Neutral Citation: [2023] UKFTT 00313 (TC)

Case Number: TC08770

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2018/07513
TC2018/07514

Debt Release
Section 415 Income Tax (Trading and Other Income) Act 2005

Heard on: 2 November 2022
Judgment date:15 March 2023

Before

TRIBUNAL JUDGE FIONAGH GREEN
JANE SHILLAKER

Between

SIMON ENGLAND and DEBRA ENGLAND

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth of counsel

For the Respondents: Joshua Carey of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs ('HMRC')

The hearing took place on 2 November 2022 by video and with consent of the parties. 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. The hearing was therefore held in public. Simon

and Debra England decided not to attend the hearing as they were represented and as the issues were now limited. Michael Firth asked the Tribunal to proceed in their absence and the Tribunal decided that it was in the interests of justice to proceed with the hearing. Transcribers were permitted.

DECISION

INTRODUCTION AND SUMMARY

1. This is an appeal in respect of the release of a debt. It was agreed by the parties and confirmed in the speaking notes of Counsel for Simon and Debra England ('the Appellants') and by Counsel for HMRC during the appeal hearing that there was a release for the debt triggering a charge to tax pursuant to section 415 of the Income Tax (Trading and Other Income) Act 2005 ("ITTOIA"). The only remaining issue between the parties for the Tribunal to decide was whether this arose in the 2013 - 2014 tax year.

2. The grounds of appeal had been firstly whether section 415 ITTOIA applied and secondly when the release or write off occurred triggering the charge to tax under section 415. The second issue was if the charge to tax occurred at the point the settlement agreement was executed and specified that the full liability ceased to be due or payable with immediate effect. The parties confirmed to the Tribunal at the hearing (and in the submission during the hearing) that the first issue had been agreed and accepted by the parties.

3. We decided that the appeal is refused and the release/write-off arose during the 2013 – 2014 tax year.

BACKGROUND FACTS

4. The facts set out below were not in dispute.

5. There was no declaration in the tax returns for the 2013 - 2014 tax year. The competency of the discovery assessment was no longer in issue. The unpaid directors' loan had been released by the Liquidator and the Tribunal had to decide if the release took place in the 2014 tax year.

6. The Appellants were directors of a company, Alexander Lauren Associates Limited ("the company") and accrued debts to the company in respect of loans it had made to them through a directors' loan account. The business was providing car finance to the motor trade through the internet. The company commenced trading on 1 June 2002 and at all relevant times the Appellants were the two directors and participators of the company. On 26 September 2012, having encountered financial difficulties, the company was placed into creditors' voluntary liquidation following a meeting of its creditors, with Kate Breese of Walsh Taylor appointed as Liquidator.

7. The Appellants had incurred a debt to the company of £1,009,063.00 before the settlement agreement was entered into by them on 28 October 2013, the company having been placed in liquidation on 26 September 2012. The settlement was to be in the sum of £100,000 and to release the remaining £909,063.00.

8. Clause 2.1 of the settlement agreement required the Appellants to pay £100,000 over 2 years from 1 November 2013 to 1 November 2015. The final payment was to be by a "balloon payment" of £77,000. The settlement agreement provided for failure to make any of the payments when the whole of the Liability was due and payable immediately with security "at all times" for the Liability by way of a legal charge.

9. A liability can be released/written off once.

10.The agreement dated 28 October 2013 included the following terms:

(i) Recital (B) defined 'Liability' as the existing indebtedness under the Appellant's director's loan accounts and stated that "Upon investigation of the Company's accounts, the Liquidator determined that the Debtors were indebted to the Company in respect of their director's loan accounts in the sum of £1,009,063.00 (the "Liability");

(ii) Clause 1 confirms that the agreement is immediately binding.

(iii) Clause 2.1 requires the Debtors (the Appellants) to pay £100,000 over 2 years from 1 November 2013 to 1 November 2015. The final payment is a "balloon payment" of £77,000.

(iv) Clause 2.2 provides that if the Debtors fail to make any of the payments in accordance with clause 2.1, the whole of the Liability is due and payable immediately. The Liability is the pre-existing indebtedness of the Appellants to the company, defined in Recital B.

(v) Clause 3 requires security "at all times" for the Liability, the existing indebtedness, by way of a legal charge.

(vi) Clause 4 provides, Release 4.1 This agreement is in full and final settlement of the Liability and subject to the payment of the settlement sum is in full and final settlement of all known causes of action that the Liquidator may have against the Debtors.

THE LEGISLATION

11. Income tax: The charge on release or write-off, section 415 ITTOIA. Section 415 ITTOIA creates a charge to income tax on the release or write-off of loans to the participator of a close company. The section relevantly provides that – section 415 Charge to tax under Chapter 6 (1). Income tax is charged if— (a) a company is or was chargeable to tax under section 455 of CTA 2010 (loans to participators in close companies) in respect of a loan or advance, and (b) the company releases or writes off the whole or part of the debt in respect of the loan or advance and that expressions used in this Chapter have the same meanings as they have for the purposes of section 455 of CTA 2010.

12. Section 455 of the Corporation Tax Act 2010 ("CTA 2010"), as referred to in section 415 ITTOIA, creates a charge to tax on loans by a "close company" to a "participator" in the company. A "participator" in relation to a company is "a person having a share or interest in the capital or income of the company": section 454(1) CTA 2010. A "close company" is a

company which meets either of the conditions in section 439(2) and (3) of the CTA 2010. The condition in section 439(2) is that the company "is under the control—(a) of 5 or fewer participators, or (b) of participators who are directors".

13. Section 455 CTA 2010 provides as follows: " Charge to tax in case of loan to participator (1) this section applies if a close company makes a loan or advances money to— (a) a relevant person who is a participator in the company or an associate of such a participator, … (2) there is due from the company, as if it were an amount of corporation tax chargeable on the company for the accounting period in which the loan or advance is made, an amount equal to such percentage of the amount of the loan or advance as corresponds to the dividend upper rate specified in section 8(2) of ITA 2007 for the tax year in which the loan or advance is made.

14. For the purposes of this section and sections 456 to 459, the cases in which a close company is to be treated as making a loan to a person include a case where— (a) that person incurs a debt to the close company ... in such a case, the close company is to be treated as making a loan of an amount equal to the debt. Relevant person means— (a) an individual, or (b) a company receiving a loan or advance in a fiduciary or representative capacity.

15. The amount charged under section 415 ITTOIA is the amount released or written off, grossed up by reference to the dividend ordinary rate for that year, section 416 ITTOIA. The amount is charged as dividend income and taxed at the dividend ordinary rate, sub sections 14 and 19 (2) (d) Income Tax Act 2007 ("ITA 2007"). The person liable for any tax charged is the person to whom the loan or advance was made, section 417(1) ITTOIA.

16. Section 188(1) of the Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") provides that where an "employment-related loan is released or written off in a tax year", "the amount released or written off is to be treated as earnings from the employment for that year". However, section 189(1) ITEPA provides that where there is a double charge, Section 188 (loan released or written off and the amount is treated as earnings, the charge does not apply if, by virtue of any other provision of the Income Tax Acts, the amount released or written off — (a) is employment income of the employee, or (b) is or is treated as income of the employee (or of the employee as a borrower) which is not employment income and upon which that person is liable to pay income tax. This is subject to subsections (2) and (3) which are not relevant for present purposes. Subsections 14 and 19(2) (d) ITA 2007 treat the released or written-off amounts as dividend income rather than employment income, these amounts fall within section 189(1)(b) ITEPA. Accordingly, section 189(1) operates to ensure that a charge to tax arises only under section 415 ITTOIA and not also under section 188 ITEPA.

THE ISSUE

17. The first ground of appeal, namely whether section 415 ITTOIA applies was agreed between the parties and notified to and accepted by the Tribunal on the day of the hearing. It was agreed that section 415 ITTOIA does apply.

18. It was agreed that the Appellants had incurred a debt to the company of £1,009,063.00 before the settlement agreement was entered into in October 2013. There was an outstanding loan account balance in that amount.

19. The issue before the Tribunal was whether or not the debt was released/written off in the 2013 – 2014 tax year.

THE SUBMISSIONS OF THE PARTIES

20. HMRC

(i) Under the settlement agreement, the Liquidator agreed to accept a lower sum of £100,000 from the Appellants and to release or write off the remaining £909,063.00. The reality of what occurred was that as a result of the agreement, instead of the debt being repaid, £909,063.00 was released or written off.

(ii) The release or write off occurred triggering a tax charge under s. 415 at the point the settlement agreement was executed and at that point the full liability ceased to be due or payable with immediate effect. The release or write off of the debt therefore occurred in 2013 - 2014, irrespective of when the final payment was made

(iii) The Appellants owed a debt to the company of £1,009,063.00 before the settlement agreement was entered into in October 2013 and that is clear from:

a. The documentation provided by the Appellants during correspondence with the Respondents in 2016

b. The correspondence before the settlement agreement was entered into in 2013

c. The terms of the settlement agreement itself

d. The Appellants' continued failure to provide any evidence for their assertion that no debt was owed

e. The substance of the transaction effected by the settlement agreement was that in October 2013, the Appellants went from owing a debt of £1,009,063.00 to the company to owing £100,000.00. The balance of the debt was therefore released for the purposes of section 415 ITTOIA. The transaction did not "consist of or amount to a repayment of the loan", nor did the company "accept something equivalent to" the debt. The circumstances surrounding the transaction, particularly the Appellants' professed inability to pay the full liability, support the view that the Liquidator accepted £100,000.00 because this was all the Liquidator considered the Appellants were likely to be able to pay, not because the Liquidator accepted that there was some uncertainty as to the amount owed. The wording of the settlement agreement is also consistent with the analysis that there was a release of the balance of the debt for the purposes of section 415 ITTOIA.

21. The Appellants

(i) HMRC's case that the Liability was released and disappeared at the time of entering into the agreement must be wrong because the agreement requires security for the Liability at all times. This assumes that the Liability continues to exist.

(ii) Firstly, a liability can be released only once. This proposition is considered to be self-evidently correct and it does not appear that HMRC dispute it. It follows from this proposition that an interpretation of the legislation that involves or permits the same liability potentially being released twice must be wrong.

(iii) Second, where a release is agreed subject to a condition being satisfied or an event occurring, the release occurs at the time the condition is satisfied, or the event occurs and that this proposition is a logical extension of the first submission that a liability can only be released once.

(iv) The release of a liability may be agreed to be subject to a condition being satisfied or an event occurring. If the condition is not satisfied or the event does not occur, the liability will continue to exist and may be the subject of an entirely separate release in the future. Accordingly, it cannot be right that where parties agree to release a liability if a condition is satisfied the liability is released at the time of the agreement, because if the condition is not satisfied the liability continues and may be released at a later time.

(v) Thirdly, the legislation does not contemplate or accommodate the release happening when a conditional release is agreed as opposed to when the condition is satisfied. The structure of the legislation is that tax is paid upon release. If tax is paid at the time of entering into an agreement providing for conditional release, but the condition is not satisfied, the liability will remain in existence. There is, however, no mechanism for repayment or adjustment of the tax already paid. On HMRC's case, one could end up with a situation where tax is paid by the Debtors for a release at the time the agreement is entered into, the condition is not satisfied, and the full liability ends up being repaid to the Company by the Debtors. In those circumstances, it is inconsistent with the purpose of the legislation for tax on a release to have been paid.

(vi) Alternatively, tax is paid for a release at the time the agreement is entered into, the condition is not satisfied, the full liability remains due but a new agreement is entered into providing for the release of the liability. It would appear that the liability is to be treated as released twice and tax paid twice which again, does not fit with the purpose of the legislation.

(vii) Fourthly, the consequences of treating an agreement that provides for a release on a condition being satisfied or event occurring as itself being the release for tax purposes are widespread and anomalous.

(viii) Fifthly, in the present case, the parties agreed that if the £100,000.00 was paid in accordance with the schedule, the existing indebtedness would not be enforced, but if it was not so paid, it would be enforced. On a common sense interpretation of the agreement the release of the liability only happens if and when the £100,000.00 is paid. If the £100,000.00 is not paid (in accordance with the schedule in clause 2.1) there is no release and the original liability will be enforced. Accordingly, during the period in which the £100,000.00 is supposed to be paid, the £1million liability continues in existence. This is very much supported by HMRC's own approach to interpreting the agreement and that Recital (B) to the agreement notes that upon investigation the Liquidator "determined" that the Appellants "were indebted" in the sum of £1,009,063.00. It is not stated that the Liquidator merely "alleged" that this was the debt, or that the Appellants disputed this sum. Although these words are contained in a recital, that does not diminish their status as aids to interpretation of the agreement

(ix) Furthermore, the debt is defined in the Recital, and referred to throughout the agreement, as "the Liability". It is not referred to as, for example, "the Alleged Liability". This supports the view that the Appellants did not dispute that they were liable for the sum set out in the agreement

(x) Clause 2.2 provides that if the Appellants fail to pay the agreed sum of £100,000.00, the whole of the Liability less any sums repaid will become due and payable. If the Appellants genuinely disputed the fact that they owed this sum to the company or that the amount of the debt was £1,009,063.00, it is difficult to see why they agreed that it should become payable if they defaulted on their obligations under the settlement agreement. Accordingly, HMRC's skeleton argument agrees that the Liability is the original debt and it is that debt that is immediately due and payable if clause 2.1 is not adhered

(xi) Sixth, as already noted the continuing existence of the original liability during the course of the 2 year period and potentially thereafter is put beyond doubt by clause 3, which requires security for that liability at all times

(xii) Seventh, the suggestion that clause 2.2 is a liquidated damages clause is wholly unsustainable. Liquidated damages must be a genuine attempt to estimate the loss that will be caused by a breach. The loss caused by the Appellants failing to pay any of the £100,000.00 in accordance with the schedule could not, on any reasonable view, be anything like £1million and is not what the agreement says. Overall, what clause 2 is saying is that if the Appellants make the payments in clause 2.1, the company will not enforce the existing indebtedness, but if they do not, it will enforce the existing indebtedness

(xiii) HMRC's case appears to be based on the proposition that the company would not or could not enforce the original liability during the 2year period (or at least for as long as the schedule is adhered). The liability continues to exist even if it is not due and payable immediately, for instance, where a loan is made on a 5 year term, the debt is not due and payable during the 5 years, but it is still a liability and has not been released. A liability not being immediately due and payable does not mean that it is not a liability

(xiv) Ninthly, on HMRC's case in relation to this agreement, there was a release at the time of entering into it in 2013 and tax was due. If the Appellants had not made payments in accordance with the schedule, the original indebtedness would remain and be enforced. In that situation, the Appellants would either pay tax on the release of the £1million but also have to repay the £1million to the company or pay tax on the release of the £1million and pay further tax if or when a further settlement agreement was reached. Neither is consistent with the purpose of the legislation

(xv) Tenth, HMRC's basic error is failing to appreciate that there is a difference between agreeing the conditions for release (which is what the settlement agreement does) and meeting those conditions (which happened in November 2015)

(xvi) Eleventh, HMRC appear to place some reliance on clause 4 that "This agreement is in full and final settlement of the Liability and subject to the payment of the settlement sum is in full and final settlement of all known causes of action that the Liquidator may have against the Debtors." It appears that they say that the first part of this clause operates immediately upon entering into the agreement and only the second part is subject to payment of the settlement sum but on reading the agreement as a whole, what was in full and final settlement of the Liability was the payments under clause 2.1. It is incorrect to argue that the mere entering into the agreement was the release (or full and final settlement) of the Liability when that same agreement requires security for that Liability "at all times" and provides that it will be enforced in full if clause 2.1 is not adhered

(xvii) As HMRC submitted, in identifying a release, one must look at the substance of the arrangement. The fact that the settlement terms do not expressly state that the company "releases" the debt (albeit the heading in the settlement agreement does) does not alter this analysis. Following the approach in Esprit Logistics and examining the agreement by reference to the surrounding facts and circumstances, it is clear that part of the debt owed by the Appellants was released by operation of the agreement

(xviii) HMRC seek to elevate the words used in the agreement over the substance of the transaction. Esprit Logistics shows that this is not the correct approach. There, the Tribunal found that there had been no "release" under the section even

though the parties had entered into a "deed of release" which purported to release the directors from debts owed, since the transaction between the company and each director amounted in substance to a repayment of the director's loan. In this case, conversely, the fact that the document entered into was not labelled as a "deed of release", and used the phrase, "full and final settlement", does not preclude the Tribunal from concluding that in substance the transaction was one of release or write-off. One cannot, logically, argue that it is necessary to look at the substance of the matter to identify whether there is a release at all but not apply the same approach to determining when the release happened. In reality, they are one and the same question. Identifying a release must necessarily involve identifying a release at a particular time. The substance of the agreement was plainly that the release operated if and when clause 2.1 was complied.

(xviv) The fact that HMRC assessed 2013 - 2014 cannot influence the question of whether the release took place in 2013 - 2014. This is a question of general importance and the same logic as is applied in this case must be applied to all instances of release subject to conditions.

THE PARTIES SUBMISSIONS AND OUR VIEW

22. The first Ground of Appeal was settled between the parties and accepted by the Tribunal. Section 415 ITTOIA applies.

23. The parties agreed that the Appellants owed a debt to the company of £1,009,063.00 before the settlement agreement was entered into in October 2013 which is clear from the documentation provided by the Appellants during correspondence with the Respondents in 2016 and the correspondence before the settlement agreement was entered into in 2013 and the terms of the settlement agreement itself.

24. The conditions which must be satisfied in this case in order for each Appellant to be liable to a charge to income tax under section 415 ITTOIA are (a) Alexander Lauren Associates Limited must have been “chargeable to tax under section 455 CTA 2010 in respect of a loan or advance. The company must have been a “close company” in which the Appellants were “participators” in accordance with section 415(1)(a) ITTOIA. It is not disputed in this case that the company was a close company and that the Appellants, as shareholders, were both participators. The company must have “made a loan or advance” to the Appellants in accordance with section 455(1) CTA 2010. This will be satisfied if the Appellants “incurred a debt to” the company, section 455(4)(a) CTA 2010. If the company made such a loan or advance, this triggered a corporation tax charge on the company for the accounting period in which it was made (section 455(2) CTA 2010). The company must have “released or written off the whole or part of the debt in respect of the loan or advance” for section 415(1)(b) ITTOIA to apply.

25. The Tribunal considered the terms and whether the settlement agreement was conditional and dependant on a condition being satisfied or an event occurring The substance of the transaction effected by the settlement agreement was that in October 2013, the Appellants went from owing a debt of £1,009,063 to the company to owing £100,000.

26. The settlement agreement provided that if the £100,000 was paid in accordance with the schedule, the existing indebtedness would not be enforced, but if it was not so paid, it would be enforced. The Tribunal considered the facts and case law decided that the facts in Esprit Logistics Management Limited v HMRC [2018] UKUT 287 (TC) were different. In that case the settlement entered into to release the Directors from the debt was held in substance to be a repayment of the Director's loan and a reward for services which became subject to income tax.

'Whether a transaction amounted to a 'release' for the purposes of section 415 of the 2005 Act involved looking not just at the deed of release but also at the particular facts and circumstances surrounding the transaction. The board minutes, together with the deed of release, reflected that there was an exchange of equal value: the company wanted to award the directors sums so they could pay off their loans, but instead of handing over the money only for it to be handed back to make the repayment, the company reduced the director's indebtedness. On the facts of each case, the transaction between the company and the director amounted to a repayment of the relevant loan. The companies had not released the loans for the purposes of section 415. Since section 415 did not apply, the sums were taxable as employment income under the 2003 Act. The appeals would therefore be dismissed; Collins v Addies (Inspector of Taxes) [1992] STC 746 considered.'

27. The advice the appellants in that case had sought was advice about the most tax efficient way of 'releasing' or extracting funds from the company to finance their new property purchase. There was some disagreement between the parties as to the proper extent and ordering of the issues for determination, which it was necessary to address at the outset. HMRC's starting point was their argument that the so-called waiver of the loan was, in reality, simply a reward for the director's services and chargeable as employment income (within the meaning of section 62 ITEPA) under section 9 ITEPA. The scheme of arrangements was the mechanism for the delivery of bonuses which were taxable as employment income. It was not necessary to consider other charging provisions. The appellants maintained the starting point was nevertheless to consider whether section 415 ITTOIA applied, as they argued, because there was a 'release' of the director's loan and then consider whether, as they maintained, section 415 ITTOIA had priority over the charge to income tax under ITEPA. The appellants accepted the release was capable of falling within the definition of earnings in section 62 ITEPA. However, the difficulty highlighted by the appellants with HMRC's starting point was that it assumed either section 415 ITTOIA had no application or that, if the ITTOIA charge applied, that ITEPA nevertheless took priority or otherwise excluded section 415 ITTOIA.

28. The term 'release', as it appeared in the predecessor legislation to section 415 was considered in Collins v Addies (Inspector of Taxes) [1992] STC 746 where the taxpayers were directors and shareholders of a close company who were indebted to the company. Under the terms of a sale of shares to a fellow director, that director was obliged to deliver a deed under which the company released the taxpayer directors from their liability up to £68,000 in consideration of the substitution of that director for the taxpayer directors as debtor to the company in that amount. The debt owing to the company was novated. The Revenue raised assessments under predecessor provisions to section 415 (section 287 of the Income and Corporation Taxes Act 1970). The issue in that appeal was whether the novation of a debt constituted a 'release' as the Revenue maintained. The Special Commissioners rejected the appellant's argument that the novation was not a release, as did the High Court on appeal. The Court of Appeal unanimously upheld the High Court's decision. The High Court's judgment went on to set out that the term 'release' was not limited to gratuitous

releases and drew a clear distinction between novation (release of one debt and substitution of another) and all other forms of payment or satisfaction under which the debt was actually repaid. In the Court of Appeal (Nourse, Glidewell and Stocker LJJ) the Court of Appeal also confirmed releases were not limited to gratuitous releases. Nourse LJ rejected the appellant's argument that it was illogical to accept both that a novation was a release and the Revenue's concession that a release would cover accord and satisfaction.

29. We considered at length whether the section 415 charge only applies when the conditions mentioned within it are fulfilled, the precise scope of how those conditions should be interpreted will be informed by the ordinary meaning of the words used as properly understood in their statutory context. That task of interpretation has previously been carried out by the higher courts. Having considered the substantially similar predecessor sections, both the High Court and Court of Appeal in Collins v Addies were able to discern and articulate a purpose for the provision.

30. The question of whether there has, on the facts, been a 'release' is a legal question involving analysis of the legal effect of the deed but also all of the circumstances as made clear in the Esprit appeal. In the Esprit appeal HMRC maintained that, even if section 415 and ITEPA apply, then section 9 ITEPA is a stand-alone charge which means it is not necessary to consider other charging provisions. The appellants' response was that something was provided in return. The waiver was a form of reward for services, the company was getting value in return for the release in the same way as if it had paid a discretionary bonus even if the legal form was different.

31.There was a release, and therefore nothing which amounted to repayment or satisfaction of the debt which was written off. In the Esprit appeal it was decided that the parties dealing at arm's length would not have entered into the transaction without getting something in return and on the particular circumstances the decision was that there was no release of loan by the close company appellants for the purposes of s 415 ITTOIA but that did not address the question of liability to PAYE.

32.The settlement agreement at clause 4 was headed 'Release' and the Liquidator, on completion of the agreement, was positively obliged to release/write off the £909,063.00 and had the power so to do. The Appellants did not dispute that they were liable for the sum set out in the agreement.

33.The agreement provided clearly that the £100,000.00 was to be in full and final settlement of the Liability and of all known causes of action that the Liquidator may have against the Appellants.

34.The agreement was not labelled as a "deed of release", but used the phrase, "full and final settlement" and Clause 4 was headed 'Release'. The Tribunal concluded that in substance the transaction was one of release and write-off of the £909.063.00.

35.There was no exchange of equal value and no satisfaction by set off. The balance of the debt was therefore released for the purposes of section 415 ITTOIA.

36.The transaction did not "consist of or amount to a repayment of the loan".

37. The company did not "accept something equivalent to" the debt (Collins). The circumstances surrounding the transaction, particularly the Appellants' professed inability to pay the full liability, support the view that the Liquidator accepted £100,000.00 because this was all the Liquidator considered the Appellants were likely to be able to pay and not because the Liquidator accepted that there was some uncertainty as to the amount owed. The fact that the £100,000.00 was to be paid in stages did not affect the underlying position and was a mechanism whereby the Appellants could meet the payment. The Liquidator was achieving a practical way of proceeding in the light of all the circumstances and to maximise payments to settle the debt and ensure that the Appellants would be able to meet the full amount.

38. The wording of the settlement agreement is also consistent with the analysis that there was a release of the balance of the debt for the purposes of section 415 ITTOIA.

39.The background was also considered by the Tribunal and the position of the Liquidator in the light of Top Brands Limited v Sharma as to whether there was any negligence or breach of fiduciary duty and whether the standard of care was reasonably to be expected of a skilled insolvency practitioner. However the Appellants were able to take independent legal advice regarding the tax position and whether there would be a charge to tax and in which tax year this would arise.

40. The Tribunal further considered the appeal of Stewart Fraser Limited v HMRC [2011] UKFTT46 (TC) as to whether a loan to a participator in a close company was waived for him in his capacity as a director of the company or as the majority shareholder and whether Class 1 NICs were payable by the company on the waiver of the loan. The Tribunals attention was also drawn to HMRC's Manual which refers to the earnings of employees and office holders and states that if the employer decides not to ask the employee to pay back any part of a loan and simply writes it off without seeking anything from the employee in return for giving up the debt, the amount written off becomes earnings and will be liable for Class 1 NICs at the time of the write-off.

41. A copy of CTM61630 of HMRC's Company Taxation Manual was also referred to in Stewart Fraser Limited and which refers to the release or writing off of a loan or advance to a participator in a close company. Sections 415 to 421 of ICTA state that where the participator or associate is an employee, the amount released or written off will attract Class 1 NICs if it is remuneration or profit derived from an employment (Section 3(1) SSCBA 1992). HMRC stated that Section 50(6) of the Taxes Management Act placed the burden of proof on the Appellant to displace the decisions made under Section 8 as excessive. The Tribunal in that appeal found that the appellant was unable to produce any evidence to support the contention that the waivers of the loans were payments in the capacity as a majority shareholder. The appellant had not met the burden of proof to displace the Section 8 decisions.

42. The Tribunal, having considered all of the evidence in this appeal and submissions determined the legal effect of the documents the parties entered into in the settlement agreement. The Section 415 charge applies. The fact that HMRC assessed the 2013 – 2014 tax year does not influence the question of whether the release took place in that tax year.

43. The Tribunal decided that the settlement agreement entered into did amount to a release of the £909,063.00. The release did occur at the time of the execution of the deed because of the wording of the clauses. The agreement was fully and effectively binding at that date. The obligation under the agreement in respect of the Liquidator was to release the Appellants from repaying the Director's loans of £909,063.00. There was a positive obligation under the agreement in respect of the Liquidator making the release. The payment of the settlement sum of £100,000.00 was in full and final settlement of the Liability and of all known causes

of action that the Liquidator may have against the Appellants. The wording was plain and clear. The liability was released at the point of execution of the agreement and is taxable in the tax year 2013 – 2014.

DECISION AND APPEAL RIGHTS

44. For the reasons set out above, we find that the appeal is refused. The Tribunal agrees with the parties that the Section 415 charge applies. The Tribunal decided that this arose in the 2013 – 2014 tax year.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

FIONAGH GREEN
TRIBUNAL JUDGE

Release date: 15th MARCH 2023