

> "Basically that we could sort of —everybody was potentially able to benefit
> but we could choose who we thought should."

(4) Therefore we limit the agreed fact to agreement as to what the Board Minutes stated. That does not mean that the Board Minutes were correct. Indeed, by the end of the hearing Mr Thornhill accepted on behalf of the Appellants that their evidence was such that they should be seen to have control of the Trust;

(5) the Directors described the Scheme in various ways: a reward for past service; a reward for past service combined with an incentive for themselves; and a reward for past service plus an incentive for other employees. We do not understand how there would be incentivisation for the Directors in circumstances where the money received by them as cash following the credits to their loan accounts was "effectively a loan";

(6) we see no basis for the Scheme being an incentive to other employees. The evidence about any provision of information to other employees was scant. At most that evidence came from Ms Bessant who thought she may have notified other employees of the existence of the Trust verbally, but given her inability to remember most of what had happened in relation to the Scheme, we give this vague description little weight. Further, the Trust would have no more than minimal funds of £1000 for 10 years and there is little evidence of any real dissemination of information about the Trust and ways in which the employees may benefit.

(7) In addition, in maintaining that other employees would be inventivised, the Appellants are saying that the reward for the Directors' services would not only be limited to what was, in effect, a loan, but would also have a real likelihood of being passed to other employees in 10 years' time. This flies in the face of standard commercial behaviour;

(8) At the same time the Appellants seek to maintain that the £300,000 was a reward for past services even though there was an obligation to pay the money in 10 years' time to the Trust in circumstances where it was claimed that there was no expectation of that money coming back to them. That is, to say the least, an unusual reward;

(9) Overall, the varying claims other than that recognising that the cash received by the employees was a reward for services make little sense. As a fundamental matter, the

Directors had foregone any other payment for their services in 2014 and 2015. It makes no sense that the Directors would convert income which they would otherwise have received from the Company in relation to their efforts and the profits resulting therefrom into a loan where the money's repaid would then be used to pay others;

(10) The Appellant's own accounting expert, Mr Brice, in reaching his view that the £300,000 was correctly treated in the Company's accounts as an expense, specifically took into account that:

(a) what he describes as the "rewards" given to the Directors were for past service. There was not sufficient evidence to recognise an Trust asset which may potentially relate to future service of employees of the Company;

(b) even when amounts are paid to the Trust in 2024 they are linked to a transaction for past service of the Directors and it is therefore reasonable to consider that the trustee of the Trust would have a number of options available which would not result in a future economic benefit for the company. For example, Mr Brice specifically contemplates that the amounts could simply be "recycled" for instance by another similar loan arrangement. At the hearing Mr Brice confirmed that he considered that the Directors who had effectively earned the money's were the most likely to benefit under the Trust when the £300,000 was paid to it;

(11) The Directors continue to owe the RPI uplift element. Given the rates of RPI that amount is becoming a more significant liability, yet the Trustees have not carried out any payability reviews since 2017 and the Directors were seemingly unaware if their mounting liabilities. No evidence has been provided that the obligation has been waived. The implication is that the Trustees are not, in fact, concerned whether the Directors are able to pay the money they still owe. We conclude that the Directors had no actual intention of paying that money;

(12) the Directors used the money received by them in 2014 to pay for courses and to refurbish and improve properties. They were therefore facing a liability to pay very large amounts to the Trust with no ready access to funds to do so. We recognise that the money's (excluding the RPI element) were in fact paid in 2019, but to do so they had to obtain third party loans;

(13) the fees (including the "commission" paid to Asset Hound") paid for the Scheme were more than 13.5% of the £300,000 received by the Directors. The Directors referred to the Scheme as being a tax efficient way of accessing the money, although they struggled to articulate any efficiencies. At most, Ms Bessant said that the efficiency derived from a comparison with drawings. Both Directors said that they struggled to obtain third-party finance, but that does not explain why they could not have borrowed from the Company in which they were participators if all they were in reality receiving was money akin to a loan. While there would have been a corporation tax "loan to participator" charge under s455 CTA 2010, that would have been refundable on repayment of the loan. There would also have been a small benefit in kind charge on the difference (if any) between the interest payable on the loans and the official rate. Overall, the fees paid to use the Scheme significantly exceeded the tax costs of loans from the Company.

136. Considering these factors and the evidence overall, we have concluded that the stated intention to pay the £300,000 (plus RPI) to the Trust in 2024 was based on the understanding that the Directors would in some way be able to access those funds again when "recycled" by the Trust. We recognise that at that point there is the potential for a tax charge on the payment

of the money's to the Directors, but the extent of that tax will depend upon the way in which the money's are provided and the amounts provided in any particular tax year.

AGREED ISSUES

137. The parties have agreed that Part 7A ITEPA 2003 does not apply to the transactions. They have also agreed that there is no difference in the analysis to be applied for NICs and income tax purposes. Neither party argues that the moneys paid to Ms Bessant and Mr Hutchinson were distributions from the Company.

138. The parties have also agreed that the following issues are in dispute (in the following agreed terms):

(1) In relation to the partial closure notice issued to Mr Hutchinson and closure notice issued to Ms Bessant, if (and only if) a payment of income was made by the Company, whether s222 ITEPA 2003 applies;

(2) In relation to the determinations issued under Regulation 80 Income Tax (Pay As You Earn) Regulations 2003 and decisions under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 for the years ended 5 April 2015 and 2016, the overall issue is whether the Company has made payments of earnings (within the meaning of s62 ITEPA 2003) and/or earnings of an employed earner (within s3 Social Security Contributions and Benefits Act 1992);

(3) In relation to the closure notices for the periods ended 30 April 2014 and 2015, whether the Company is entitled to a deduction for corporation tax purposes. The following specific issues arise for determination:

(a) Do the transactions give rise to an expense in the Company's accounts in accordance with UK Generally Accepted Accounting Principles?

(b) Were the relevant payments made wholly and exclusively for the purposes of the trade (within the meaning of s54 Corporation Tax Act 2009 ("CTA 2009"))?

(c) Is a deduction denied by s1290 CTA 2009; specifically whether there was an 'employee benefit contribution' and whether the application of s1290 is excluded because the relevant deductions were allowable for something given as consideration for goods or services provided in the course of a trade or profession (within the meaning of s1290(4)(a) CTA 2009)?

(d) Is a deduction denied by s1288 CTA 2009?

(e) Do those transactions give rise to a charge under s464A CTA 2010?

139. If it is decided by us that the Appellants are liable to pay PAYE and NICs, it is agreed that the Company can only be liable to corporation tax on the basis of the issue described at 136(3)(b) above.

140. If (and only if) the Appellants are otherwise successful in their appeals against the closure notices, determinations and NIC decisions, the issue is whether the General Anti-abuse Rule ("GAAR") applies and in particular:

(1) Whether there are tax arrangements that are abusive (within the meaning of s207 FA 2013)?

(2) What just and reasonable adjustments are required to be made to counteract the tax advantages?

THE APPELLANTS' CASES

141. In summarising both parties' cases we have touched upon issues which have not formed the basis of this decision, most notably the GAAR, for information as this is the first time in which the GAAR has been relied upon by HMRC in the tribunal.

142. At the heart of Ms Bessant's and Mr Hutchinson's cases is the contention that the arrangements were effectively loans; they were what Mr Thornhill called "quasi-loans" (as in paragraph 2 Schedule 11 Finance Act (No 2) 2017 dealing with the loan charge). The money was received by them on the basis that they had an obligation to pay those amounts (together with an amount reflecting RPI) to the Trust in the future. Mr Thornhill submits that a loan by an employer does not give rise to earnings as confirmed by *CIA Insurance Services Ltd v HMRC* [2022] UKFTT 00144 (TC). The Directors had the use of the money as opposed to the receipt of money and applying Lord Hodge in *RFC 2012plc (in liquidation) (formerly The Rangers Football Club plc) v Advocate General for Scotland* [2017] 1 WLR this is not earnings. HMRC's logic would turn loans into earnings.

143. It is recognised that this conclusion requires the Directors to have had a genuine obligation to make payments to the Trust. If not, then it was conceded that receipt of the gold would give rise to earnings. The genuineness of the obligation to make payments to the Trust is evidenced in part by the fact that the contractual payments to the Trust were made in full at an early point in order to avoid the loan charge introduced by Finance (No 2) Act 2017. It is significant that HMRC value such obligations to employee benefit trusts at their full value when assessing them to inheritance tax at this stage of winding up the employee benefit trusts.

144. Arguably, the provision of the gold may give rise to a benefit in kind charge although that has not been relied upon by HMRC. Alternatively, the arrangements would give rise to liability under section 464A CTA 2010 if there was a "benefit". If there is any benefit it lies in the ability to pay the RPI indexation in year 10. However that "benefit" is not an actual benefit because it has to be compensated for when making the payment after 10 years..

145. If the receipt of the gold constituted earnings Mr Thornhill submitted that the *Ramsay* principles should be applied to the arrangements such that it should be treated as a payment of earnings and cash so that there was no notional payment within section 222 ITEPA 2003. Decisions such as *DTE Financial Services Ltd v HMRC* [2001] EWCA Civ 455 show that specialist provisions dealing with, for example, assets subject to trading arrangements, do not stop HMRC relying on *Ramsay* to treat the arrangements as a payment in cash. The Company could have deducted and paid PAYE. Therefore section 222 does not apply.

146. As the Directors did not receive earnings the Regulation 80 determination imposed on the Company falls away.

147. In the light of the evidence, it was accepted by Mr Thornhill in his closing submissions that Company control existed over the Trust. The Directors both said they would expect the Company to make recommendations to the Trustees.

148. However, in relation to the correct accounting under GAAP, UITF 32 "Employee benefit trusts and other intermediate payment arrangements" (which HMRC's expert says applies) only applies if the Company can be said to have exchanged one asset for another. In this case the asset given up by the Company is the future receipt of £300,000. The asset acquired by the Company is the benefit to the Company of the future £300,000 to be received by the Trust. The Appellants do not accept HMRC's position that the £300,000 would not in fact be paid by the Directors to the Trust.

149. In relation to the "wholly and exclusively" test under s54 CTA 2009 it is submitted that the case of *Scotts Atlantic Management Ltd and another v Revenue and Customs*

Commissioners [2015] UKUT 66 (TCC) still permits awards to be provided in the most tax efficient form. It draws the line at attempts to extract the maximum amount of profits in a tax-free form, for example, to defeat creditors. At that point the tax avoidance purpose takes on a life of its own. In this case there is a price to pay for the tax free treatment in the hands of the directors which was the obligation to place equivalent amounts in the Trust. The Company did not have an "all pervading object" of avoiding corporation tax.

150. The fee to Asset Hound of £40,500 was not a hidden fee for tax advice. Mr Devapal's evidence showed that such transactions mostly involve commissions charged by Asset Hound which varied with the particular client circumstances. If the Directors had revoked their instruction to sell their gold then Asset Hound would be at risk of not recovering the amount owed by the Company. The fee was a price worth paying for the wider purposes of the Company and each director used their money to generate substantial benefits for themselves.

151. In relation to the GAAR Panel opinion, the taxation of loans under Part7A is a penal provision reflecting a view that most loans caught by the provisions will not be repaid. In contrast, in this case the directors were under a real obligation to pay the Trust. Therefore if any counteraction was called for, it would be to treat the transactions as a loan, but no counteraction would then be necessary because loans from an employer are not earnings.

152. The only abnormality was the Directors contributing to the Trust and this should not lead to an earnings charge. Had the Directors received loans from the Company there would not be an earnings charge. It is the fact of the obligation to pay the Trust which negatives earnings just as if a loan had been made by the Company. The obligation to pay the Trust assisted the Company in its argument that under GAAP there is no asset created in return for its payments for the gold or in relation to s1290(4)(a) CTA 2009.

153. The Tribunal should be slow to accept a counteraction which leads to a liability which could quite easily be avoided. If an advisor were to advise a contribution to the Trust and a loan where the employer could have made the loan the advisor might be negligent.

HMRC'S CASE

154. In essence, HMRC say that the obligation on the Directors to fund the Trust and the involvement of the purchase of gold bullion which was sold immediately after it was purchased were contrivances to avoid the disguised remuneration provisions in Part 7A ITEPA and the restrictions on deductions for employee benefit contributions in ss1290-1293 CTA 2009.

155. HMRC does not assert that the transactions were shams. It is accepted that the relevant documents created real rights and obligations. In particular, the obligation on Ms Bessant and Mr Hutchinson to pay sums to the Trust was not a sham, but HMRC maintained that there was no practical likelihood of the obligation in question being enforced and no real intention that it should be enforced. However, HMRC maintained that that factual inference is not necessary in order for the appeals to be dismissed.

156. In relation to assessing the evidence, Mr Tolley submitted that, unusually, neither the documents purporting to record the parties' contemporaneous intentions, nor the recollection of the witnesses, provide a reliable guide to the determination of disputed matters of fact. He submitted that the Appellants demonstrated a lack of candour and the Tribunal was therefore invited to give significantly greater regard to inherent probabilities than to self-serving witness statements being carefully curated documents which bear little resemblance to reality.

157. The documents purporting to record contemporaneous decisions and intentions of the Company and the Directors comprised templates prepared by Qubic. Neither of the Directors had any understanding of their contents and each, at times, undermined their own witness statements. Furthermore, expected documents were missing. There is no evidence of the

advice given by Qubic even though Mr Devapal confirmed that Qubic would ordinarily provide such advice on writing. Mr Hutchinson had referred to a specific letter of engagement which had not been produced. Generally Mr Devapal's evidence was so limited by his lack of specific knowledge of the facts that it added little to the documents.

158. HMRC relies upon *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) although the documentary evidence in this case is of little more assistance than the witnesses' recollections. Therefore the Tribunal will have to depend to a high degree on inferences to be drawn from the inherent probabilities.

159. Mr Tolley submitted that the evidence showed that it was preordained that the gold bought for the Directors would immediately be resold and the proceeds applied against Asset Hound's invoice so that the Directors were left with a credit in their directors' loan accounts. The money or money's worth received by the Directors fell within section 62(2) ITEPA and was therefore earnings. They received that money or money's worth as a reward for their service and the earnings were therefore from the employment (*Shilton v Wilmshurst* [1991] 1 AC 684). The assumption of the obligation to pay sums to the Trust does not fall within any of the categories of allowable deduction and therefore does not reduce what section 11(1) ITEPA describes as "net taxable earnings". The existence of the obligation to pay the Trust does not cause the money or money's worth to cease to be "earnings" and in this respect the cases of *Smyth v Stretton* 919040 5 TC 36 and *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] 1 WLR 2767. The arrangements did not involve loans to the Directors and there is no basis to tax the Directors as if they had received loans.

160. Furthermore, Mr Tolley submitted that there is no real intention that the Directors should be required to pay the sums into the Trust or any real likelihood of them doing so. HMRC maintained that the real intention on entry into the transactions was that, at the end of the 10 years, the Trustee would simply leave the debt outstanding. This is relevant to whether there was "earnings" on a purposive construction of the legislation (*OCO Ltd & another v RCC* [2018] SFTD 123).

161. If the Directors received earnings the effect of section 222 ITEPA is that a further charge to income tax arises on them because:

(1) the Company's provision of the gold was the provision of a "readily convertible asset" and the Company was therefore treated as making a payment of PAYE income pursuant to section 696 ITEPA. This was a "notional payment" for the purposes of section 222 and section 710 ITEPA;

(2) the Company did not make sufficient actual payments from which it could deduct income tax due pursuant to section 710(1) and was therefore obliged to account for the tax under section 710(4); and

(3) the Directors did not make good that amount to the Company within 90 days.

162. The Appellants' contention that in substance they received a payment of cash (applying the *Ramsay* principle) which is not a notional payment is not accepted because the concept of providing PAYE income in the form of a readily convertible asset is, by definition, intended to cover situations in which it might be said there is, in substance, a payment of earnings in cash.

163. Alternatively, it is submitted that the Company was liable to tax under s464A CTA 2010 on the value of the gold provided to the employees. This section was introduced in order to counter arrangements which sought to extract value from a close company without the company making a loan to a participator. In this case the transfer of beneficial ownership of the gold to the Directors was a benefit within section 464A and that benefit was conferred as a

result of arrangements, the main purpose of which was conferring an income tax advantage on them; i.e. the avoidance of an earnings charge. Consequently the Company was liable to tax at 25% of the value of the gold. It would make no sense if the value of any benefit should be reduced by the existence of a corresponding (unsatisfied) obligation on the participator. Instead, the benefit to be valued for the purposes of s464A is simply what the Directors received, i.e. the gold.

164. Turning to the position of the Company and the deductibility of expenses, s46(1) CTA 2009 requires the profits of the trade to be calculated in accordance with GAAP. The recognition of the expenses in the company's accounts did not follow GAAP if the Directors stated obligation to pay the £300,000 to the Trust was seen by the parties as a real obligation. However, if was found that there was no intention to pay the Trust, or the clear intention from the outset was for any such payment to be "recycled" by the Trust, HMRC accepted that both experts agreed that the £300,000 was correctly recorded as an expense.

165. However,, the purpose of implementing the scheme in order to obtain a corporation tax deduction (as well as to reward the Directors) gave rise to a duality of purpose which is fatal under s54 CTA 2009, applying *Vodafone Cellular Ltd & others v Shaw* [1997] STC 734.

166. In relation to the GAAR, the witness evidence confirmed that the gold transactions were a contrivance with no purpose beyond avoiding the application of Part 7A and s1290 CTA 2009. A further contrivance is found in the Directors purportedly funding the Trust. The Scheme was intended to exploit a shortcoming in the drafting of s554Z8(5) ITEPA which failed to include a tax avoidance proviso.

167. The just and reasonable adjustment is the re-imposition of a general earnings charge or a Part 7A charge. The Appellants' arguments regarding counteraction provide an answer to the wrong question. The question is not how could the advantage have been obtained in a different way, but how is the tax advantage obtained from the arrangements to be counteracted?

THE LAW

Taxability of earnings

168. The charge to tax on employment income under this Part is a charge to tax on "general earnings" and "specific employment income". (section 6 ITEPA)

169. In s7 ITEPA "general earnings" is defined as earnings within Chapter 1 of Part 3 ITEAP, or any amount treated as earnings under s7(5).

170. "Earnings" are defined in s62 ITEPA (the only section in Chapter 1 of Part 3). Section 62 provides, so far as relevant:

> "62 Earnings
>
> (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..."

171. Section 9 ITEPA provides that the amount of general earnings charged to tax is the "net taxable earnings" from an employment in the year. That amount is calculated under section 11 ITEPA by reference to any taxable earnings from the employment in the year. Section 10 then provides that taxable earnings are determined under Chapters 4 and 5 of Part 1 ITEPA (which in turn set out the provisions identifying that all general earnings received by a UK resident in a tax year are taxable earnings).

172. Section 11 provides that:

> "the "net taxable earnings" from an employment in a tax year are given by
>
> the formula:
>
> TE - DE
>
> Where:
>
> TE means the total amount of any taxable earnings from the employment in the tax year, and
>
> DE means the total amount of any deductions allowed from those earnings under provisions listed in section 327(3) to (5) (deductions from earnings: general)."

173. The result is that the code sets out that a person is taxed on their net taxable earnings and in making that calculation the only deductions are the amounts allowed under the ITEPA provisions.

174. The Court of Appeal in *Murphy v HMRC* [2022] EWCA Civ 1112 confirmed the interpretation and restriction of these provisions (at para 22):

> "Thus the statutory scheme contemplates that all earnings from a person's employment are taxable, subject only to the allowable deductions provided for by the provisions listed in s.327 (all of which are in Part 5 of ITEPA). The question whether a payment amounts to "taxable earnings" from the taxpayer's employment is therefore entirely separate from the question whether a deduction is to be allowed against taxable income. Whilst it is only the "net taxable earnings" from a person's employment which are chargeable to income tax by virtue of s.9(2), the expression "net taxable earnings" is a defined expression which takes into account those types of expenditure which Parliament has expressly stipulated may be deducted."

175. Notably, the Court of Appeal specifically reaffirmed the limitation of "earnings" to amounts "from" a person's employment (at para 24) as previously stated by the House of Lords in the case of *Shilton v Wilmshurst* (1991] 1 AC 684 (at 689 B-D). "From" being an employee was identified as being a reward for services or an inducement to enter into employment and provide future services (at 689 E).

176. In making the required calculations, even in the context of the word "profit", the full amount of the earnings are taken into account, not some amount after taking into account deductions (see *Murphy* at para 23):

> "It is designed to capture the taxpayer's entire earnings from his employment from which permissible deductions can then be made. Seen from this perspective, it would make no sense if the word "profit" in s.62(2)(b) were to be given a meaning that involved making a deduction from the payment received by the taxpayer, all the more so if that deduction would not be permitted under Part 5 of ITEPA."

177. The first question therefore is to identify what, if any, amount has been received by the employee as earnings under section 62.

178. Lord Hodge in the Supreme Court in *Rangers* stated that:

> "Income tax on emoluments or earnings is, principally but not exclusively, a tax on the payment of money by an employer to an employee as a reward for his or her work as an employee." (para 35)

179. Lord Hodge further identified that the legislation applies to remuneration paid in money or money's worth (para 59). He noted (at para 59) that:

> "The relevant provisions for the taxation of emoluments or earnings were and are drafted in deliberately wide terms to bring within the tax charge money paid as a reward for an employee's work…. "

and confirmed the purposive approach which should be applied:

> "In applying a purposive interpretation of a taxing provision in the context of a tax avoidance scheme it is legitimate to look to the composite effect of the scheme as it was intended to operate."(para 65).

180. If the Directors received earnings under section 62, it is then necessary to decide whether there is a charge under section 222 ITEPA.

181. Section 222 ITEPA provides:

> "222 Payments by employer on account of tax where deduction not possible
>
> (1) This section applies if—
>
> (a) an employer is treated by virtue of sections 687, 687A, 689, 689A and 693 to 700 as having made a payment of income of an employee ("the notional payment"),
>
> (b) the employer is required by virtue of section 710(4) to account to an officer of Revenue and Customs for an amount of income tax ("the due amount") in respect of the notional payment, and
>
> (c) the employee does not, before the end of the period of 90 days after the end of the tax year in which the relevant date falls, make good the due amount to the employer.
>
> (2) The due amount is to be treated as earnings from the employment for the tax year in which the relevant date falls…
>
> (4) In this section "the relevant date" means…
>
> (b) …the date on which the employer is treated as making the notional payment."

182. Section 696(1) ITEPA 2003 provides that

> "[i]f any PAYE income of an employee is provided in the form of a readily convertible asset, the employer is to be treated, for the purpose of PAYE regulations, as making a payment of that income…"

183. Section 702 defines "readily convertible asset" in so far as material as follows:

> "702 Meaning of "readily convertible asset"
>
> (1) In this Chapter "readily convertible asset" means…
>
> (c) an asset for which trading arrangements are in existence, or are likely to come into existence in accordance with—

(i) any arrangements of another description existing when the asset is provided, or

(ii) any understanding existing at that time.

(2) For the purposes of this section trading arrangements for any asset provided to any person exist whenever there exist any arrangements the effect of which in relation to that asset is to enable—

(a) that person, or

(b) a member of that person's family or household,

to obtain an amount or total amount of money that is, or is likely to be, similar to the expense incurred in the provision of that asset…"

184. If a notional payment is made under s222(1)(a), s710 sets out an employer's PAYE obligations. The employer must deduct income tax (in compliance with the PAYE regulations) at the relevant time from any payment or payments the employer actually makes; and if the employer is unable to deduct, then it must still account to HMRC at the relevant time for an amount of income tax equal to the amount of income tax the employer is required, but is unable, to deduct.

Corporation tax deductibility of the costs of the Scheme

185. As we conclude later in this decision that the Directors received earnings, the deductibility of the amounts for the Company depends on:

(1) whether the expense of £300,000 was correctly recognised in accordance with generally accepted accounting practice ("GAAP") as required by s46(1) CTA 2009; and

(2) whether the expense of £300,000 was incurred wholly and exclusively for the purposes of the trade as required by s54 CTA 2009.

186. Section 46(1) CTA 2009 provides that:

> "The profits of a trade must be calculated in accordance with generally accepted accounting practice, subject to any adjustment required or authorised by law in calculating profits for corporation tax purposes."

187. If the profits are calculated in accordance with GAAP, an adjustment may still be required or authorised by law if the claimed expenses do not satisfy the requirements of s54 CTA 2009 which provides that a deduction is only allowed for expenses incurred "wholly and exclusively for the purposes of the trade".

188. The judgement of Millett LJ in *Vodafone Cellular Ltd & others v Shaw* [1997] STC 734 at 742-743 sets out the approach we must apply:

> "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."

189. We have also been referred to the case of *Scotts Atlantic*. Mr Thornhill distinguishes the circumstances of this case from that because he says that the Company here did not have the "all-pervading object" of avoiding corporation tax which had been found as a matter-of-fact to exist by the First-tier Tribunal in *Scotts Atlantic*. Furthermore, he referred us to various passages of the Upper Tribunal decision and in particular at para:

… "a taxpayer is entitled to order its affairs in a way which incurs the least tax liability and 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."

190. While it is true that the First-tier Tribunal found that there was an all-pervading purpose to secure a corporation tax deduction in the case of *Scotts Atlantic*, we are clear that that is not the test which should be applied. Indeed, the Upper Tribunal in that case made this clear when it said (at paras 70,71 and 80):

"It seems to be saying that one, perhaps the dominant, reason why the contributions were made was to obtain a tax deduction. On that approach, there was a duality of purpose in the context of the 'wholly and exclusively' test because one purpose of the expenditure (rather than of the steps by which the expenditure was incurred) was to obtain a tax deduction. In other words, this was not a case where the purpose of the expenditure was solely to provide employee benefits with the incidental result that a deduction would be obtained; rather, one purpose of the contribution was to obtain the deduction (in order, no doubt, on this approach to reduce the corporation tax liability).

Thus we conclude that the FTT's decision contains a finding that one of the purposes of the contributions, in contrast with the purpose of the method of effecting the expenditure by way of the scheme, was to obtain a corporation tax deduction which would not have been available if the contribution had been made by more conventional means, and that in these particular circumstances such purpose was not an incidental consequence of the expense.

> …Accordingly, the correct question to ask is what the purpose of that expense was in the context of the scheme as a whole and to ascertain what the intentions of SAML and SFML were in subscribing [for] the shares and permitting Newco to grant the options. The answer on the factual findings of the FTT, is that 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. The deductibility which it was hoped to achieve was not simply inherent in the (allegedly sole) purpose of benefiting employees and directors.

191. We must therefore ask what was the purpose of the relevant expenses in the context of the Scheme as a whole.

DISCUSSSION

Were the Appellants taxable on the basis of having received "earnings" under Section 62 ITEPA?

192. In essence, the Appellants' cases maintain that the gold and/or the payments received in cash by Ms Bessant and Mr Hutchinson following the credits made to their directors' loan accounts were not earnings because of the obligation to pay the £300,000 (plus an amount reflecting RPI) to the Trust. In contrast, in essence HMRC say that the Appellants received earnings on the application of the basic earnings rules contained in the legislation and case law and that there is no provision entitling the individuals to a deduction or allowance for the obligation to make payment at a future time to the Trust.

193. The facts show that:

(1) on 9 October 2014, agreements were entered into between the Directors and the Company. Under the terms of the agreements the Directors agreed to pay the combined sum of £300,000, increased by reference to RPI and by any increase necessary in order that no amount of corporation tax would be chargeable under section 464A(3) Corporation Tax Act 2010, to the Trustee in consideration for receiving a quantity of gold bullion from Asset Hound;

(2) the Directors received £300,000 worth of gold. The documents were at pains to show that the beneficial ownership of the gold vested in the Directors;

(3) the Directors immediately sold the gold and directed that the proceeds should be used to pay Asset Hound's invoice issued to the Company for purchasing the gold;

(4) the satisfaction of the invoice gave rise to a debt owed to the Directors by the Company reflected in the directors' loan accounts; and

(5) the Directors subsequently extracted cash from the Company by drawing against the credits in their loan accounts.

194. At the hearing we raised whether we should be considering the provision of the gold or the provision of cash as earnings. Mr Tolley submitted that looking at the transactions both as a whole and step by step earnings are conferred on the individuals in the receipt of the gold, or the money that the gold becomes as soon as it is sold. There is then an agreement to dispose of those earnings, in a particular way, namely for the discharge of the invoice for the purchase of the gold, which creates the directors' loan account credit. One does not need to go any further in terms of identifying the earnings. Mr Thornhill has submitted that this part of the transaction could have *Ramsay* applied to it so that the gold is ignored and the transactions are viewed simply as cash transactions, although at the same time he accepted that the sale of the gold was the mechanism to produce the credits on the loan accounts.

195. We are clear that the provision of the gold to the Directors was the provision of money or money's worth to them. The Directors were able to convert their momentary ownership of the gold into loan account credits which they subsequently drew as cash. There was no contractual requirement as between the Company and the Directors that when they became entitled to the gold they should use the proceeds of sale of it to satisfy Asset Hound's invoice. Instead, the Directors received the gold and the documents sought to make clear that they had beneficial ownership of it even if in fact that ownership was momentary because they had already decided to sell it.

196. The Appellants' case is that the undertaking to contribute £300,000 to the Trust causes the provision of gold not to be money or money's worth (or for that money or money's worth to have a negligible value) on the basis that a loan or quasi-loan by an employer does not give rise to earnings. Mr Thornhill relies upon the judgement of Lord Hodge in *Rangers* to say that the use of money as opposed to the receipt of money is not earnings. However, we are clear that there was no actual loan in this case. Instead, we agree with Mr Tolley that the Company paid money or money's worth to an employee, on terms that the employee should subsequently pay an equivalent sum to a trust for the employee's own benefit; and that is not a loan of the money or money's worth.

197. That conclusion is re-enforced when we stand back and look at the core elements of the Scheme which were, on the one hand, the receipt of cash of £300,000 by the Directors through the mechanism of the gold and loan account transactions; and on the other hand, an obligation to pay £300,000 (plus RPI) in 2024 to the Trust, in circumstances where we have found that the money's would be recycled to the Directors. That obligation to make the payment cannot be categorised as repayment of the money to or for the benefit of the Company, given our conclusion that the money would then pass back to the Directors. The obligation to make the payment to the Trust is at best no more than another contrived step in a series of contrived steps.

198. Mr Tolley relied upon Lord Hodge's judgement in *Rangers*. In that case the employer made payments to an employee remuneration trust with a recommendation the trustee resettled the sum paid onto a sub-trust allocated to the particular employee (footballer), under which members of the employee's family were the beneficiaries. The employee was protector of the relevant sub-trust and received unsecured loans repayable only on death from the sub-trust of the amount settled by the employee remuneration trust trustee. The Supreme Court decided that the actual loans made to the employees in that case were taxable earnings where the payments were made by the employer to the employee remuneration trust. In so doing, the Supreme Court confirmed the purposive approach to be taken to the construction of s62 ITEPA which we have set out earlier.

199. In this case the employees, the Directors, have received money or money's worth either in the form of the gold initially or in the form of the cash received by them; and the obligation to pay the Trust does not (in contrast to the position in *Rangers*) give rise to a loan. Considering the reasoning in the Supreme Court, we agree with Mr Tolley that there is little basis to conclude that the transactions in the *Rangers* case should be treated as giving rise to earnings and those in this case as not doing so. Ultimately, that is because, just as in *Rangers*, we are satisfied that the money or money's worth received by the Directors was a reward for their services as employees of the Company. When we stand back and look at the "composite effect" of the Scheme as required by *Rangers*, we find cash paid to the Directors as a reward for their services.

200. We have reached the conclusion that the Directors received a reward for their services because of the evidence overall (including that of the Appellants' expert accountant viewing the amount as such); and our findings that:

(1) this was one of the drivers of the Scheme described to us by the Directors themselves and reflected in the Scheme documentation, in particular, the Company board minutes referring to the arrangements as a reward to certain employees;

(2) there were not alternative drivers of incentivisation of themselves and other employees;

(3) the stated intention to pay the £300,000 (plus RPI) to the Trust was based on the understanding that the Directors would in some way be able to access those funds again when "recycled" by the Trust, thereby providing what Ms Bessant described as a "pension pot";

(4) the Directors received no other reward for their services in contrast to the position in the years prior to implementation of the Scheme.

201. We are therefore satisfied that the Directors received money or money's worth of £300,000 when awarded the gold which was received from their employer, the Company, as a reward for their services. That money or money's worth is therefore "earnings" under s62 ITEPA. There is no allowable deduction under ss327(3)-(5) ITEPA which would reduce the amount of that money or money's worth when calculating the net taxable earnings of the Directors.

Application of section 222 ITEPA

202. The Appellants do not dispute that the gold was a "readily convertible asset" as defined by s702(1) ITEPA. Instead, Mr Thornhill submits that *Ramsay* should be applied so that there was no provision of the gold, only the cash which the Directors accessed following the credits to their loan accounts.

203. However, we agree with the submissions made by Mr Tolley that the rules dealing with the provision of PAYE income in the form of a readily convertible asset are precisely aimed at covering situations in which there is, in substance, a payment of earnings in cash. The provisions were originally introduced to deal with the multifarious schemes used in the 1990s to reward employees by provision of various types of assets such as platinum sponges which were immediately sold to produce cash for the employees. The clear purpose of the rules is to impose PAYE in situations where employees receive assets that can be readily converted into cash. It would be contrary to the purpose of them to ignore their clear wording and conclude that, in reality, cash was paid.

204. The evidence shows that the Company did not make sufficient actual payments from which it could deduct the income tax due pursuant to s710(1) ITEPA. Therefore it was required to account for the tax under s701(4) ITEPA. As the Directors did not make good the due amount to the Company before the end of the period of 90 days after the end of the tax year in which the notional payment (i.e. the provision of the gold) was made, s222(2) ITEPA imposes a charge. The due amount is treated as earnings from the employment for the tax year in which that date arose.

Corporation tax deduction

Application of GAAP

205. The experts agreed that the £40,500 paid to Asset Hound as a fee should have been recognised as an expense in the Company's accounts in the year ended April 2015. We are

therefore satisfied that the deduction of that expense in the accounts of the Company is in accordance with GAAP as required by s46(1) CTA 2009.

206. Turning to the £300,000 paid for the gold, Mr Brice considers that it was correctly treated as an expense of the Company whereas Mr Orrock considers that the treatment was incorrect. The core of their disagreement focuses on whether the Company should have recognised an asset in relation to the Trust on its balance sheet in the year ended 30 April 2015. Mr Brice's opinion is that GAAP does not require such recognition whereas Mr Orrock is of the opinion that GAAP does require an asset to be recognised. Their difference of opinion depends upon their different interpretations of the application of:

(1) the accounting standard "Financial Reporting Standard for Smaller Entities ("FRSSE"); and

(2) UITF 32 "Employee benefit trusts and other intermediate payment arrangements".

207. In short, Mr Brice's opinion is that UITF 32 does not apply to these transactions whereas Mr Orrock considers that it does and that its application results in the recognition of a Trust asset. However, the experts agree that if there was in fact no intention that the Directors should satisfy the obligation to pay sums into the Trust, the expenses would be correctly recognised.

208. We have found that the intention was for the Directors to pay the Trust in 2024 on the assumption that the moneys would be "recycled" to them in some way. Indeed, the Appellants' own expert was of the view that it was most likely that the moneys would go back to the Directors. Mr Orrock's opinion, in contrast, was based to a significant extent on his conclusion that there is no evidence from the documents that recycling would happen. As we have explained, the documents do not provide reliable evidence of the intention of those involved in the Scheme. Therefore this fundamental assumption made by Mr Orrock is undermined.

209. Furthermore, in his closing submissions Mr Tolley says that if the recycling was the clear intention from the outset, then in substance that comes to the same thing as saying that there is no intention that the Directors would satisfy their obligations, which is the premise on which both experts hold that the recognition of the expense was in accordance with GAAP. We agree with this submission.

210. We therefore conclude that, on the basis that we have found that recycling of the moneys to the Directors was the most likely scenario on payment of the £300,000 to the Trust and this was the understanding (and intention) of the participants in the Scheme, no asset should be recognised in the balance sheet of the Company and deduction of the amounts as expenses in the Company's profit and loss account was correct.

Wholly and exclusively

211. The issue is whether, in incurring the relevant expenses in the implementation by the Company of the Scheme, there was a duality of purpose which means that the wholly and exclusively test is not met. There are again two elements to the relevant expenses:

(1) the £300,000 paid for the gold; and

(2) the £40,500 paid as fees to Asset Hound.

212. In this case we have found that the Company wished to reward the Directors. Beyond that the Directors struggled to provide any reliable evidence regarding intentions or the purpose of the Scheme and the Company's expenses in paying out the £300,000 save to say it was a way of receiving money more tax efficiently. Their understanding of what the tax efficiencies were was limited. We have not been provided with the marketing material provided by Qubic or the advice offered by Qubic or Ross Martin about entering into the Scheme, even though as Mr Devapal recognised, such advice would usually be in writing. We have therefore reached

our conclusions about the purpose of the Scheme from the evidence overall, remembering however, that the burden of proof remains with the Appellants to show that the requirements of s54 CTA 2009 are met.

213. As we have noted above, reference to matters such as obtaining funds in a situation where the Directors were unable to borrow from third parties makes little sense as a reason for the significant expenditure in implementing this Scheme given that the same result would have been achieved at much less cost if the Company had simply made loans to the directors as and when it had the cash to do so.

214. The Scheme transactions were highly contrived in order to seek to achieve the combination of tax free income for the Directors and a tax deduction for the Company. Firstly the Scheme included the Directors taking on the obligation to fund the Trust as a means to argue that they received no "earnings" (despite the understanding that those money's would return to them after payment to the Trust).

215. The Scheme also used the purchase of the gold as a way to circumvent the application of Part 7A ITEPA which contains the rules designed by Parliament to tax what is described as disguised remuneration and which would not otherwise be caught by s62 ITEPA. In essence, previously employers had been able to seek to avoid the income tax and NICs rules by structuring payments of remuneration through employee benefit trusts and other third parties. Part 7A is very widely drawn, but the use of the gold transactions meant that the participants could rely on a specific lacuna in the rules. More particularly, the Scheme relied upon ss554Z8(5) and (6) ITEPA which apply where an employee has an asset made available to them. The Scheme was designed to fall within those provisions with the result that the amount chargeable as disguised remuneration would be zero given that those particular rules were not limited at the time by any anti-avoidance rule within the disguised remuneration code itself (in contrast to many comparable situations). (HMRC has not sought to challenge the reliance on ss554Z8(5) and (6) ITEPA.)

216. Finally, the tax code generally seeks to align the timing of a company's corporation tax deduction for rewards to employees with the time at which tax is imposed on the employee. The rules to do so are contained in Chapter 1 of Part 20 CTA 2009 (Restriction on Deductions – Unpaid Remuneration and Employee Benefit contributions). Broadly speaking the rules provide that there is no corporation tax deduction for remuneration until it is paid to an employee and there is no deduction for employee benefit contributions until paid out of an employee benefit trust. In the case of the Scheme, the transactions were designed with the aim of circumventing those rules by, amongst other things, the very unusual step of the Directors ostensibly undertaking to fund the Trust themselves.

217. These consequences were "so inevitably and inextricably involved" in the payment of the £300,000 and were not "merely incidental" (as per *Rangers*) that they must be taken to be a purpose for which the payment was made.

218. Therefore, looking at the transactions and our findings overall, we conclude that a primary purpose of the Scheme was to provide tax-free cash to the Directors in circumstances where a corporation tax deduction could also be sought. There was a clear purpose to implement a pre-arranged scheme in order to achieve those results. The purpose of the transactions was not simply to reward the employees. That could have been achieved in various, much simpler ways.

219. As a result we are satisfied that there was a duality of purpose when the Company paid the £300,000 for the gold in the context of the Scheme overall. The securing of a corporation tax deduction was a freestanding purpose of the Company in entering into the Scheme transactions.

220. We recognise that in the ordinary course the payment of taxable earnings to employees would give rise to deductible expenses for an employer. Mr Thornhill submitted that this must be the result here. However, there is no legislative or other rule identified by Mr Thornhill causing that corporation tax treatment to follow the taxability of the earnings and we are satisfied that no such result is required in law.

221. Turning to the £40,500 Ms Bessant and Mr Hutchinson's evidence at the hearing was that the amount was, in substance, a fee for the implementation of the Scheme. As a result we are satisfied that this payment was made to secure the tax benefits we have described, including the corporation tax deduction for the Company. Consequently it was not made "wholly and exclusively" for the purposes of its trade.

CONCLUSION

222. Given our conclusions, we have not embarked upon consideration of the application of the GAAR. The GAAR is more appropriately dealt with by a tribunal as and when its application forms the basis of a decision.

223. It has been identified by HMRC that there are a number of possibilities for the extent to which the assessments under appeal should be upheld, varied or dismissed depending on how the Tribunal decides the various issues. We have therefore been asked to set out our conclusions regarding the agreed issues at this stage.

224. Consequently, we set out our decisions regarding the agreed issues on the basis that the parties are at liberty to apply if the procedural consequences are not agreed.

225. We have decided that:

(1) in relation to the determinations issued under Regulation 80 Income Tax (Pay As You Earn) Regulations 2003 and decisions under section 8 Social Security Contributions (Transfer of Functions, etc.) Act 1999 for the years ended 5 April 2015 and 2016, the Company made payments of earnings (within the meaning of s62 ITEPA 2003) and earnings of an employed earner (within s3 Social Security Contributions and Benefits Act 1992);

(2) in relation to the partial closure notice issued to Mr Hutchinson and closure notice issued to Ms Bessant, s222 ITEPA 2003 applies;

(3) in relation to the closure notices issued to the Company for the periods ended 30 April 2014 and 2015, the relevant payments were not deductible for corporation tax purposes because they were not made wholly and exclusively for the purposes of the Company's trade.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

226. 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.

JUDGE TRACEY BOWLER
TRIBUNAL JUDGE

Release date: 06 JANUARY 2023

Annex

Section 211 FA 2013 Proceedings before a court or tribunal

(1) In proceedings before a court or tribunal in connection with the general anti-abuse rule, HMRC must show:

(a) that there are tax arrangements that are abusive, and

(b) that the adjustments made to counteract the tax advantages arising from the arrangements are just and reasonable.

(2) In determining any issue in connection with the general anti-abuse rule, a court or tribunal must take into account:

(a) HMRC's guidance about the general anti-abuse rule that was approved by the GAAR Advisory Panel at the time the tax arrangements were entered into, and

(b) any opinion of the GAAR Advisory Panel about the arrangements (see paragraph 11 of Schedule 43).

(3) In determining any issue in connection with the general anti-abuse rule, a court or tribunal may take into account:

(a) guidance, statements or other material (whether of HMRC, a Minister of the Crown or anyone else) that was in the public domain at the time the arrangements were entered into, and

(b) evidence of established practice at that time.

Para 12 Schedule 43 FA 2013

(1) A designated HMRC officer who has received a notice or notices under paragraph 11 must, having considered any opinion of the GAAR Advisory Panel about the tax arrangements, give the taxpayer a written notice setting out whether the tax advantage arising from the arrangements is to be counteracted under the general anti-abuse rule.

(2) If the notice states that a tax advantage is to be counteracted, it must also set out—

(a) the adjustments required to give effect to the counteraction, and

(b) if relevant, any steps that the taxpayer is required to take to give effect to it.

Para 13 Schedule 43 FA 2013

(1) A designated HMRC officer may give a notice, or do anything else, under this Schedule where the officer considers that a tax advantage might have arisen to the taxpayer.

(2) Accordingly, any notice given by a designated HMRC officer under this Schedule may be expressed to be given on the assumption that the tax advantage does arise (without agreeing that it does).