Neutral Citation: [2024] UKFTT 1098 (TC)

Case Number: TC09372

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House Tribunal Centre

Appeal references: (1) TC/2022/11351
(2) TC/2023/08654

Gift Aid relief – section 416 Income Tax Act 2007 – qualifying donations – no – closure noticed varied at HMRC request – otherwise charity appeal dismissed – discovery assessments – validity – section 29 Taxes Management Act 1970 – tax years ending 5 April 2016 – discovery assessment valid – tax year ending 5 April 2017 – information provided in charity's enquiry relevant to donor's enquiry – whether that information available to hypothetical officer in donor's case – no – discovery assessment valid – donor appeal dismissed

Heard on: 3, 4 July, 8 October 2024
Judgment date: 6 December 2024

Before

TRIBUNAL JUDGE RUDOLF KC
LESLIE HOWARD

Between

(1) JOHN HARVEY
(2) KESWICK ENTERPRISES HOLDINGS CHARITABLE TRUST

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Ms Harriet Brown, counsel, instructed by Raffingers LLP, Chartered Certified Accountants

For the Respondents: Ms Ruth Hughes, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION AND ISSUES

1. The Appellants in this case are (1) Mr John Anthony Harvey CBE ('Mr Harvey') and (2) Keswick Enterprises Holdings Charitable Trust ('the charity'). The Respondents are the Commissioners for His Majesty's Revenue and Customs ('HMRC').

2. These are timely appeals to the First-tier Tribunal (Tax Chamber) ('the Tribunal') by Mr Harvey and the charity. Given the appeals arise out of the same set of facts the parties agreed, and the Tribunal concurred, that it would be appropriate to hear them together. That was given effect by the Tribunal's direction of 9 November 2023. The appeals require the Tribunal to consider the provisions of the Income Tax Act 2007 ('ITA') relating to 'Gift Aid'. That is where qualifying donations are made so higher and basic tax relief can become available to the donor and recipient respectively. Further, in the case of Mr Harvey only, the Tribunal is required to consider the validity of the discovery assessments raised.

3. Mr Harvey appeals against:

   (1) A discovery assessment dated 3 March 2020 increasing his chargeability to income tax by £132,628.08 for the tax year 2015-16 and

   (2) A discovery assessment dated 3 March 2020 increasing his chargeability to income tax by £139,460.16 for the tax year 2016-17.

4. Both relate to HMRC's decision to require repayment of gift aid relief at the higher rate of income tax based upon gifts provided to the charity, but each must be considered separately.

5. The charity appeals against:

   (1) A closure notice dated 4 January 2023 increasing the charity's chargeability to tax by £101,250 for the tax year 2016-17 and

   (2) A closure notice dated 4 January 2023 increasing the charity's chargeability to tax by £100,000 for the tax year 2017-18.

6. In respect of both closure notices HMRC accept that they are excessive (as the wrong figures were calculated) and ask the Tribunal, irrespective of the merits of the appeals, to vary each to £75,000 under section 50 (7) of the Taxes Management Act 1970 ('TMA'). That, it is said, would properly reflect the decision to recover gift aid relief at the lower rate from the charity. In the charity's case the issue raised means both can be considered together.

7. The Appellants submit (a) that the gifts made by Mr Harvey to the charity were 'qualifying donations' as all six ITA conjunctive conditions were met and attracted the higher rate income tax relief claimed by him and ought not to be recovered from the charity by HMRC and (b) the discovery assessments against Mr Harvey were invalid.

8. HMRC submit (a) the gifts made by Mr Harvey were not 'qualifying donations' as three of the six ITA conjunctive conditions required to be met were not, so no higher rate income tax relief was available to him. Consequently, the charity could not have the benefit of the basic rate income tax relief that would have attached had the gift been a 'qualifying donation' and (b) the discovery assessments against Mr Harvey were validly raised.

9. We heard the appeal over three days having adjourned to receive written submissions in advance of the final day. The Tribunal was greatly assisted by the oral and written advocacy of Ms Brown and Ms Hughes.

10. We deal with the common issue of 'qualifying donations' first. If they were, then there is no need to consider the validity of the discovery assessments relating to Mr Harvey only.

PREAMBLE

11. Prior to the hearing we received:

(1) An 867-page bundle that included the Notices of Appeal, HMRC's statements of case (there were two as there were two appeals), witness statements of Officers Darren MacDonald and Alex Kempall, and those of Mr Harvey and Ms Philippa Reid. There were also many documents and correspondences. This bundle also included some legislation and authorities which we were invited to ignore as a further bundle was provided. That was upgraded to an 891-page version which was uploaded (timeously) but which we received during the hearing, which also included the same materials to be ignored

(2) A 54-page supplementary bundle including redacted bank statements that related to the enquiries into Mr Harvey's self-assessments

(3) A skeleton argument of 23 pages from Ms Hughes for HMRC dated 12 June 2024 with a chronology and list of principal persons

(4) A skeleton argument of 14 pages from Ms Brown for the Appellants dated 13 June 2024 together with a chronology

(5) A joint reading list, which made our task considerably more efficient.

12. To ignore the original bundle's legislation and authorities in an effective way, we were provided with a more comprehensive legislation and authorities bundle of 483 pages, 'contemporaneous legislation' in a 56-page bundle and additional authorities.

13. At the hearing we had the advantage of a transcriber and have a full record of each of the three days of the appeal. We record our thanks to the transcribers on each of the days who were, as ever, professional and efficient.

14. For convenience we heard first from Officer MacDonald for HMRC who was cross-examined. We then heard from Mr Harvey and Ms Reid for the Appellants. Again, both were cross-examined. Lastly, we heard from Officer Kempall for HMRC who was also cross-examined.

15. Finally in terms of documents, before the final day, we received written submissions from both sides together with glossaries and further legislation and authorities. We are pleased to record that the written submissions themselves did not exceed 33 pages each.

16. This decision is long. Given the wholesale attack upon the validity of the discovery assessments raised against Mr Harvey it has been necessary to delve interstitially into events up to the appeal notices lodged with the Tribunal. Those events take place between from 2015 to 2023 including, as they must, the enquiries into the charity.

Burdens of proof

17. Before we set out our findings of fact it is necessary to address a point made by Ms Brown in relation to burdens of proof.

18. It is agreed that HMRC have the burden of proving the validity of the discovery assessments in relation to Mr Harvey (the point does not arise in relation to the charity) and on the balance of probabilities. Thereafter it is for the Appellants to prove, again on the balance of probabilities, that the discovery assessments and closure notices are excessive.

19. Ms Brown submitted that although those burdens themselves do not change where HMRC make a positive allegation (which does not need to be one of dishonesty) they, "take

both the evidentiary and legal burden of proving that positive allegation". No allegation of dishonesty is made here, and we do not therefore need to consider dishonesty further.

20. For that submission Ms Brown relied upon *Brady v Group Lotus Car Companies PLC and another* [1987] STC 635 ('Brady') and the judgment of Mustill LJ. At page 643G-I he said:

> "It is, however, submitted that the concept of a shifting burden has another meaning, relative to what is called the 'evidentiary burden of proof'. Although this term is widely used, it has often been pointed out that it simply expresses a notion of practical common sense and is not a principle of substantive or procedural law. It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing and it is often convenient to speak of one party or the other as having the evidentiary burden at a given time. This is, however, no more than shorthand, which should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout—which will almost always mean that the party who relies on a particular fact in support of his case must prove it. I do not see how this fact of forensic life bears on the present case. It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof."
>
> (emphasis added)

21. Ms Brown sought to buttress that with the consideration of *Brady* by the Upper Tribunal in *Qolaminejite (also known as Cooper) v Revenue and Customs Commissioners* [2021] UKUT 118 (TCC) ('Qolaminejite*')*. On the principle they said:

> [24] The tribunal will decide the question whether the assessment overcharged the taxpayer on 'the balance of probabilities'. Mr Birkbeck says that term means what it says. But deciding something on the balance of probabilities does not, we consider, equate to balancing which, as between the appellant's case and HMRC's case, is the more likely. In showing the assessment overcharges the taxpayer, the taxpayer might advance positive propositions (eg the deposit had a particular explanation, it was received by someone else) or a negative one (it was not the sort of income that would give rise to the charge under assessment, or no deposit was in fact received). Whether the proposition is positive or negative, all that balancing probabilities means is that the FTT need not be sure X was definitely the case – it is enough that X is more likely to be the case than 'not X'.
>
> [25] Thus, the tribunal must weigh up which is the more probable as between the proposition advanced and the negative of that proposition. So, the probability the deposit was a loan versus the probability it was not a loan. As discussed, even if HMRC put forward no arguments or evidence for some of those counterfactual propositions ('the not X'), it is still open to the tribunal to consider that the taxpayer has not shown X is more likely that 'not X'. Because the burden is on the taxpayer it is entirely for the taxpayer to do the running on showing X is more likely than 'not X'. That is not to say that HMRC might not still have to 'exert' themselves, as the extract from *Brady* above suggests, if HMRC fear the taxpayer's case was strong enough to get across the threshold of proof."

(emphasis added)

22. In our judgment, there is a danger of overcomplicating what are well known and well traversed principles in the Tribunal.

23. It is accepted that in the context of whether the Appellants have been overcharged by assessments they bear the burden of proving that on the balance of probabilities and that this does not change. However, Mustill LJ's explanation of the 'shifting' burden in *Brady* could not be clearer. All it means is that, at any given moment in time, one party may have established something with evidence and if the other party wishes to de-establish it, they must do so with evidence. Nothing in *Qolaminejite* detracts from that.

24. Before weighing up whether 'X' is more probable than 'not X' the Tribunal will make findings of fact. Where the Appellants have the burden of proof, HMRC may decide to do nothing beyond submitting that they have not proved 'X' and, as a result 'not X' is more probable. Or HMRC may 'exert themselves' and call some evidence to help their case that the Appellants have not proved 'X'.

25. Contrary to Ms Brown's submissions, if HMRC 'exert themselves' that does not mean they take any burden at all. To submit HMRC do is to elide where the burden of proof lies with what the evidence, taken as a whole and adduced in the proceedings, may show and, therefore, whether 'X' or 'not X' is more probable. That HMRC have chosen to 'exert themselves' by calling evidence does not alter that. Making positive allegations that the evidence does not support the Appellants' case (the 'not X') also does not alter that.

26. To illustrate the principle by reference to the other issue in this case, Mr Harvey has positively asserted that HMRC have invalidly raised discovery assessments against him. He has 'exerted himself' both evidentially (by cross-examination of HMRC's witnesses) and in submissions. But by doing so he does not, to borrow the words from Ms Brown's submission, "take both the evidentiary and legal burden of proving that positive allegation".

27. We will make our findings of fact. In doing so there is no question we will find something 'might' have happened (per Lord Hoffman in *Re B* [2009] AC 11 (at [2])). We will find things did or did not occur, either because there is direct evidence to that effect or by inference, or there is not, as envisaged by Mustill LJ in *Brady* (see 643I set out at [20] above).

28. As we have said we will decide first whether the Appellants have shown the donations are 'qualifying donations' and been overcharged by the assessments or closure notices on the balance of probabilities ('X') or failed to show that ('not X') by deciding which is more probable. If it is 'X' then the Appellants will have discharged their burden and proven their case. If it is 'not X' then they will not have. We do that first simply because it is a matter that affects both Appellants.

29. If not, we will decide whether HMRC have proven the discovery assessments against Mr Harvey only are valid ('X') or not ('not X') in the same way.

FINDINGS OF FACT

30. The following are our necessary findings of fact for our analysis and conclusions in these appeals.

Witnesses

31. Each of the witnesses we heard from were honest witnesses doing their best to assist the Tribunal. Concessions were made where appropriate but on other matters each stood their ground when challenged. Inevitably, in relation to all the witnesses we heard, given the length of time between the hearing and the events that took place, memories were not perfect. However, the evidence that emerged was more than clear enough for us to make findings of

fact. We also gained considerable assistance from contemporaneous documentation from the time of the donations and the time of the various interventions (to deliberately employ a neutral and non-statutory specific term) by HMRC (of which we count six in total) across the relevant returns of both Appellants.

HMRC interventions

32. Given the challenge to the validity of the discovery assessments in Mr Harvey's case, our findings of fact contain details of one informal enquiry into Mr Harvey's self-assessment for the tax year ending 5 April 2016, a formal enquiry into Mr Harvey's self-assessment for the tax year ending 5 April 2017 and the discovery process in relation to both culminating in discovery assessments on 3 March 2020. We also detail the formal enquiries into the charity's returns for the tax years ending 5 April 2017 and 5 April 2018 culminating in the closure notices dated 4 January 2023 in each case. Those are the six interventions we have referred to.

33. As both officers confirmed in evidence, the various enquiries and processes pursued by HMRC in relation to Mr Harvey and the charity were undertaken by different officers within different teams. Different events occur at different times. It seems that 'Wealthy' was the part dealing with Mr Harvey, through, most relevantly Officer Kempall. Officer Kempall told us that 'Charities, Large Partnerships and International' was the part dealing with the charity through, eventually, Officer MacDonald.

34. The case reference for Mr Harvey's informal enquiry into his self-assessment for the tax year ending 5 April 2016 ended in 751 as it did for the formal enquiry ending in the closure notice for his self-assessment for the tax year ending 5 April 2017. For the enquiries into charity the case reference ended 903.

35. The reader will find paragraphs beginning with dates and "Mr Harvey" where events directly relate to him and dates and "the charity" where they directly relate to it (usually with a reference to the agents for both, who were the same). To ensure maximum clarity we have also made considerably greater use of (see [] above (or below)) then we usually would.

(i) Mr Harvey, his company, the charity, the donations and the loans

36. Mr Harvey is a committed Christian, a philanthropist and a wealthy businessman. Over the years many causes have benefitted considerably from the wealth he has accumulated. He was, and remains, a very active person with a busy working day. Some 75% of his available time is split between his charitable and business work.

37. Mr Harvey is also a shareholder and director of the Keswick Enterprises Group Limited ('the company') which he founded in 2004. At the material times he owned some 70% of the shares and a similar amount of the voting rights. As a result, there is no dispute, Mr Harvey and the company are "connected persons" and Mr Harvey had "control" over the company, for the purposes of the applicable law in this case (see [204] and [205] below respectively).

38. Mr Harvey had made significant loans to the company over the years since its founding. The company had to repay Mr Harvey for the loans he had made to it and did so by reducing his directors loan account ('DLA') when it could afford to do so.

39. He has also made significant donations to the charity. The appeals are concerned with £800,000 given in 2016 and 2017 ('the principal donations'). Unfortunately, due to the statutory language, the word 'gift' or 'gifts' is also employed from time to time. 'Gift' and 'principal donations' are the same unless we specifically say otherwise.

40. Had the company not repaid Mr Harvey's DLA when it did Mr Harvey would still have made the principal donations to the charity, as there was an advantage to the charity by the payment of interest upon the loans it gave the company as well as an advantage to the company.

But as it happened it meant that this cash could be used. As a result, there were a series of pre-ordained steps. As Mr Harvey told us in answer to the question that the "corresponding payment [from the company to him] is part of the plan":

> "Yes, well, it's part of getting cash into the charity and away from me and what we wanted to do was to make sure that we -- the -- any cash we realised or redemption, went into the trust which is what happened."

41. The company had several parts to its business including Keswick European Holdings ('the associated company') which had a Romanian subsidiary Tibbett Logistics SRL. That was an intermobile business in Romania. As Mr Harvey helpfully told us:

> "This is where you take containers from a ship or a railway wagon and put them on a road wagon. To do that, you finish -- need a special terminal, you have to have customs clearance, government approval and so forth and you need cranes".

42. Although they had a second-hand crane, they needed a better, newer crane or it was likely the business would collapse as timetables were very tight. A new crane was some £600,000 with £200,000 or so in moving and other logistical costs.

2015

43. The charity is a charitable trust established by deed on 22 December 2015 by Mr Harvey and Ms Phillipa Reid, who is one of Mr Harvey's daughters. When Mr Harvey turned 80, he and his wife ('the Harveys') wanted to formalise their charitable giving and part with their money. Their children were financially independent.

44. Mr Harvey was the 'donor' (the term the charitable trust deed employs). The charity's aims largely reflected the religious and philanthropic interests of the Harveys, namely, to advance Christianity, promote and advance education, sustainable development, preserving the environment and relieving poverty. The charity tries to give away about 75% of the income it receives in a year. About 50% of that it gives out are to Christian causes with the rest split amongst the others. The deed reposed the power to appoint trustees in Mr Harvey whilst he himself remained a trustee. There were to be no fewer than two trustees and no more than six.

45. Further gifts of shares and cash in later tax years not subject to appeal over £1m have been made.

46. Eventually, there were four trustees: Mr Harvey, Ms Phillipa Reid and two others. The three trustees other than Mr Harvey were his daughters. The charity was openly a family affair set up to give away a lot of the wealth that the Harveys had.

47. Ms Reid is a highly experienced director of human resources having had several senior jobs over the years. She has had board level experience. Ms Reid is a school governor and is active in her church and has been a trustee of the charity since inception. Ms Reid has been active in the charity's distributions to the causes it assists. Ms Reid is a perfectly capable and independent trustee for the charity notwithstanding her relationship to Mr Harvey. On any view the trustees accepted Mr Harvey's business experience and followed his guidance on such matters provided other professionals agreed. Mr Harvey agreed that "he called the shots" but that if disagreement was required, the trustees would provide it. As Ms Reid put it from the witness box:

> "…the person who has got the big money experience and the investment knowledge is John Harvey, not any of the three of us, so in terms of how the investment strategy is done, the ideas for that are very often John Harvey's ideas and he will then talk to us about it and we will talk to professional advisers as a check and balance."

48. Ms Reid continued:

> "We would generally test any proposal that's put forward but yes, in principle, given that the point of this was that it was a charity that John and Jill Harvey were trying to get going, and the funding was coming from John and Jill Harvey in principle, yes, we would certainly, you know, look at their view because why not? I mean, they were the ones trying to give their money away."

49. Any criticism that the familial relationship with Mr Harvey of the other trustees was omitted from her written evidence is misplaced; not least as HMRC knew about it in 2021.

50. At the relevant time Mr Harvey was in sole charge of the banking arrangements of the charity.

51. The establishment of the charity and the requirements of the company for a crane were entirely coincidental in terms of timing.

2016

52. The first donation, which was £100 and was needed to start the charity, was made by Mr Harvey on 16 February 2016.

53. In February 2016 the trustees sought advice from Raffingers when the company enquired of the charity whether that might be possible. The trustees were aware that this was for the purchase of a crane. Mr Harvey was not pleased (to put it mildly) with the response he was getting from various banks about the terms they would offer to purchase a crane including wanting interest at 10%. Mr Harvey's view was that if 10% was the market rate, then the company could be loaned money and the charity receive the interest rather than the bank, "killing two birds with one stone" as Mr Harvey put it.

54. Raffingers responded with positive advice. With that request, as with subsequent requests, the trustees considered Mr Harvey's relationship with the company and the fact he had stepped away from management. The investment opportunity was deemed a good one for the charity. Mr Harvey on behalf of the charity also sought legal advice from the solicitor who had drafted the documents setting it up. The trustees were not provided with any written report of that advice but were made aware of it.

55. On 3 March 2016 Mr Harvey donated £4,900.

56. In the course of 2016, the company made repayments to Mr Harvey to reduce his DLA.

57. On 22 March 2016 (or 5 April 2016: there are two copies of the same minutes differently dated but nothing appears to turn on this, it seems in a busy period they were sent around twice) the charity's minutes record Mr Harvey making a declaration of interest in the company as a "director and major shareholder" ('the pecuniary declaration'). The meeting was provided with a single page memo drafted by Raffingers, the charity's accountants ('the memo') entitled "Report to the Trustees" of the charity. The meeting approved a loan of £200,000 from the charity to the company secured by a floating charge over the assets of the company for a term of six years with repayments deferred for 12 months and interest at 10% ('the first loan').

58. The first loan was to the company to principally assist it with the purchase of a mobile crane to assist with its business (as the subsequent loans also were).

59. The memo set out the amount of £200,000, the interest rate of 10% and its payment terms, the suggested capital repayments, the proposed security by way of the floating charge, and the purpose as "working capital requirement". There was no issue that the terms of the charity deed permitted such a loan. The memo also set out under the heading **Commerciality of the transaction**: "the rate of interest to be charged on the loan is commensurate with current

commercial lending rates and appears to be reasonable. From the Trustees point of view, the loan would provide a good rate of return on its funds". The issue of risk was addressed (as the Trustees are obliged to consider that and the need to produce returns on its assets) but the company's balance sheet showed a healthy net asset position so "was more than adequate for security purposes". The memo did not, and did not purport to, give any advice in relation to gift aid or anything else beyond the narrow description of it we have set out here.

60. Ms Reid was taken to the minutes dated 22 March 2016 and said she remembered the meeting. Mr Harvey had indicated that there was the prospect of loaning the company money for a crane with a very good rate of return for the charity. Both Raffingers and the solicitor retained advised positively.

61. On 5 April 2016 three payments occurred. First, the company repaid Mr Harvey a part of his DLA in the sum of £200,000. Then Mr Harvey donated £200,000 to the charity. Finally, the charity loaned the company £200,000 on commercial terms.

62. The principal donations to the charity by Mr Harvey were conditional upon the loans being made to the company (and therefore loan agreements with repayment terms and interest being in place). The principal donations would not otherwise have been made as they were. Given the submissions made by Ms Brown upon this we set out, in full, the cross-examination of Mr Harvey by Ms Hughes and his answers:

> "Q We can see that it's necessary for the payment in [from you] to happen, in order for the charity to afford this payment out [the loan to the company] –
>
> A Yes
>
> Q -- can't we? And there was never going to be any other use for those funds apart from payment to the company; that's right, isn't it?
>
> A Yes
>
> Q And HMRC suggest in relation to this payment and all of the relevant payments that that was effectively a condition of the gift that you made to the –
>
> A Sorry, can you say that again?
>
> Q So HMRC suggest in relation to this payment into the charity –
>
> A Yes
>
> Q -- and all of the relevant payments into the charity that it was essentially a condition of the payment that it would be paid on to the company?
>
> A Yes. Implicit, if not actual, yes.

63. Ms Reid agreed that it was "in a way correct" that there was no real prospect of the donations from Mr Harvey being used for anything other than the loans but in another way pointed out that it created an income stream for the charity and was a good idea.

64. On 30 April 2016 the company and the charity signed the terms of the first loan. The trustees had delegated the agreement of the terms to Mr Harvey for this and subsequent loans. The sum identified was £200,000. The draw down date was 6 April 2016, and the interest rate was 10% "such rate may change by agreement between the parties". The interest was to be calculated quarterly in arrears and payable quarterly in arrears and "accrued but unpaid interest shall be added to the principal amount of the loan". The capital repayments were to begin from month 13 following the month of the drawdown and repayable over 60 months from that date. A default interest amount was imposed.

65. As to security, despite the minuted decision of the trustees, the loan said, "The loan will be unsecured". Ms Reid told us when the issue of not being able to provide security was raised:

> "I think it was absolutely clear to all the directors involved on the Keswick side that this was a non-defaultable thing. And it was clear to us that John Harvey would make sure that it -- that the charity was not out-of-pocket over this. I don't think we asked a specific question which is that this can't go ahead unless we see that kind of security."

66. The trustees did not have any concerns over repayment to the charity by the company knowing, what they did, about the relevant finances. Had there been any default by the company Mr Harvey would have ensured the charity was not out of pocket for this, and subsequent, loans.

67. The loan document was signed by two people. Mr Harvey for the charity and the managing director of the company for the company.

68. On 12 July 2016 HMRC received Mr Harvey's self-assessment return for the tax year ending 5 April 2016.

69. On the same date the charity was successfully registered with HMRC, which application was accepted as a charity for tax purposes by HMRC in August 2016.

70. On 13 July 2016 and 14 July 2016, a further three payments occurred. First on 13 July 2016, the company repaid Mr Harvey a further part of his DLA in the sum of £200,000. Then on 14 July 2016 Mr Harvey donated £200,000 to the charity. Finally, on 14 July 2016 the charity loaned the company £200,000 again on commercial terms.

71. On 15 July 2016 the charity's minutes record Mr Harvey making the pecuniary declaration. The meeting possessed the memo. The meeting approved a loan of £200,000 from the charity to the company secured by a floating charge over the assets of the company for a term of six years with repayments deferred for 12 months and interest at 10% ('the second loan'). Ms Reid believed that Raffingers were advising upon the principle of the loan. They were not contacted each time a loan was being considered for separate advice. The reference to 10% in the memo was the initial rate, but it was an error that the minutes reflected 10%. Reports from the investments managers were provided on an ongoing basis and 5% did not seem unreasonable.

72. Mr Harvey agreed that the reduction in interest rate would be beneficial to the company.

73. On 31 July 2016 the company and the charity signed the terms of the second loan. The sum identified was £200,000. The draw down date was 6 July 2016, and the interest rate was 5% "such rate may change by agreement between the parties". The interest was to be calculated quarterly in arrears and payable quarterly in arrears and "accrued but unpaid interest shall be added to the principal amount of the loan". The capital repayments were to begin from month 13 following the month of the drawdown and repayable over 60 months from that date.

74. Again, as to security, despite the minuted decision of the trustees, the loan said, "The loan will be unsecured".

75. Again, the loan document was signed by two people. Mr Harvey for the charity and the managing director of the company for the company.

76. On 2 October 2016 the charity's minutes record that the final two trustee appointments had been notified to the Charity Commission.

(ii) HMRC's informal enquiry into Mr Harvey begins and the donations, the loans and the gift aid relief continue

77. On 20 December 2016 HMRC contacted Mr Harvey's agents about his self-assessment for the tax year ending 5 April 2016 on an informal basis and the gift aid donations. No formal enquiry was opened. The informal enquiry asked for the names of the recipient(s) (of the donations upon which gift aid relief was being sought by Mr Harvey) and evidence to support the donations.

78. A further series of payments occurred in late December 2016. First, on 19 December 2016 £100,000 was transferred to the company from the charity. The charity had funds to make this payment. Secondly, on 19 December 2016 £300,000 was transferred to the company from Mr Harvey. That was an error. It should have been paid to the charity. Thirdly, on 21 December 2016 £100,000 was transferred to the charity from Mr Harvey. At that point Mr Harvey should have transferred £400,000 to the charity but as can be seen, only £100,000 was as £300,000 had gone to the company. Fourthly, on 22 December 2016 £400,000 was transferred to Mr Harvey from the company further repaying Mr Harvey's DLA.

79. On 20 December 2016 the charity's minutes record Mr Harvey making the pecuniary declaration. The meeting possessed the memo. The meeting approved a loan of £400,000 from the charity to the company secured by a floating charge over the assets of the company for a term of five years with repayments deferred for 12 months ('the third loan'). The meeting also agreed to the consolidation of the three loans totalling £800,000 with interest at 4%. Again reports from the investments managers were provided and 4% did not appear to be unreasonable at this time. At this point no one had noticed the error in that the charity had only loaned £100,000 to the company rather than £400,000.

80. On 31 December 2016 the company and the charity signed the terms of the third loan. The sum identified was £400,000. The draw down date was 6 December 2016, and the interest rate was 4% "such rate may change by agreement between the parties". The interest was to be calculated quarterly in arrears and payable quarterly in arrears and "accrued but unpaid interest shall be added to the principal amount of the loan". The capital repayments were to begin from month 13 following the month of the drawdown and repayable over 60 months from that date.

81. Once again, as to security, despite the minuted decision of the trustees, the loan said, "The loan will be unsecured".

82. This loan document consolidated the previous loans and reduced the interest to 4% in line with the previous loan documents and the decision of the trustees. It also stated, "The total interest due on all loans will be £32,000 per annum payable quarterly in arrears from 6th January 2017". Therefore, none of the loans, individually or when consolidated, had any security at all as no floating charge was taken out as the company's other lenders were not prepared to reduce their security. Additionally, the trustees reduced the interest rate that was to be paid. All of this was done without any further advice from Raffingers beyond the initial memo received before the first loan was provided to the company.

83. Again, the loan document was signed by two people. Mr Harvey for the charity and the managing director of the company for the company.

2017

84. On 2 January 2017 the charity's minutes record that a gift aid claim was to be made in respect of the "second December injection" into the charity of £400,000.

85. As we have seen, an error was made. Instead of sending £400,000 to the charity, £100,000 was transferred to the charity on 21 December 2016 and £300,000 to the company directly. All £400,000 should have been transferred to the charity before the charity loaning the money to the company.

86. On 16 January 2017 Mr Harvey's agents replied to HMRC's informal enquiry about his self-assessment return for the tax year ending 5 April 2016 and the gift aid donations. That reply included the following:

> "[the charity] is a registered charity … I attach a copy of the charity repayment claim summary giving details of the contributions totalling £405,000. This relates to a payment made on 14 – 2 – 16 of £205,000 and 15 – 7 – 16 of £200,000, which was carried back to the 2015-16 tax year …"

87. On 18 January 2017 HMRC responded to Mr Harvey's agents reply of 16 January 2017. The noted the information about the recipient but requested proof of payment.

88. On 23 January 2017 copies of Mr Harvey's bank statements were also supplied showing the payments of £4,900 on 3 March 2016, £200,000 on 5 April 2016 and £200,000 on 13 July 2016 (cleared on that date but made on 8 July 2016). Those bank statements were deliberately (but it was not suggested improperly) redacted so that only the outgoing payments from Mr Harvey's account could be seen. There was no accident in copying. It stretches coincidence beyond breaking point to suggest, as it was to Officer Kempall, that it could have been a copy error. As Officer Kempall pointed out, the Sort Code and Account Number which could be seen were in a place which would have been similarly cut off had some sort of error occurred unless that error was confined by the photocopier only to the 'money in' column below them.

89. As a result, the amounts of the transfers into Mr Harvey's account on 5 April 2016 and 13 July 2016 marked 'F/FLOW THE KESWICK' in identical amounts could not be seen at this stage (cf. 29 August 2018 when HMRC were supplied this information (see [101] below)).

90. At no stage in the informal enquiry was the connection between Mr Harvey and the company brought to HMRC's attention.

(iii) HMRC close Mr Harvey's informal enquiry

91. On 17 February 2017 HMRC wrote to Mr Harvey's agents informing them they had no further questions about his self-assessment return for the tax year ending 5 April 2016 having been provided with proof of payment from the redacted bank statements. No formal enquiry into this self-assessment was ever opened under section 9A TMA into that self-assessment.

92. On 27 March 2017 the charity's minutes record that the charity "now has £800,000 invested in an interest-bearing five-year loan" to the company with a floating charge over its assets.

93. The payment error was corrected on 30 and 31 May 2017. First, £300,000 was transferred back from the company to Mr Harvey. Secondly, on 31 May 2017 Mr Harvey transferred £300,000 to the charity. Thirdly, on 31 May 2017, the charity transferred £300,000 to the charity completing the loan.

94. On 15 August 2017 HMRC received Mr Harvey's self-assessment for the tax year ending 5 April 2017. That included a total in 'box 5' of £414,490 as gift aid payments made in that tax year, the total of one-off payments in 'box 6' included in that sum being £414,400.

95. The charity sent its self-assessment tax return dated 21 August 2017 to HMRC for the tax year ending 5 April 2017. It declared that no tax was due with an exemption from tax being claimed due to the charitable status. The income upon which the charity was claiming exemption from tax included the sum of £1,006,250 in the box marked 'Gift Aid'. That was said to be made up of (a) gifts totalling £805,000 from Mr Harvey and (b) £201,250 in gift aid relief for the period ending 31 March 2017. The declarations were made, quite properly, by Mr Harvey in his capacity as a trustee. The gift aid claim for 2016 was submitted for the gifts said to be made by Mr Harvey on 14 February 2016 of £205,000 and 15 July 2016 of £200,000.

The total relief was said to be £101,250. £51,250 was paid by HMRC to the charity in that amount on 27 October 2016 (the remaining £50,000 included in the income for the return ending 5 April 2017).

96. As we have already found, the £200,000 dated 14 February 2016 was made on 5 April 2016 (and £100 was made on 16 February and £4,900 on 3 March 2016). In any event that is outside the scope of the charity's appeal which relates to the tax returns of the charity for the years ending 5 April 2017 and 18. Officer MacDonald told us that HMRC would not pursue the £51,250 as that would require the use of extended time limits and HMRC did not believe it had an assessable position in respect of that donation made in the tax year ending 5 April 2016.

2018

97. On 4 January 2018 the £800,000 consolidated loan was repaid back to the charity. £28,000 in interest had already been paid (variously in July and October 2016 and January and April 2017). The company sold the Romanian business including the crane. None of that money was returned to Mr Harvey.

(iv) HMRC open separate formal enquiries into Mr Harvey and the charity

98. On 10 August 2018 HMRC through its wealthy team wrote giving notice of the opening of an enquiry into Mr Harvey's self-assessment return for the tax year ending 5 April 2017 under section 9A TMA checking, inter alia, gift aid relief. Also, on 10 August 2018 HMRC through a separate team wrote to the charity. Officer MacDonald, who gave evidence in relation to the charity's appeal, had knowledge of the charity's case since the enquiry was opened in 2018 by a different case officer. There was liaison between the two teams in relation to the enquiries being undertaken.

99. On 29 August 2018 Mr Harvey's agents provided a breakdown that of the total set out in 'boxes 5 and 6' £400,000 related to the charity (see [94] above). Although the reply dealt with other matters in relation to gift aid it said: "Gift Aid Relief We enclose the breakdown of gift aid donations below: [The charity] £400,000 …"

100. At no stage directly within the formal enquiry into Mr Harvey's self-assessment for the tax year ending 5 April 2017 was the connection between Mr Harvey and the company brought to HMRC's attention.

101. Additionally on 29 August 2018 in response to HMRC's letter, the charity (through its agent) sent HMRC: (a) a spreadsheet with several details. This included the following:

The keswick Enterprises Holdings Charitable Trust
Schedule of Information for HMRC
Case reference CFS-1580903
Period Ended 31 March 2017

			Notes
1 A breakdown of the charity's income for the period		**1,006,250**	
Donations received			
05/04/2016 John Harvey	200,000		
06/07/2016 John Harvey	5,000		
13/07/2016 John Harvey	200,000		
21/12/2016 John Harvey	100,000		
23/12/2016 John Harvey	300,000		
		805,000	
Gift aid from HMRC			
27/10/2016 received	101,250		
31/03/2017 due	100,000		
		201,250	
		1,006,250	

102. After setting out the charitable giving at 2, the spreadsheet continued with the following:

3 Debtors

The Keswick Enterprises Group Ltd			800,000
30/04/2016 4% p.a		200,000	
31/07/2016 4% p.a		200,000	
31/12/2016 4% p.a		400,000	
		800,000	
Loan interest due - QE 31-3-18	rec'd 5-4-17		8,000
Gift aid - due from HMRC			100,000
			908,000

4 Loan agreement with The Keswick Enterprises Group Ltd

a See 3 above
b See 3 above
c See 3 above - interest was paid quarterly
d The loans were all repaid in December 2017
e There were no conditions attached to the loan
f the loans were used for working capital purposes and were secured on the company's assets
g None
h See 3 above
i bank statements enclosed

103. Thus, this included a total of £805,000 from Mr Harvey said to be within 2016. In fact, as we have set out, £300,000 which was believed to have been donated in December 2016 by Mr Harvey but was not; such error corrected in 2017. Further information included (b) the bank statements of the charity for the period ending 31 March 2017 and (c) the charity's trust deed approved by the Charity Commission (f) the minutes of the meeting dated 5 April 2016 and the memo (see [57]-[59] above), the minutes dated 15 July 2016 (and further copy of the memo) (see [71] above), the minutes dated 2 October 2016 (see [76] above), the minutes dated 20 December 2016 (see [79] above), the minutes dated 2 January 2017 (see [84] above) and the minutes dated 27 March 2017 (see [92] above). As we have said the total of the loans was £800,000 from the charity to the company from money donated by Mr Harvey.

104. The bank statements included the following (bank details redacted by the Tribunal: we do not consider it is necessary in the interests of justice for such a detail to be revealed. It adds nothing and is an unwarranted invasion into the privacy of Mr Harvey):

"*Date*	*Payment type*	*Details*	*Paid out*	*Paid in*
16 Feb16	Deposit	Northwood		£100
3 Mar 16	Deposit	500001		£4,900
5 Apr 16	Deposit	FRM *** 460		£200,000
5 Apr 16	Transfer	THE KESWICK	£200,000	
13 Jul 16	Deposit	J.HARVEY		£200,000
14 Jul 16	Transfer	F/FLOW KESWICK-ENT	£200,000	
19 Dec 16	Transfer	F/FLOW KEWSICK-ENT	£100,000	
21 Dec 16	Deposit	500003		£100,000"

105. The transfer to the company on 19 December 2016 was able to take place prior to the donation by Mr Harvey on 21 December 2016 as the charity had over the months received other income giving it a positive balance of above £100,000 by 19 December 2016.

106. The bank statements provided did not show the £300,000 received by the charity in 2017 – the correction of the error when £300,000 was sent to the company not the charity, in December 2016.

107. Between the correspondence and enclosures from the charity's agent dated 29 August 2018 during the charity's enquiry, the connection between Mr Harvey and the company was clearly disclosed. The declaration in the minutes by Mr Harvey as, "director and major shareholder" in the company (see, for example, [57] above), the donations made by Mr Harvey to the charity and the loans immediately made to the company by the charity were ample evidence of that.

108. On 5 October 2018 HMRC requested further information from the charity. That letter began with, "Thank you for your letter dated 29 August 2018".

109. The charity sent its self-assessment tax return for the tax year ending 5 April 2018 to HMRC dated 8 October 2018. Again, it declared that no tax was due with an exemption from tax being claimed due to the charitable status. The income upon which the charity was claiming exemption from tax included the sum of £573,426 in the box marked 'Gift Aid'. Again, the declarations were made, quite properly, by Mr Harvey in his capacity as a trustee.

110. The gift aid claim for 2017 was submitted for the gift said to made by Mr Harvey on 21 December 2016 of £400,000. The relief was said to be £100,000 (which had also been included as income in the return for tax year end 5 April 2017, but not yet received by the charity). The £400,000 was made up of two amounts: £100,000 on or about 21 December 2016 and £300,000 on 31 May 2017 (to correct an error made in December 2016 when the donation should have been for £400,000 but was not, but was believed to have been).

111. That caused a confusion as when the claims were being made and, therefore, the request for the Tribunal to correct the amounts in the closure notices (see [6] above and [187] below).

112. On 19 October 2018 the charity (through its agent) responded to HMRC's letter of 5 October 2018. That letter began with, "Thank you for your letter dated 5 October 2018". They further wrote:

> "The interest can be seen on the statements already in your possession."
>
> …
>
> "The £800,000 loan was used within [the company] partly for working capital purposes whilst banking finance was reorganised and partly to acquire Calamar Mobile Cranes for an associated business in Romania – the plan was that these assets would be refinanced and hence the loans were of a short-term nature."

113. The letter then set out the amounts of each of the first, second and third loans and their original interest rates together with the information about the consolidation and reduction in interest rate to 4% in December 2016. They again enclosed the loan agreements.

114. The letter went on to state:

> "The intention was to take a floating charge over the company's assets in relation to these loans. This however was not possible as [the company's] other funders would not agree to any reduction in their security. As the loans were of a short-term nature and repayment was forthcoming from an associated business sale, the trustees were prepared to defer the security issue pending the loans being repaid before the end of the 2017 calendar year".

115. It also provided evidence showing repayment of the £800,000 to the charity on 4 January 2018.

116. On 22 November 2018 HMRC requested further information from the charity for the accounting period ending 5 April 2017. HMRC at the same time opened an enquiry into the accounting period ending 2018 under section 9A TMA. For the period ending in 2017, HMRC requested information about the £800,000 in loans between the charity and the company and the Calamar Mobile Crane Company. For the period ending in 2018, HMRC requested information about the charity's fixed asset investments and whether the trustees or connected persons have an interest in the same investments.

117. On 28 November 2018 the charity's agent replied expressing a degree of surprise at the enquiry. Some queries were answered. Others were not as they were not seen as relevant.

2019

118. On 8 January 2019 Mr Harvey's agents wrote to HMRC identifying that due to a software error Mr Harvey's chargeability to tax as set out in his self-assessment for the tax year ending 5 April 2017 had been understated.

119. On 25 January 2019 HMRC answered the charity's letter dated 28 November 2018 and explained the relevant of its queries explaining that the information for the period ending 2018 was needed in detail which was why the enquiry had been opened.

120. On 30 January 2019 in response to the charity's agent's letter of 8 January 2019. Having responded to matters that do not concern the appeal HMRC wrote:

> "Other matters
>
> I confirm I have checked the calculation for the 2017 tax year and can see that taking into account the calculation error and the relief claimed error that an additional £31,822.25 will be payable … I can see that there was a problem when the return for 2017 was submitted as you had to send in a paper return …"

121. On 30 January 2019, in reply, the charity's agent indicated that the information had already been supplied in the 28 November 2018 letter.

122. On 15 February 2019 Mr Harvey's agents replied to HMRC's letter of 30 January 2019.

123. On 8 March 2019 HMRC wrote to Mr Harvey's agents indicating that they would be closing down the enquiry for the self-assessment for the tax year ending 5 April 2017.

(v) HMRC issue a closure notice ending Mr Harvey's formal enquiry

124. On 26 March 2019 HMRC issued Mr Harvey a final closure notice under section 28A (1B) and (2) TMA, increasing his chargeability to tax arising from a software error that had used to complete his self-assessment for the tax year ending 5 April 2017, but not disqualifying the donations from gift aid relief.

(vi) HMRC's enquiry into the charity continues

125. Having heard nothing in relation to the charity, its agent wrote again on 24 April 2019.

126. On 23 May 2019 HMRC responded to the charity's agent apologising for the delay due to a change in caseworker and the need for the new officer to get up to speed. The officer wrote, inter alia, "I feel the information requested previously was reasonable required in order for HMRC to be satisfied the donations made by Mr J Harvey to the charity during the period under review were not made contrary to the tainted donation legislation … or under the qualifying donation legislation …". Further, "I have been reviewing the accounts covering the period ended 31 December 2016 for [the company]. I note that point 26 that the company accounts shows a capital loan owing to Mr Harvey of £1,959,526. The company accounts for period ended 31 December 2015 show a capital loan balance owing of £2,778,800. The

difference between these amounts is £819,274 and I must now seek assurances that the money advanced by the charity was not used to repay the loan owing to Mr Harvey."

127. Further correspondence was exchanged with the charity. A request was made for any independent advice received from the charity in relation to the loans. A copy of the memo (again (see [59] above)) was enclosed with the explanation that it was provided with the terms of the charity's deeds and powers in mind regarding making loans (which is very broad indeed). The agent explained that they would have reviewed the deed, the balance sheet of the company, the proposed interest rate to be charged, the security on offer and the timescales for repayment. The confirmed that after the initial memo no further advice had been sought.

128. On 18 July 2019 the agents for the charity wrote in reply to HMRC's letter of 23 May 2019. That included the reference number for the charity (see [34] above). However, it was provided to us as the first document relevant to the discovery process in Mr Harvey's case after the closure notice of 26 March 2019.

129. That letter included a considerable number of enclosures relating to six numbered paragraphs within the letter, reflecting the requests made by HMRC on 23 May 2019. At point 1 the charity's agents listed donations made by Mr Harvey to the charity of £800,000. They said:

> "The bank made an error in the instructions it received. The £300,000 which should have been paid to the charity was sent to [the company] account in error (see attached bank statements for [the company]). This position was corrected in May 2017 (see attached statements). We accounted for what the substance of the position should have been in the Charity accounts."

130. At point 2 the loans to the company from the charity – reflecting point 1 were set out with the same error referred to.

131. At point 3 an explanation of who initiated the loans was given (with copies of the minutes, loans and relevant information having been requested by HMRC). Much of the information had already been provided "as set out in our letter of 19th October 2018" (see [112] above).

132. At point 4 further information was given in relation to the purchase of the mobile cranes.

133. At point 5 reference was made to the company bank statements. The paragraph ended with, "*Repayment of capital to Mr Harvey – see point 6 below*".

134. At point 6, there is a heading, **Full details of the repayments of the capital loan to Mr Harvey in the year ended 31 December 2016**. Underneath it, the reader is directed to a schedule of the DLA movements.

135. Referring to point 1 a bank statement of the charity was provided showing the correction payment when it was realised that Mr Harvey had, in December 2016, paid £300,000 directly to the company rather than the charity. That showed, inter alia:

"*Date*	*Payment type*	*Details*	*Paid out*	*Paid in*
31 May17	Deposit	FRM *** 460		£300,000
31 May 17	Transfer	F/FLOW KESWICK ENT	£300,000.	

136. Referring to point 3 the minutes of the three meetings where the first, second and third loans were agreed to be made from the charity to the company were provided (again).

137. Referring to point 5, the company bank statements supplied showed:

(1) On 5 April 2016 £200,000 being paid to Mr Harvey

(2) On 5 April 2016 £200,000 being paid from the charity

(3) On 13 July 2016 £200,000 being paid to Mr Harvey

(4) On 14 July 2016 £200,000 being paid from the charity

(5) On 19 December 2016 £100,000 being paid from the charity

(6) On 19 December 2016 £300,000 being paid from Mr Harvey

(7) On 22 December 2016 £400,000 being paid to Mr Harvey.

138. Referring to point 6, the schedule supplied by the charity's agents showed that Mr Harvey had been repaid by the company: £200,000 in April 2016, £200,000 in July 2016 and £400,000 in December 2016.

(vii) HMRC consider Mr Harvey's self-assessments again

139. On 31 July 2019 Officer Kempall became involved with Mr Harvey's case. This had happened when he received an internal referral, as the Customer Compliance Manager for Mr Harvey, from the Charities team. He was the decision maker from this point forward. From the information referred to him, in particular the letters and attachments received from Mr Harvey's agents dated 19 October 2018 and 18 July 2019, he concluded that the donations made by Mr Harvey to the charity may have been 'tainted', as set out in schedule 3, Finance Act 2011 or did not meet the definition of a 'qualifying donation' in section 416 Income Tax Act 2007.

140. In both instances, income tax relief would need to be withdrawn. He told us he had therefore discovered a loss of tax and had done so after the dates section 29 (1) TMA required him to do so. Those dates were 12 July 2017 for the self-assessment for the tax year ending 5 April 2016 (that is 12 months after the return was delivered to HMRC (see [68] above)) and 26 March 2019 for the tax year ending 5 April 2017 (that is the date of the final closure notice issued (see [124] above)) respectively.

141. The letter and attachments dated 19 October 2018, and the letter dated 19 July 2019 that had been provided to Officer Kempall were originally, as we have seen, supplied by Mr Harvey's agents in their capacity as the charity's agents into the charity enquiry.

142. On 30 October 2019 HMRC wrote to the charity's agents indicating they hoped to provide an update by 31 December 2019.

143. Before issuing the discovery assessments, on 6 November 2019 HMRC wrote to Mr Harvey's agents indicating that both his self-assessments for the tax years ending 5 April 2016 and 2017 was believed to be incorrect and that an officer of HMRC had made a discovery of a loss to tax. This letter was written with the reference number that related to Mr Harvey (see [34] above).

144. It is necessary to set out most of this letter. HMRC wrote (in a letter authorised by Mr Kempall):

> "**Gift Aid Donations – 2015/16 and 2016/17**
>
> It has come to HMRC's attention that your client's tax return for the years ending 5 April 2016 and 5 April 2017 may be incorrect. For simplicity, I have decided to informally ask the questions I have under this letter, rather than writing a separate letter under the discovery provisions at Section 29 of the Taxes Management Act 1970.
>
> I would welcome your cooperation in answering these questions in this manner to establish if your client's tax return was completed correctly. Alternatively, I will use the available provisions described above.

It is understood that your client claimed Gift Aid relief on donations of £405,000 and £400,000 made to the Keswick Enterprises Holding Charitable Trust ([the charity]) in the years 2015/16 and 2016/17 respectively. At this stage, it must be noted that HMRC previously opened an intervention in both years to establish what charitable donations were made.

HMRC now understands that upon making the donations to the charity, the charity then loaned the money to a company, Keswick Enterprises Group Limited ([the company[), that your client is director and majority shareholder of.

The donations to Keswick Enterprises Holding Charitable Trust were made as follows:

- £200,000 05/04/2016
- £5,000 06/07/2016
- £200,000 13/07/2016
- £300,000 19/12/2016(Accidentally sent to [the company], corrected on 31/05/2017)
- £100,000 21/12/2016

Gift Aid claims were submitted by [the charity] to HMRC for the £805,000 in received donations and HMRC subsequently paid £201,250 to [the charity].

Loans from [the charity] to [the company] were then made as follows:

- £200,000 05/04/2016
- £200,000 14/07/2016
- £100,000 19/12/2016
- £300,000 19/12/2016 (As above, corrected on 31/05/2017)

HMRC understands that the loans were made to [the company] on a commercial basis. Interest was charged on the loans to [the company], all of which were repaid in full, including interest of £28,000 in December 2017.

HMRC now holds information to suggest that the loans made to [the company] from [the charity] have been used to repay capital owed to your client from [the company]. An analysis of the Directors Loan Account (DLA) shows the following:

- £200,000 Repaid in April 2016
- £200,000 Repaid in July 2016
- £400,000 Repaid in December 2016

It is for the reason above that HMRC believe that your client's tax return for the years 2015/16 and 2016/17 are incorrect. From the information HMRC now holds it appears as though money donated to the charity has effectively returned to Mr Harvey by way of a repayment in the DLA. If this is the case, any gift aid relief claimed on your clients 15/16 and 16/17 tax return in respect of donations made to [the charity] may need to be withdrawn."

(emphasis added)

145. That letter acknowledged that both self-assessments had been the subject of what the letter neutrally describes as "interventions". It did not refer to 'tainted donations' or 'qualifying donations' – simply that the relief may have been incorrectly claimed.

146. Mr Kempall told us, and we accept, that when he received the correspondences from Charities he, "drew the conclusion that I felt that there may have been a loss of tax in terms of either them being tainted or them not being qualifying donations". When taken to the letter of 21 August 2021 that he had written (see [169] below) he said, and we accept, before being shown any letters in between, "I think the tainted donation legislation was initially our first position, but it wasn't our only thing that we were considering and from memory, I'm pretty consistent in the other letters that I wrote, that both section 416 and section 809 are referred to".

147. On 26 November 2019 Mr Harvey's agents replied suggesting to HMRC that their questions were not appropriate to a personal tax enquiry being asked informally as they were. They referred the author of HMRC's letter to the enquiry into the charity and said the questions had been, "asked and answered" there.

148. On 7 December 2019 HMRC responded (in a letter authorised by Mr Kempall). Again, it is necessary to set out most of this letter:

> "**Gift Aid Donations – 2015/16 and 2016/17**
>
> I understand that the questions asked under this section have not been answered on the basis that they have already been answered during the course of an enquiry into the Keswick Enterprises Holding Charitable Trust ([the charity]) for which you are awaiting a response. In addition, you do not believe the questions to be appropriate for a personal tax enquiry.
>
> To clarify the above points, I am aware that [the charity] is currently under enquiry for the year ended 5 April 2017. Prior to sending out my letter of 6 November 2019, and on an ongoing basis, I have been in contact with the compliance officer … who has been running the enquiry into [the charity]. I believe the questions asked are not only relevant to the enquiry into [the charity], but also to Mr Harvey's personal tax position. Furthermore, I understand that the questions asked either differ to those that have already received a response from yourselves during the enquiry into [the charity], or have not been answered fully.
>
> As previously explained, it has come to HMRC's attention that the gift aid claims in your client's personal tax returns for the years ending 5 April 2016 and 5 April 2017 may be incorrect. I therefore believe the questions asked are appropriate for a personal tax enquiry. In order to verify that valid gift aid claims were made by your client I believe the answers to the questions that have been asked are required. I need to be satisfied that the conditions for a qualifying donation at s416 ITA 2007 have been met and that the donation does not meet the definition of a tainted donation under s809ZH ITA 2007. As director and majority shareholder in [the company] your client has the power to obtain the information required while he also has the ability to answer any questions relating to [the charity] in his capacity as a Trustee.
>
> At this stage it must be noted that adequate answers have not been provided to the questions raised under this heading in my previous letter. In the absence of such answers HMRC may need to form a view which may involve raising an assessment on Mr Harvey, [the charity], or both, unless it can be shown that the donations made to [the charity] should obtain relief.
>
> If a response is not received to the questions asked then I will need to consider issuing an information notice or whether or not HMRC should use the information we currently have to raise an assessment under the discovery provisions at s29 TMA 1970. For the

avoidance of any doubt, the questions requiring a response have been asked again below. A copy of my letter dated 6 November 2019 has also been enclosed."

(emphasis added)

2020

149. On 23 January 2020 HMRC provided an update to the charity that they hoped to be in a position to write further by 31 March 2020. On 16 June 2020 HMRC wrote indicating the enquiry into the charity was still ongoing.

150. On 20 February 2020 Mr Harvey's agents wrote back to HMRC. This letter asserted that there was a confusion apparent from the letter dated 7 December 2019 and set out what they said the money movements in that (a) Mr Harvey's director's loan account with the company was in credit (b) the company made a cash repayment to Mr Harvey which was itself a return of a loan with no income tax consequences to Mr Harvey and reduced his director's loan account (c) Mr Harvey made a donation to the charity (d) the charity made a commercial loan to the company on commercial terms charging a commercial rate of interest. Other questions were responded to.

151. On 26 February 2020 HMRC wrote to Mr Harvey's agents indicating a colleague would be in touch at a later date.

(viii) HMRC raise discovery assessments against Mr Harvey

152. That colleague was Officer Kempall who had been the decision maker throughout and authorised the previous letters his involvement. On 3 March 2020 Officer Kempall issued discovery assessments under section 29 TMA against Mr Harvey for tax years ending 5 April 2016 and 2017 for £132,628.08 and £139,460.17 respectively which he had discovered before issuing the discovery assessments.

153. We set out the letter accompanying the assessments in full:

"**Mr J A Harvey**

1. Notices of amended assessment

I am writing to you to inform you that assessments have been raised in respect of your clients Self Assessment tax returns for the years ending 5 April 2016 and 5 April 2017. These assessments have been raised under section 29 of the Taxes Management 1970 as HMRC believes that additional tax is due.

I enclose copies of the notices of amended assessment that I have sent to your client today.

2. Reason for amended assessments

The attached assessments have been raised as it has come to HMRC's attention that the gift aid claims in your client's Self Assessment tax returns for the years ending 5 April 2016 and 5 April 2017 appear to be incorrect. This was explained in letters to yourselves on 6 November 2019 and 17 December 2019.

In both letters mentioned above, HMRC requested information that your client has the power to obtain in his capacity as a trustee of the Keswick Enterprises Holding Charitable Trust [the charity] and that of director and majority shareholder in Keswick Enterprises Group Limited [the company].

So far to date, no documentation has been provided and as a result the attached assessments have been raised to protect HMRC's position. I believe excessive relief has

been claimed by your client in both the years ending 5 April 2016 and 5 April 2017. I have therefore raised the attached assessment to make good this loss of tax.

Having reviewed bank statements provided during the course of an enquiry into [the charity], HMRC understands the following to be true:

05/04/2016	£200,000 was transferred to Mr Harvey from [the company]
05/04/2016	£200,000 was transferred to [the charity] from Mr Harvey
05/04/2016	£200,000 is transferred to [the company] from [the charity]
13/07/2016	£200,000 was transferred to Mr Harvey from [the company]
13/07/2016	£200,000 was transferred to [the charity] from Mr Harvey
14/07/2016	£200,000 was transferred to [the company] from [the charity]
19/12/2016	£100,000 was transferred to [the company] from [the charity]
19/12/2016	£300,000 was transferred to [the company] from Mr Harvey
21/12/2016	£100,000 was transferred to [the charity] from Mr Harvey
22/12/2016	£400,000 was transferred to Mr Harvey from [the company]
31/05/2017	£300,000 was transferred to [the charity] from Mr Harvey
31/05/2017	£300,000 was transferred to [the company] from [the charity]

3. Information and documentation requested

As previously explained, information and documentation have been requested in order to confirm whether the donations made by Mr Harvey to [the charity] meet the conditions for a qualifying donation at s416 ITA 2007 and that they do not meet the definition of a tainted donation at s809ZH ITA 2007. No documentation has been provided to date as you believe that the information requested is not part of your client's statutory personal records.

The key issue at hand is the fact that there is a direct personal tax implication for your client. In addition, Mr Harvey has the power to obtain the requested information in his personal capacity as a trustee of [the charity] and that of director and majority shareholder in [the company]. The information and documents required are therefore within his power to obtain.

If the conditions for a tainted donation are met, as is believed, then Mr Harvey will not be eligible for any relief on the donations he made to [the charity]. From HMRC's understanding of the series of transactions Mr Harvey has received a financial advantage. [The charity] has claimed gift aid on Mr Harvey's donation and your client has also claimed gift relief on his Self Assessment returns for both 15/16 and 16/17. [The charity] has in turn invested in Mr Harvey's own company once the amount had been paid out of the DLA to Mr Harvey. The transactions are essentially circular.

As a result, HMRC have come to the conclusion that the arrangement in place meets the definition of a tainted donation and as such any relief claimed by Mr Harvey in respect of the donations made to [the charity] will be lost. The attached assessments have withdrawn relief in respect of donations made of £400,000 to [the charity] in each tax year. If you believe this not to be the case, please set out the reasons why in response to this letter.

At this point I would like to stress that in order for HMRC to consider the position further, the previously requested documentation is required. For the avoidance of doubt, this is shown below:

1. An explanation as to why KEHCT loaned money to KEG

2. How was the money used by KEG?

3. An explanation as to why the money owed to Mr Harvey in the DLA for KEG was reduced by the same amount and in the same month in which the charitable donations to KEHCT were made

4. KEG bank statements / ledgers evidencing the reduction in the DLA for the years 2015/16 and 2016/17

5. Personal bank statements evidencing any money transferred to Mr Harvey from KEG."

(emphasis added)

154. Drawing breath here, Officer Kempall had notified Mr Harvey of the assessments in paragraph 1 of his letter. His reasons, in paragraph 2 were that he believed he had discovered a loss to tax by way of excessive relief arising out of gift aid reclaims. That was a change in position from that previously notified to Mr Harvey in relation to each tax year in question as Officer Kempall had taken a different view. This view was honestly held by reference to the material he had at the time he made the discovery and, for the reasons he gives, reasonably held; looking at that point as it did that the payments were entirely circular. A reasonable officer could hold that belief on the material before Officer Kempall. At paragraph 3 he continued to seek information and documentation on the questions of both "qualifying donations" and "tainted donations". The context for that request were the content of the letters sent under his authority on 6 November 2019 (see [143]-[144] above) and 7 December 2019 (see [148] above). At the discovery stage he concluded that the relief was excessive because the donations were "tainted donations" but wanted more material to consider the position further. At no point did he rule out that the donations were not "qualifying donations".

155. On 23 March 2020 Mr Harvey (through his agent) requested a review and on 30 March 2020 Officer Kempall issued his view of the matter. Mr Harvey sought an independent review. They set out, in short form, that the donations were not tainted donations and that the discovery assessments were not validly raised.

156. On 26 March 2020 Officer Kempall postponed collection of the tax raised against Mr Harvey by the discovery assessments.

157. On 16 April 2020 Officer Kempall wrote to Mr Harvey explaining that there would be a pause due to the pandemic.

158. On 20 October 2020 Officer Kempall wrote to Mr Harvey's agents asking for further documentation as, "It is clear that answers to the questions would facilitate a better understanding of the series of transactions as there are clearly some gaps that need to be filled."

159. On 29 October 2020 Officer Kempall wrote to Mr Harvey's agents. Having apologised for not being able to take a telephone call he said, "The last I heard from you on this was that you were having a look at the case into Mr Harvey and were intending to come back to me this week regarding the possible tainted donation".

160. On 30 October 2020, having had a productive telephone call with Mr Harvey's agents, Officer Kempall wrote:

"As I explained on the call, I have been considering what information and documentation HMRC would like to see in order to determine whether the gift aid claims made by Mr Harvey in 15/16 and 16/17 are correct. As you're aware, HMRC have been considering whether the conditions set out within the tainted donation legislation have been met. I appreciate that you do not believe this to be the case due to the fact the transactions originated from the Company and not from Mr Harvey, however, I think we need a little more clarity and transparency on the series of transactions in order to be happy that the donations do qualify for relief.

As a result, I have provided a more comprehensive list of the information and documents I think HMRC will need to see in order to resolve this case. These have been provided below:

• An explanation of who initiated the loans from Keswick Enterprises Holdings Charitable Trust (KEHCT) to Keswick Enterprises Group Limited (KEG) with supporting evidence.

• What considerations/due diligence/advice did the trustees undertake before approving the loans to KEG? Please include any supporting evidence.

• Were all the trustees aware of the loans being made to KEG? Please include any supporting evidence.

• A copy of the loan documents for the loans from KEHCT to KEG.

• What was the money loaned to KEG spent on? Please include any supporting evidence.

• An explanation as to why were the loans repaid early if the original term was set to 6 years?

I am aware that there is a slight overlap in the above questions and the information that has previously been asked, most recently in my letter of 3 March 2020 …"

(emphasis added)

161. On 10 December 2020 the officer wrote to the charity's agent noting that Officer Kempall was enquiring into Mr Harvey's personal returns and that technical gift aid advice was being sought. HMRC noted that the enquiry into the charity returns was ongoing and no further information was required at this time.

162. On 21 December 2020 Mr Harvey's agents provided a response to Officer Kempall's email of 30 October 2020 with several enclosures (all of which having been provided to HMRC on a number of occasions previously). Having answered the bullet point questions their reply continued:

"We would like to provide you with some more background regarding the transactions in question which may help the understanding of the nature of the transactions. Please see below:

• Our client's director's loan account with [the company] was in credit.

• [The company] made a cash repayment to our client. This cash repayment was a return of a loan and carried no tax consequences for our client as far as income tax is concerned. Mr Harvey's DLA credit was reduced.

• Our client made a donation to [the charity].

• [the charity] made a commercial loan to [the company]. The loan was made on commercial terms charging commercial rate of interest. Please refer to the documents mentioned earlier in the letter and enclosed with this letter for your review.

Based on this we do not believe that the transfers made by Mr Harvey to [the charity] meet the conditions for a tainted donation. We also do not believe that there was an arrangement in place which was set up by our client which sole or main purpose was to obtain a tax advantage. Our client drew on his DLA which was in substantial credit and made a donation to [the charity]. The trustees made a loan to the company on which they earn commercial rate of interest. Thus, it is an arm's length transaction as no preferential credit terms were offered by the charity to the company."

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163. On 11 February 2021 Officer Kempall wrote to Mr Harvey's agents. He said:

"I note in your response you have raised that the transactions originated from [the company] – i.e. Mr Harvey's credit balance on his DLA was reduced when the cash repayment was made. Mr Harvey then made a donation to [the charity] who then made a commercial loan to [the company]. On this point, I have been able to review bank statements for [the charity] and [the company] that were provided to HMRC during the course on an enquiry into [the charity]. In order for me to see the complete picture, please can you provide bank statements for Mr Harvey evidencing the repayments from [the company] and donations to [the charity]?

Once these have been received, I will have confirmation that the transactions occur in the order you have stated. I am hopeful that providing the relevant bank statements shouldn't be too onerous, so that we can keep things moving. I will then be in a position to determine if the gift relief claims made by your client are correct."

(emphasis added)

164. Officer Kempall's access to the documentation from the charity's enquiry is both unsurprising and sensible. Officer MacDonald told us that there had been liaison between the team at HMRC looking at the charity of which he was a part and the different team considering Mr Harvey of which Officer Kempall was a part. That liaison was in relation to the relief claimed by Mr Harvey, something that impacted upon the charity. There were discussions over whether there were risks associated with the payments made to the charity as well as general compliance. Documents were shared between the teams. That included bank statements (such as those provided by Mr Harvey in relation to his own bank accounts (see [168] below). The teams kept each other informed of any significant developments.

165. On 4 March 2021 HMRC wrote again to the charity's agent noting that the enquiry was still ongoing into Mr Harvey's returns but, to avoid delay, to provide their view of the matter in relation to the charity. That view was to disallow the gift aid relief because the donations by Mr Harvey were non-qualifying for the purposes of gift aid due to what is described "circular transaction" between the charity, Mr Harvey and the company and setting out how HMRC describe the circularity.

166. On 18 March 2021 the charity's agent replied to HMRC saying that they were communicating with Officer Kempall over Mr Harvey's enquiry and replying to his letter dated 11 February 2021. They also indicated that Mr Harvey's wife had very sadly passed away recently noting "Mrs Harvey was the remaining trustees' mother" and informing HMRC there would be delay in responding to the view of the matter.

167. On 18 May 2021, in response to Officer Kempall's request on 11 February 2021, Mr Harvey's agents supplied copies of some of Mr Harvey's bank statements. These contained the payments made in April and July 2016. The following day Officer Kempall wrote asking for the bank statements for the payments in December 2016 and May 2017.

168. On 7 June 2021 Mr Harvey's agents provided those outstanding bank statements to Officer Kempall.

169. On 21 August 2021 Officer Kempall wrote to Mr Harvey. The case had not yet been sent for an independent review after the appeal against the discovery assessments as Officer Kempall was receiving further information from Mr Harvey. Ms Brown spent some time on this letter both in cross-examination of Officer Kempall and in submissions. This letter must therefore be set out in full:

> "**Mr J A Harvey**
>
> As you are aware, notices of assessment for the years ended 5 April 2016 and 5 April 2017 were issued on 3 March 2020. These assessments were appealed in a letter dated 23 March 2020 and, as a result, the collection of the tax due has been postponed until the appeal has been settled.
>
> As the COVID-19 situation evolved, the case was temporarily put on hold following the wish of your client on 16 April 2020. HMRC were then notified on 20 August 2020 that Mr Harvey was happy to proceed with the enquiry.
>
> Thank you for your continued patience while HMRC has been reviewing the case and your cooperation and willingness to proceed with matters since the enquiry was restarted.
>
> You will also be aware that The Keswick Enterprises Holdings Charitable Trust ([the charity]) has been under enquiry by HMRC and on 4 March 2021 HMRC wrote out to yourselves with their view of the matter explaining that Gift Aid claimed on donations to the charity should be withdrawn.
>
> I have now had the opportunity to consider all the information gathered to date and am in a position to provide you with my current understanding of the position and view as to whether qualifying donations had been made by Mr Harvey or whether the relief obtained on his 15/16 and 16/17 Self Assessment tax returns needs to be withdrawn.
>
> **1) Series of Transactions**
>
> It is understood that the following transactions took place during the 15/16 and 16/17 tax years between Mr Harvey, Keswick Enterprises Holding Limited ([the company]) and [the charity]:

05/04/2016	£200,000 was transferred to Mr Harvey from [the company]
05/04/2016	£200,000 was transferred to [the charity] from Mr Harvey
05/04/2016	£200,000 is transferred to [the company] from [the charity]
13/07/2016	£200,000 was transferred to Mr Harvey from [the company]
13/07/2016	£200,000 was transferred to [the charity] from Mr Harvey
14/07/2016	£200,000 was transferred to [the company] from [the charity]
19/12/2016	£100,000 was transferred to [the company] from [the charity]
19/12/2016	£300,000 was transferred to [the company] from Mr Harvey
21/12/2016	£100,000 was transferred to [the charity] from Mr Harvey
22/12/2016	£400,000 was transferred to Mr Harvey from [the company]
30/05/2017	£300,000 was transferred from [the company] to Mr Harvey
31/05/2017	£300,000 was transferred to [the charity] from Mr Harvey

31/05/2017 £300,000 was transferred to [the company] from [the charity]

It is understood that an error occurred in December 2016 where a number of transactions were accidentally sent to the wrong parties. This was corrected in May 2017, resulting in Mr Harvey receiving a net amount of £400,000 from [the company], [the charity] receiving a total of £400,000 from Mr Harvey and [the company] receiving a total of £400,000 from [the charity] across December 2016 and May 2017.

It is also understood that all amounts transferred to Mr Harvey from KEG were repayments from a credit balance in his Directors Loan Account (DLA), all amounts transferred by My Harvey to [the charity] were donations made to the charity and all amounts transferred from [the charity] to [the company] were loans.

In previous correspondence with HMRC it was explained that the series of transactions originated from KEG who made a repayment from Mr Harvey's Directors Loan Account (DLA) that was in credit. Mr Harvey then made a donation to [the charity], who in turn loaned money back to [the company] as working capital. These loans were subsequently repaid upon the sale of an associated Company.

2) Legislation – s809ZJ ITA 2007

The tainted donations legislation is located at s809ZJ ITA 2007. If a donation is deemed to be tainted, the donor loses any tax relief that they would have been entitled to claim. Based on the information provided to date, HMRC are no longer looking to challenge the arrangements in place under this section of the legislation.

3.1) Legislation – s416 ITA 2007

While the notices of assessment were initially raised as it was believed the tainted donations legislation was in point, having reviewed the case again the legislation as s416 ITA 2007 is more relevant.

The legislation at s416 ITA 2007 sets out the conditions that must be met in order for a gift to a charity to be regarded as a qualifying donation. The pertinent sections of the legislation are set out below:

(1) A gift made to a charity by an individual is a qualifying donation for the purposes of this Chapter if-

- *a) Conditions A to F are met, and*
- *b) the individual, or an intermediary representing the individual, gives the charity, or an intermediary representing the charity, a gift aid declaration relating to the gift.*

(2) Condition A is that the gift takes the form of a payment of a sum of money.

(3) Condition B is that the payment is not subject to any condition as to repayment

(4) Condition C is that the payment is not a sum falling withing section 713(3) of ITEPA 2003 (payroll deduction scheme).

(5) Condition D is that the payment is not deductible in calculating the individual's income from any source.

(6) Condition E is that the payment is not conditional on, or associated with or part of an arrangement involving, the acquisition of property by the charity from the individual or person connected with the individual.

An acquisition by way of gift is ignored for the purposes of this condition.

(6A) Condition EA is that the payment is not by way of, and does not amount in substance to, waiver by the individual of entitlement to sums (whether of principle or return) due to the individual from the charity in respect of an amount-

a) advanced the charity, and

b) in respect of which a person, whether or not the individual, has obtained relief under Part 5B (relief for social investments).

(7) Condition F is that-

a) there are no benefits associated with the gift, or

b) there are benefits associated with the gift but the restrictions on those benefits are not breached.

The two conditions of particular relevance are:

- Condition E – The payment is not conditional on the acquisition of property by the charity
- Condition F – There are no benefits associated with the gift (or the restrictions on benefits associated with the gift are not breached).

3.2) Analysis – s416 ITA 2007

For a qualifying donation to occur, all the conditions set out in s416 ITA 2007 must be met and therefore each condition needs to be looked at in isolation.

Condition F

Condition F(a) refers to the fact that for a gift to be a qualifying donation there must be no benefits be associated with it. A benefit is regarded as being associated with a gift if it is received by Mr Harvey or a person connected with Mr Harvey.

In addition, Condition F(b) covers the instance where there are benefits associated with the gift, however, if the restrictions on those benefits are breached, there would not be a qualifying donation.

There is no doubt that Mr Harvey is connected to [the company] through his role as majority shareholder and director. In this instance I believe that the loan received by [the company], following the DLA repayment to Mr Harvey and subsequent donation by Mr Harvey to [the charity], is a benefit associated with the gift. The arrangements put in place allowed [the company] to benefit by receiving a loan from [the charity].

That is not to say that [the company] were unable to enter into any commercial loan agreements., however, the important point to consider here is the circular nature of the transactions.

At the time the DLA repayments were made to Mr Harvey, the bank statements for [the company] show that the Company either went overdrawn or became further overdrawn. The bank accounts show that the account balances immediately after the repayment were as follows:

- 05/04/2016: - £355,672
- 13/07/2016: - £130,321
- 22/12/2016: - £392,733

The above shows that [the company] did not have the available credit balance to make a repayment to Mr Harvey. Furthermore, the fact that [the charity] loaned money back to

[the company] for the purpose of working capital raises the question as to whether [the company] would have been able to make the repayments to Mr Harvey, or indeed continue to operate financially as a Company, had it not received a loan from [the charity] immediately after.

When reviewing the bank statements for [the charity] the situation is very similar. The accounts show a balance of £5,000 and £8,945 immediately before the first and second donations of £200,000 were received. The charity would also not have had the funds to lend [the company] £400,000 during the second tranche of transactions had they not received further donations from Mr Harvey and claimed the Gift Aid associated with the first two donations from HMRC.

In previous correspondence with HMRC it was explained that the loan from [the charity] to [the company] was made for the purpose of working capital and the need for funds is clearly evidenced by the bank account balances for the Company.

When the above is considered alongside the proximity between the DLA repayment, donations and the loan, there is good evidence that the loan was received as a consequence of the donation. Had a donation not been made, [the charity] would not have been in a financial position to make loans back to [the company].

The fact [the company] needed to take the loan for working capital acts as evidence that the Company was not in a position to make the DLA repayment to Mr Harvey had they not received the funds back. The arrangements in place were only possible due to the circular nature of the transactions. Had one of the transactions not happened, they would not have been able to all happen.

I therefore believe that [the company] benefitted in being able to receive a loan, which was only made possible as a result of both the donation made by Mr Harvey and DLA repayment. Given the fact that Mr Harvey is connected [the company] through virtue of being majority shareholder and director, Condition F has not been met and as a result a qualifying donation has not taken place.

<u>Condition E</u>

Condition E refers to the fact, for a qualifying donation to occur, the payment is not conditional on, associated with or part of an arrangement involving the acquisition of property by the charity.

Having already explained the proximity between each of the transactions and how they are intrinsically linked, they were all part of an arrangement put in place. Had Mr Harvey not made the donations to [the charity], they would have been unable to loan money back to [company].

In making a loan to [the company], [the charity] is entitled to any repayments that [the company] is required to make along with any other rights attached with the loan. These rights are transferable and can therefore be assigned to a third party and, as a result, are considered to be a form of property. There is therefore no doubt that [the charity] has obtained a form of property in making a loan to [company].

Given that this property was obtained from a person ([the company]) connected with the individual (Mr Harvey), the conditions set out at s416(6) ITA 2007 have not been met. The important point to bear in mind here is that the payment can either be conditional on, associated with, or part of an arrangement involving, the acquisition of the property. It can be argued that all three possibilities would be met given, however, there is no doubt that the donation is associated with the acquisition of property, given [the charity] needed

to loan [the company] the funds back for the purposes of working capital following the DLA repayment to Mr Harvey.

Conclusion

While HMRC are no longer looking to challenge the donations by Mr Harvey under the tainted donations legislation, my findings set out above have outlined that the conditions for a qualifying donation have not been met.

As a result, the tax relief obtained on donations of £800,000 by Mr Harvey across 15/16 and 16/17 should be withdrawn, as detailed in the notices of assessment issued on 3 March 2020.

No information provided so far to date has changed this opinion since the assessments were raised. As a trustee of [the charity] and a director of [the company], Mr Harvey will have been involved in the decision to not only repay himself from his DLA, but also in the decision to lend the money back to [the company]. Similarly, it will have been his decision to make a donation to [the charity]. He was therefore instrumental in putting the arrangements in place which have fallen foul of the legislation.

Next Steps

If you have any further information you would like me to consider, please outline so in a response to this letter.

As you will be aware the notices of assessment were previously appealed and since then further information was provided which has been taken into account when considering the relief obtained in 15/16 and 16/17.

As a result, the case has not yet been reviewed by another HMRC officer who has previously not been involved with the case through the appeal process. If you do not have any new arguments that you wish to raise and would like to now go ahead with a review, please let me know.

Should you not opt for a review or the review finds in my favour then the previously raised notices of assessments will be upheld and the tax outstanding will become due."

170. Drawing breath again, Officer Kempall was cross-examined closely about the content of the first paragraph at 3.1 in the letter and the nature and reasoning behind what he had found. For ease, that stated, "While the notices of assessment were initially raised as it was believed the tainted donations legislation was in point, having reviewed the case again the legislation as s416 ITA 2007 is more relevant".

171. What happened was that the discovery assessments raised a tax deficiency by way of excessive relief in relation to gift aid. That was what Officer Kempall had discovered before he issued the discovery assessments. For ease, under 'reasoning' (for the discovery assessment), Officer Kempall had written, "I believe excessive relief has been claimed by your client in both the years ending 5 April 2016 and 5 April 2017. I have therefore raised the attached assessment to make good this loss of tax".

172. At that point, as we have said, Officer Kempall concluded that the statutory pathway that rendered the relief excessive was that relating to "tainted donations". That belief was based upon the material he had before him. For ease, he had said in the letter accompanying the discovery assessment, under the heading about documentation and information requested, "As previously explained, information and documentation have been requested in order to confirm whether the donations made by Mr Harvey to [the charity] meet the conditions for a qualifying donation at s416 ITA 2007 and that they do not meet the definition of a tainted donation at

s809ZH ITA 2007. No documentation has been provided to date as you believe that the information requested is not part of your client's statutory personal records". Further, "If the conditions for a tainted donation are met, as is believed, then Mr Harvey will not be eligible for any relief on the donations he made to [the charity]."

173. Officer Kempall very properly accepted that what he had written at 3.1 of his letter from 21 August 2021, "… certainly says that we were looking to challenge the position under the tainted donations legislation."

174. Thus, whilst the "tainted donations" were believed to be 'in point' at that stage, further information received (as requested in the letter accompanying the discovery assessments once more) and consideration thereafter led to "tainted donations" falling away and the focus changing to whether the donations were "qualifying donations".

175. As the correspondence read chronologically makes clear, the issue of "qualifying donations" was not a new one. It had never been suggested that whilst the focus was on "tainted donations" that the relief was not excessive due because the donations were not "qualifying donations".

176. On 19 October 2021 Mr Harvey's agents replied to Officer Kempall. Responding *seriatim* (and in relevant part) they wrote:

> "1) Noted
>
> 2) We note that after 18 months of enquiry HMRC have conceded that there is no challenge under the tainted donations legislation at s809ZJ ITA 2007
>
> 3.1) We note that HMRC have now changed their arguments in this case and are now looking at the qualifying donation legislation under S416 ITA 2007 to challenge the contributions made by our client and in particular Conditions E and F
>
> 3.2) Analysis
>
> The structure of [the company] is that there are 4 directors making up the Board. Mr Harvey is one director. Any decisions are made by the board, not by Mr Harvey alone. The fact that Mr Harvey is the majority shareholder has no bearing on the day-to-day operations of the company as this is controlled by the board. Decisions are made on a majority basis at board level, and if there is no majority, the proposed course of action does not take place. The Board meet regularly – usually once a month."

177. They also demonstrated, and we find, that the company had sufficient cash headroom to reduce Mr Harvey's director's loan account in the way that occurred to make the payments back to him.

178. On 7 December 2021 Officer Kempall wrote to Mr Harvey's agents indicating he was taking technical advice and would respond in due course.

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179. On 29 March 2022 HMRC provided a copy of the letter they were sending to Mr Harvey to Mr Harvey's agents. In the covering email Officer Kempall wrote, "Please see attached for a letter that is due to go out in the post to your client tomorrow. The challenges raised in your letter of 19 October 2021 have been considered, however, they have not affected my decision that the tax relief claimed on donations to [the charity] needs to be withdrawn as the conditions for a qualifying donation have been breached. As a result, I have treated your letter as a request for a review by another HMRC officer not previously involved in the case and the attached acts as my view of the matter".

180. That letter was dated 30 March 2022 and was HMRC's view of the matter. Happily, we do not need to set this out in full as most of it reflects that found in Officer Kempall's letter of 21 August 2021 (see [169] above) albeit there were further additions such as references to *Halsbury's Laws*. However, there were some changes which we must set out:

"**Request for Review**

1. As you will be aware, HMRC have been investigating the claims for gift relief made on your Self-Assessment return for the years ended 5 April 2016 and 5 April 2017 following donations you made to Keswick Enterprise Holdings Charitable Trust [the charity].

2. I have been carefully considering the case and am now in a position to respond to you, Mr Harvey (JH), in respect of your agent's (Raffingers) last letter, dated 19 October 2021.

3. The letter received by Raffingers' indicated that if my view remains unchanged, then you wished to request a review of my decision that the gift relief claimed should be withdrawn on the basis that a qualifying donation had not been made. Having considered the additional information provided, my view has not changed. I am therefore treating Raffingers' letter as a request for the case to be reviewed by another HMRC officer not previously involved with the case.

4. As a result, this letter acts as my view of the matter, having considered the facts of the case and all arguments raised over the course of my check. I have explained the reasons why my view is unchanged below.

5. For the avoidance of doubt, I previously looked to challenge the donations made to [the charity] under the tainted donations legislation at s809ZJ ITA 2007 and raised notices of assessment on that basis. However, I now believe that s416 ITA 2007 is in point.

…

18. Having reviewed the case in its entirety, I consider that three conditions have not been met. These are:

- Condition B - The payment is not subject to any condition as to repayment
- Condition E - The payment is not conditional on or associated with or part of an arrangement involving, the acquisition of property by the charity
- Condition F - There are no benefits associated with the gift (or the restrictions on benefits associated with the gift are not breached).

19. At this stage it must be mentioned that, if you do not agree with my analysis, it must be shown that all three conditions have been met. Should the review find in my favour, and in the event you wanted to challenge the decision at tribunal, HMRC would only need to succeed on one point for it to be found that the tax relief claimed is not allowable.

…

Condition B

31. Whilst my primary argument is that Condition E has not been met, for the sake of completeness, I also contend that Condition B has not been met. Condition B requires that the payment is not subject to any condition as to repayment.

32. As highlighted above, it is my view that there is an implied contract present in this instance. In order for a contract to be implied, it must be shown that both parties provided consideration (preventing the donations from amounting to gifts) and intended to create legal relations.

33. According to *Chitty on Contracts*, the 'traditional definition' of consideration 'concentrates on the requirement that "something of value" must be given and accordingly states that consideration is either some detriment to the promisee (in that they may give value) or some benefit to the promisor (in that they may receive value)' (Currie v Misa (1875)).

34. In this instance, consideration is present in the form of making the loans by [the charity], resulting in consideration passing to [the company]. By not retaining the donations received, [the charity] have acted to their detriment by making the loans.

35. At this stage it is important to note that both detriment to the promisee and benefit to the promisor do not need to be simultaneously present for a contract to be formed (O'Sullivan v Management Agency & Music Ltd (1985)). With that being said, it can be argued that you received a benefit from the loans in the sense that [the company] received the funds. I expand on this further under Condition F.

36. Consequently, the donations do not amount to gifts, as they served the intended purpose of providing loans to KEG. As stated in Raffingers' last letter, had [the charity] not been in receipt of the donations, no investment decision would have needed to be made. Therefore, the loans to [the company] were wholly dependent on the receipt of the donations and the donations were made for the purpose of providing a loan to [the company].

37. The wording 'any condition as to repayment', is also sufficiently broad that it would encompass instances where the money comprising a donation is effectively returned to the donor, or a person/entity related to the donor, by any means. The fact a connection exists between you and [the company] is not a point of dispute.

38. Consequently, the donation was made on the understanding that the money provided would be returned to an entity connected to you and, therefore, the conditions set out in s416(3) ITA 2007 have not been met.

39. This analysis is also reinforced when one takes a Ramsay approach to the transactions. The case of WT Ramsay Ltd v CIR (1982) [Ramsay] established that in arriving at the legal nature of the transaction in point, it was necessary to consider the whole arrangement rather than looking at each step in isolation. It also established that legislation should be applied according to Parliament's purpose and that a realistic view of the facts needed to be taken.

40. Taking a realistic view of the facts, the series of transactions entered into resulted in [the company] being in the same position following the receipt of the loan from [the charity], as it had been prior to the repayment of your DLA. The donation to [the charity] does not appear to be made on an unfettered basis. On the contrary, the funds flow back to their original source ([the company]). This would appear contrary to the purpose of gift relief more widely and is specifically prohibited by Condition B.

41. Your agent had stated that all parties to the transaction were within their rights to carry out the transaction in the way that they did. Whilst this may be true, it does not mean that the transactions as implemented meet the criteria envisaged by Parliament for gift relief to be available.

42. The principles established in the case of Ramsay, could equally apply when considering Parliament's intentions in enacting the legislation at Condition E and Condition F. Therefore, they are not solely applicable to Condition B."

181. On 7 April 2022 the officer charged by HMRC to conduct the independent review wrote to Mr Harvey to introduce himself and indicated what the procedure would be.

182. Additionally, on 7 April 2022 the charity's agent supplied the charity enquiry at HMRC with the correspondence sent to Officer Kempall on behalf of Mr Harvey as it had become clear that the two enquiries were dealing with the same subject matter. On the same day the officer charged with carrying out the independent review wrote to Mr Harvey indicating this would be occurring.

183. On 13 April 2022 Mr Harvey's agents provided further submissions to the independent review pointing out the chronology and the enquiries, both informal and formal, which had already taken place into Mr Harvey's self-assessments.

184. On 13 May 2022 HMRC finished its independent review into the discovery assessments appealed by Mr Harvey. That review concluded that the donations were not "qualifying donations" for the purposes of section 416 ITA and the discovery assessments had been validly raised. On that final point, at [6.37] the reviewing officer informed Mr Harvey he had considered all the information available to HMRC including the enquiries, both formal and informal, in accordance with section 29 (6) TMA. The officer concluded [at 6.44]:

"I consider that it was not reasonable to expect them to be aware of the situation as the information available to them at the time only related to the payment from you to [the charity]. It was not reasonable to expect them to be aware of the associated payments from [the charity] to [the company] and from [the company] to yourself".

185. That conclusion related to 12 July 2017 for the self-assessment for the tax year ending 5 April 2016 (that is 12 months after the return was delivered to HMRC (see [68] above)) and 26 March 2019 for the tax year ending 5 April 2017 (that is the date of the final closure notice issued (see [124] above)).

186. Mr Harvey remained aggrieved by these decisions and appealed to the Tribunal by a Notice of Appeal dated 8 June 2022.

187. On 4 January 2023 closure notices were issued to the charity by HMRC for the tax years 2016-17 and 2017-18 in the sums of £101,250 and £100,000 respectively. As is accepted, those were wrong. As Officer MacDonald told us, apologising to the charity, they should have been £75,000 in each case. He told us, and we accept, it was not his error, and, to the best of his knowledge, no others had been made.

188. On 13 January 2023 the charity (through its agents) notified HMRC of its wish to appeal the tax assessments and closure notices. They also submitted that the £100,000 amendment by the closure notice for the 2018 return should be £75,000 rather than £100,000.

189. On 20 February 2023 HMRC replied indicating that their position was the same as the view of the matter previously and on 13 March 2023 wrote offering an independent review or informing the charity it could appeal to the Tribunal.

190. On 27 March 2023 the charity accepted the offer of an independent review and made detailed submissions and representations to the review officer as to why the donations of Mr Harvey should be treated as qualifying as well as denying a circularity of funds generally.

191. On 22 May 2023 HMRC's independent review upheld the decisions in relation to the charity to issue the closure notices in the same amounts essentially for the same reasons previously provided in the view of the matter and on 31 March 2022.

192. The charity remained aggrieved by these decisions and appealed to the Tribunal by a Notice of Appeal dated 21 June 2023.

193. The grounds of appeal by both Appellants set out in writing reflect those pursued before the Tribunal at the hearing.

THE LAW

194. We deal with the law starting with gift aid as it applies to both Appellants, followed by that applicable to the validity of the raising of discovery assessments which applies only to Mr Harvey. We have taken account of all the submissions made to us on the relevant law although we have not referred to them all. To do so would be to unacceptably lengthen an already long decision and that is not necessary.

195. All parties accept the appeal provisions are those found under section 50 TMA. If HMRC can prove validity of the discovery assessments in relation to Mr Harvey, it is for the Appellants to prove the amounts charged to them are excessive otherwise the assessments 'stand good'. We do not need to set out the mechanisms involved in the appeal beyond that.

(1) Gift Aid

196. As ever the starting point is the terms of the relevant taxing statute(s).

(i) The Income Tax Act 2007 and The Corporation Tax Act 2010

197. Here that is principally the Income Tax Act 2007 ('ITA'). The 'gift aid' provisions are located in Part 8 as chapter 2 as one of 'other reliefs'. Chapter 2 is headed Gift Aid and although it runs from sections 413 to 430, of relevance are sections 413 to 417.

198. The parties have helpfully drawn to our attention to the terms of the legislation that have changed throughout the tax years under consideration in this appeal, that is 2015-16, 2016-17 and 2017-18. We set out below that most recently in force in relation on the basis that the differences are not material to this appeal. In particular, conditions A to F in section 416 have remained consistent.

199. Section 413, under *The Relief* states (in material part):

> "**413 Overview of Chapter**
>
> (1) This Chapter gives relief for some gifts of money to charities by individuals.
>
> (2) The relief is set out in section 414.
>
> …"

200. Section 414 states (in material part):

> "**414 Relief for gifts to charity**
>
> (1) An individual who makes a gift to a charity which is a qualifying donation is entitled to the relief set out in subsection (2).
>
> (2) The Income Tax Acts have effect in their application to the individual for the tax year in which the gift is made as if—
>
> (a) the gift had been made after deduction of income tax at the basic rate, and

(b) the basic rate limit and the higher rate limit (see section 10) and additionally, in the case of a Scottish taxpayer, the upper limit for the Scottish basic rate and the limits for any Scottish rates above the Scottish basic rate, were increased by an amount equal to the grossed up amount of the gift.

(3) …".

(emphasis added)

201. The 'grossed up amount' is defined by section 415 as the amount of the gift grossed up by the basic rate of tax in the year in which the gift is made.

202. Whilst there is no definition of "gift" in section 989 (ITA's definitions section), section 416 provides what is meant by a "qualifying donation". This section was the subject of most of the the parties' attention in the hearing and is central to the resolution of the appeal. It must be set out in full.

"**416 Meaning of "qualifying donation"**

(1) A gift made to a charity by an individual is a qualifying donation for the purposes of this Chapter if—

(a) conditions A to F are met, and

(b) the individual or an intermediary representing the individual, gives the charity or an intermediary representing the charity, a gift aid declaration relating to the gift (see section 428).

(1A) For the purpose of subsection (1)(b) an intermediary is—

(a) a person authorised by the individual to give a gift aid declaration on behalf of that individual to the charity,

(b) a person authorised by a charity to receive a gift aid declaration on behalf of that charity, or

(c) a person authorised to perform both of the roles described in paragraphs (a) and (b).

(2) Condition A is that the gift takes the form of a payment of a sum of money.

(3) Condition B is that the payment is not subject to any condition as to repayment.

(4) Condition C is that the payment is not a sum falling within section 713(3) of ITEPA 2003 (payroll deduction scheme).

(5) Condition D is that the payment is not deductible in calculating the individual's income from any source.

(6) Condition E is that the payment is not conditional on, associated with or part of an arrangement involving, the acquisition of property by the charity from the individual or a person connected with the individual.

An acquisition by way of gift is ignored for the purposes of this condition.

(6A) Condition EA is that the payment is not by way of, and does not amount in substance to, waiver by the individual of entitlement to sums (whether of principal or return) due to the individual from the charity in respect of an amount—

(a) advanced to the charity, and

(b) in respect of which a person, whether or not the individual, has obtained relief under Part 5B (relief for social investments).

(7) Condition F is that—

(a) there are no benefits associated with the gift, or

(b) there are benefits associated with the gift but the restrictions on those benefits are not breached.

See sections 417 to 421 for provision about benefits associated with gifts."

(emphasis added)

203. Section 417 states:

"**417 Meaning of "benefits associated with a gift"**

A benefit is associated with a gift for the purposes of this Chapter if it is received by the individual who makes the gift, or a person connected with the individual, in consequence of making the gift."

204. Section 993 provides the meaning of "connected" persons. At sub-section (6) there is set out:

"(6) A company is connected with another person ("A") if—

(a) A has control of the company, or

(b) A together with persons connected with A have control of the company."

205. Section 994 requires that "control" is to be read in accordance with section 450 of the Corporation Tax Act 2010 ('CTA'). That states (in material part):

"**450 "Control"**

(1) This section applies for the purpose of this Part.

(2) A person ("P") is treated as having control of a company ("C") if P—

(a) exercises,

(b) is able to exercise, or

(c) is entitled to acquire,

direct or indirect control over C's affairs.

(3) In particular, P is treated as having control of C if P possesses or is entitled to acquire—

(a) the greater part of the share capital or issued share capital of C,

(b) the greater part of the voting power in C,

(c) so much of the issued share capital of C as would, on the assumption that the whole of the income of C were distributed among the participators, entitle P to receive the greater part of the amount so distributed, or

(d) such rights as would entitle P, in the event of the winding up of C or in any other circumstances, to receive the greater part of the assets of C which would then be available for distribution among the participators.

…"

206. At this stage it is convenient to reference section 809ZH ITA which contains the overview on tainted charity donations. That is because it is relevant to the raising of the discovery assessments in this case. The detail does not need to detain us as HMRC do not now assert that the gifts made by Mr Harvey are "tainted donations".

207. It is sufficient to set out sub section (1):

"**809ZH Overview of Chapter**

(1) This Chapter makes provision for removing entitlement to income tax reliefs, and counteracting income tax advantages, where a person makes a relievable charity donation which is a tainted donation."

208. Having set out the relevant statutory provisions, we must turn to the interpretation of them.

(ii) Statutory Interpretation

209. There is a single method the courts employ to interpret all statutes; whatever the position may have been historically. That method is what has become known as the "purposive approach". The Supreme Court has repeatedly reiterated this.

210. In *Hajan v The Mayor and Burgesses of the London Borough of Brent; Kerr v Poplar Housing and Regeneration Limited Community Association* [2024] EWCA Civ 1260 Lewison LJ in the Court of Appeal summarised the approach:

"34. … as it is put in Bennion Bailey & Norbury on Statutory Interpretation (8th ed para 12.2):

"Every enactment to be given a purposive construction."

35. Three examples will suffice. In *Barclays Mercantile Business Finance Ltd v Mawson* [2004] UKHL 51, [2005] 1 AC 684 at [28] Lord Nicholls said:

"… the modern approach to statutory construction is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose."

36. In *Kostal UK Ltd v Dunkley* [2021] UKSC 47, [2022] ICR 434 at [30] Lord Leggatt said:

"First, as with any question of statutory interpretation, the task of the court is to determine the meaning and legal effect of the words used by Parliament. The modern case law… has emphasised the central importance of identifying the purpose of the legislation and interpreting the relevant language in the light of that purpose."

37. This purposive approach applies to all legislation: *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 at [10]."

211. If more were needed, see for example, *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2022] 2 WLR 343 at [28] – [33], *R v Luckhurst* [2022] UKSC 23; [2022] 1 WLR 3818 at [23] and *R (PACCAR) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 1 WLR 2594 at [40] – [41].

212. In this case HMRC submitted that this involves in the context of tax statutes the application of the 'Ramsay principle'. That was considered in the non-tax case of *Rossendale Borough Council v Hurstwood Properties (A) Ltd* [2021] UKSC 16, [2022] AC 690 ('Rossendale') where in the Supreme Court Lord Briggs and Lord Leggatt JJSC (with whom the other three members: Lord Reed PSC, Lord Hodge DPSC and Lord Kitchin JSC agreed) said:

> "*The Ramsay principle*
>
> 9 The first way in which the local authorities advance their claim that the defendants are liable for the unpaid rates relies on the approach to statutory interpretation associated in the field of tax legislation with the case of *WT Ramsay Ltd v Inland Revenue Comrs* [1982] AC 300. What has often been referred to as the Ramsay principle or doctrine may be said now to have reached a state of well-settled maturity, not least because of its restatement at the highest level in two 21st century authorities: *Barclays Mercantile Business Finance Ltd v Mawson* [2005] 1 AC 684 and *UBS AG v Revenue and Customs Comrs* [2016] 1 WLR 1005. Although usually deployed in relation to tax avoidance schemes, it is not in its essentials particular to tax, being based upon the modern purposive approach to the interpretation of all legislation, one which penetrated the field of tax legislation only at a relatively late stage: see Barclays Mercantile at paras 28—29; and UBS at paras 61—63."
>
> (emphasis added)

213. They continued:

> "12 Another aspect of the Ramsay approach is that, where a scheme aimed at avoiding tax involves a series of steps planned in advance, it is both permissible and necessary not just to consider the particular steps individually but to consider the scheme as a whole. Again, this is no more than an application of general principle. Although a statute must be applied to a state of affairs which exists, or to a transaction which occurs, at a particular point in time, the question whether the state of affairs or the transaction was part of a preconceived plan which included further steps may well be relevant to whether the state of affairs or transaction falls within the statutory description, construed in the light of its purpose." In some of the cases following *Ramsay*, reference was made to a series of transactions which are "pre-ordained": see e.g. *IRC v Burmah Oil Co [1982] STC 30*, 33 (Lord Diplock); *Furniss v Dawson* [1984] AC 474, 527 (Lord Brightman). As a matter of principle, however, it is not necessary in order to justify taking account of later events to show that they were bound to happen - only that they were planned to happen at the time when the first transaction in the sequence took place and that they did in fact happen: see *IRC v Scottish Provident Institution* [2004] 1 WLR 3172, para 23, where the House of Lords held that a risk that a scheme might not work as planned did not prevent it from being viewed as a whole, as it was intended to operate.
>
> 13 The decision of the House of Lords in *Barclays Mercantile Business Finance v Mawson* [2005] 1 AC 684 made it clear beyond dispute that the approach for which the *Ramsay* line of cases is authority is an application of general principles of statutory interpretation. Lord Nicholls of Birkenhead, delivering the joint opinion of the Appellate Committee (which also comprised Lord Steyn, Lord Hoffmann, Lord Hope of Craighead and Lord Walker of Gestingthorpe), identified the "essence" of the approach (at para 32) as being:

> "to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description."

Lord Nicholls also quoted with approval (at para 36) the statement of Ribeiro PJ in *Collector of Stamp Revenue v Arrowtown Assets* (2003) 6 ITLR 454, para 35, that:

> "… the driving principle in the *Ramsay* line of cases continues to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts. The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically."

(emphasis added)

214. Thus the 'Ramsay principle' is an early example and illustration of the purposive approach to interpreting statutes. Despite its individual context, the principle holds no special significance in the context of tax as *Rossendale* (at [9] and [12]) makes clear.

215. What it tells us is when applying statutory provisions to facts, a court should adopt a "real world" approach (see Lord Wilberforce in *Ramsay* (at [326])) and, where a series of individual steps are planned as a composite whole, the statute ought to be applied to that composite whole (see *UBS AG v HMRC* [2016] UKSC 13, [2016] 1 WLR 1005 at [62]).

216. However, in this case we agree with Ms Brown that whether the 'Ramsay principle' is applied (assuming at this stage a planned series of steps) or section 416 ITA is purposively construed condition by condition, the same answer will be reached.

217. Ms Brown placed reliance upon the decision of the Upper Tribunal (Marcus Smith J and Judge Herrington) in *Christianuyi Limited & Ors v HMRC* [2018] STC 1863 (on an aspect not considered by the Court of Appeal in the same case) in relation to statutory construction. In making the point that where the words of a statute are sufficiently clear to divine their purpose then recourse to extraneous material is improper, we agree.

218. Beyond that, however, caution should be taken. Having considered that case (and [25]) in particular), the Upper Tribunal's view (at [25 (2)] was:

> "When seeking to construe an Act of Parliament, the courts in practice take both a literal and purposive approach, to the extent that such a distinction is a helpful one."

219. That part of the approach cannot stand in the face of the authorities we have set out above.

220. Here, in consideration of the purposive approach what is important is to identify the purpose of the gift aid provisions to ensure the correct interpretation of the words used.

221. Ms Hughes submitted the purpose was to ensure that tax relief is made available on monetary gifts made to charities made without qualification. Ms Brown put it slightly, but importantly, differently. Ms Brown's submission was that the phrase "qualifying donations" in section 416 ITA indicated the intention: namely that only genuine charitable donations would qualify for relief, which would not be withheld because of the circumstances of the gift, save in narrow circumstances.

222. In our judgment, in considering sections 413 ITA onward, Ms Hughes is essentially correct in submitting that tax relief is made available on monetary gifts made to charities made

without qualification. It is the lack of qualification that makes a charitable gift 'genuine' and conditions A to F are, overall, deliberately broad and widely framed.

223. Each of the conditions in A to F carefully strips away the possibility that the gift may have arisen in circumstances where some ulterior use or purpose beyond a charitable donation exists. Parliament has legislated for tax relief upon charitable gifts to encourage them. But it did so in a way to ensure that there would be no relief where there was some inappropriate advantage, conditionality or qualification beyond the giving of the gift itself.

224. That is the reason why section 416 requires a gift to be a "qualifying donation". If any of the conditions in A to F within section 416 are not met, then the gift will be disqualified, and no tax relief will be available. The conditions in A to F are understandable, capable of straightforward application and require no gloss to be added. Further, no extraneous material is required to be considered as an aid to interpretation.

225. To give effect to the purpose we have identified, the approach to section 416 requires a broad interpretation of undefined terms.

(iii) The relevant conditions in section 416 ITA

226. Here the relevant conditions are B, E and F (see [202] above). In our judgment the approach to each is as follows.

Condition B

227. Condition B requires there be no "condition as to repayment." This is an ordinary English expression to be construed broadly. The context is that it means repayment to the person making the payment. Contrary to Ms Hughes' submission it does not stretch to onward payment to a different person. Had the section meant that it would have been very easy to say so. This condition exists to ensure that a person does not make a gift, claim tax relief and get the money back.

Condition E

228. Condition E requires that "the payment is not conditional on, associated with or part of an arrangement involving, the acquisition of property by the charity from the individual or a person connected with the individual".

229. There are six different ways a gift may fall foul of condition E. The payment to the charity must not:

(1) Be conditional upon the acquisition of property by the charity from the individual making the payment to it or

(2) Be conditional upon the acquisition of property by the charity from a person connected with the individual making the payment or

(3) Be associated with the acquisition of property by the charity from the individual making the payment to it or

(4) Be associated with the acquisition of property by the charity from a person connected with the individual making the payment to it or

(5) Be part of an arrangement involving the acquisition of property by the charity from the individual making the payment to it or

(6) Be part of an arrangement involving the acquisition of property by the charity from a person connected with the individual making the payment to it.

230. In terms of the words used, 'conditional', 'acquisition' and 'associated with' are ordinary English words or expressions to be construed broadly. 'Arrangement' has been the subject of consideration at the highest level. In *Jones v Garnett* [2007] 1 WLR 2030 Lord Walker of Gestingthorpe (with whom Lord Hope of Craighead and Lord Neuberger of Abbotsbury agreed) said:

> "50 The court has been reluctant to try to lay down any precise test for identifying the components of an arrangement or for assessing the "sufficient unity" to which Donovan LJ referred. Sometimes it has been content to conclude that wherever the boundary line is to be drawn, the taxpayer and his advisers have got themselves into forbidden territory: see for instance Sir Wilfrid Greene MR in *Inland Revenue Comrs v Payne*, at p 626, already quoted; Lord Wilberforce in *Chinn v Hochstrasser* [1981]AC 533, 549, and Lord Diplock, dissenting, in *Inland Revenue Comrs v Plummer* [1980] AC 896, 924. In my opinion the court's caution has been well advised. "Arrangement" is a wide, imprecise word. It can (like "settlement" or "partnership", or indeed "marriage") refer either to actions which establish some sort of legal structure (in this case, a corporate structure through which the taxpayer's income could be channelled) or those actions together with the whole sequence of what occurs through, or under, that legal structure, in accordance with a plan which existed when the structure was established. The planned result may be far from certain of attainment. It may be subject to all sorts of commercial contingencies over which the taxpayer has little or no control. But if the plan is successful and income flows through the structure which he has set up, it is "income arising under the settlement".
>
> (emphasis added)

231. In our judgment, applying the purposive approach we have identified, 'arrangement' in condition E is to be given a broad meaning including, for these purposes, a deliberate set of acts.

232. 'Property' is not defined in the ITA. In our judgment, it is to be given a broad meaning and includes all property including money, real or personal property, things in action and other intangible property.

233. A "connected person" may be natural or corporate. That is a term of art thar requires section 993 ITA and section 450 CTA to be considered. A company will be connected with the individual if the individual has control of the company. An individual will have control of the company if, inter alia, they exercise direct or indirect control over the company.

Condition F

234. Condition F requires "there are no benefits associated" [with the gift]. That is a term of art that also requires section 993 ITA and section 450 CTA to be considered.

235. Applying those sections in this case (although there are other situations precluded) mean, in order not to fall foul of condition F, there must be no benefit being received by the individual making the gift or a person (natural or corporate) connected with that individual, in consequence of the making of the gift. Again, a company will be connected with the individual if the individual has control of the company. An individual will have control of the company if, inter alia, they exercise direct or indirect control over the company.

236. "Benefit" is not further defined but is an ordinary English expression to be construed broadly.

(2) Discovery Assessments

237. Again, the starting point is the terms of the relevant statute(s).

(i) Section 9 of the Commissioners of Revenue and Customs Act 2005 and section 29 of the Taxes Management Act 1970

238. Where a taxpayer has made a self-assessment return, HMRC may not make a discovery of loss of tax under section 29 TMA after 12 months of the filing of the return or the date of the issuance of a final closure notice (see: section 8, 8A and 9A) unless an extended time limit applies.

239. Whether an extended time limit applies is assessed by applying section 29 (3) and, in the case of the self-assessment for the tax year ending 5 April 2016 sub-section (5) (a) and, in the case of the self-assessment for the tax year ending 5 April 2017, sub-section (5) (b). Subsection (5) is to be read subject to subsection (6).

240. No issue is taken that, if the discovery assessments are validly raised, they have been made within the relevant extended time limit of four years (section 34 TMA). No allegation of carelessness or deliberate behaviour on Mr Harvey's part has been made.

(i) (a) section 9 of the Commissioners of Revenue and Customs Act 2005

241. Prior to any formal enquiry, there is nothing to prevent an 'informal enquiry'. That is based upon section 9 of the Commissioners of Revenue and Customs Act 2005 ('CRCA'). That states:

> "(1) The Commissioners may do anything which they think—
>
> (a) necessary or expedient in connection with the exercise of their functions, or
>
> (b) incidental or conducive to the exercise of their functions."

(i) (b) section 29 of the Taxes Management 1970

242. Ms Brown submits that the discovery that HMRC must prove is the actual loss of tax by way of relief that HMRC seek to uphold in this appeal *and* the statutory pathway relied upon. In this case that is the relief claimed by the Appellants under section 414 ITA now charged to their tax by the discovery assessments because Mr Harvey's gifts are not qualifying donations under section 416 ITA. What HMRC cannot do is change the basis of the assessment from the discovery that underlies it which is what has happened as the discovery was based upon the "tainted donations" provisions (see [207] above).

243. Further, Ms Brown submits, in considering the objective test, the existence of, and information supplied in, an informal enquiry is something the Tribunal should consider.

244. Further, and alternatively, Ms Brown submits in relation to both discovery assessments they should be held to be invalid in that a hypothetical officer would have reasonably been able to be aware of the loss of tax on or before the 12 July 2017 and 26 March 2019 respectively.

245. Ms Hughes submits that all that is required is a discovery of a loss of tax provided the discovery meets the statutory tests as interpreted by the courts. If the assessment is based upon that discovery, it will be valid. What is required is that the conclusion of the discovery assessment – that there was a discovery of a loss of tax (in this case because of a relief that was claimed that should not have been) – can be proven. The exact reasoning – by any individual statutory pathway – does not require to be proven but, in any event in this case, it can be.

246. Ms Hughes agrees that the existence of, and information supplied in, an informal enquiry is something the Tribunal should consider.

247. Ms Hughes submits that for both discovery assessments the statutory criteria in section 29 TMA are fulfilled and, given the submission made by Ms Brown, that a hypothetical officer

would not have reasonably been able to be aware of the loss of tax before the 12 July 2017 and 26 March 2019 respectively

248. The version of section 29 in force at relevant date (that is 30 March 2020 when the discovery assessments were made) is as follows and is set out in full:

"29 Assessment where loss of tax discovered.

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment—

(a) that any income which ought to have been assessed to income tax, or chargeable gains which ought to have been assessed to capital gains tax, have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) Where—

(a) the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, and

(b) the situation mentioned in subsection (1) above is attributable to an error or mistake in the return as to the basis on which his liability ought to have been computed,

The taxpayer shall not be assessed under that subsection in respect of the year of assessment there mentioned if the return was in fact made on the basis or in accordance with the practice generally prevailing at the time when it was made.

(3) Where the taxpayer has made and delivered a return under section 8 or 8A of this Act in respect of the relevant year of assessment, he shall not be assessed under subsection (1) above—

(a) in respect of the year of assessment mentioned in that subsection; and

(b) ... in the same capacity as that in which he made and delivered the return,

unless one of the two conditions mentioned below is fulfilled.

(4) The first condition is that the situation mentioned in subsection (1) above was brought about carelessly or deliberately by the taxpayer or a person acting on his behalf.

(5) The second condition is that at the time when an officer of the Board—

(a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or

(b) in a case where a notice of enquiry into the return was given—

(i) issued a partial closure notice as regards a matter to which the situation mentioned in subsection (1) above relates, or

(ii) if no such partial closure notice was issued, issued a final closure notice,

the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above.

(6) For the purposes of subsection (5) above, information is made available to an officer of the Board if—

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

(b) it is contained in any claim made as regards the relevant year of assessment by the taxpayer acting in the same capacity as that in which he made the return, or in any accounts, statements or documents accompanying any such claim;

(c) it is contained in any documents, accounts or particulars which, for the purposes of any enquiries into the return or any such claim by an officer of the Board, are produced or furnished by the taxpayer to the officer ... ; or

(d) it is information the existence of which, and the relevance of which as regards the situation mentioned in subsection (1) above—

(i) could reasonably be expected to be inferred by an officer of the Board from information falling within paragraphs (a) to (c) above; or

(ii) are notified in writing by the taxpayer to an officer of the Board.

(7) In subsection (6) above—

(a) any reference to the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment includes—

(i) a reference to any return of his under that section for either of the two immediately preceding chargeable periods; …

(ia) . . . . . .

(ii) where the return is under section 8 and the taxpayer carries on a trade, profession or business in partnership, a reference to any partnership return with respect to the partnership for the relevant year of assessment or either of those periods; and

(b) any reference in paragraphs (b) to (d) to the taxpayer includes a reference to a person acting on his behalf.

(7A) The requirement to fulfil one of the two conditions mentioned above does not apply so far as regards any income or chargeable gains of the taxpayer in relation to which the taxpayer has been given, after any enquiries have been completed into the taxpayer's return, a notice under section 81(2) of

TIOPA 2010 (notice to counteract scheme or arrangement designed to increase double taxation relief).

(8) An objection to the making of an assessment under this section on the ground that neither of the two conditions mentioned above is fulfilled shall not be made otherwise than on an appeal against the assessment.

(9) Any reference in this section to the relevant year of assessment is a reference to—

(a) in the case of the situation mentioned in paragraph (a) or (b) of subsection (1) above, the year of assessment mentioned in that subsection; and

(b) in the case of the situation mentioned in paragraph (c) of that subsection, the year of assessment in respect of which the claim was made."

(emphasis added)

(ii) The Authorities

249. In *R (on the application of JJ Management Consulting LLP and others) v Revenue and Customs Commissioners* [2020] STC 1422 ('JJ') (at [46] – [55]) the Court of Appeal held that informal enquiries were perfectly permissible. Indeed, it is thetical to good administration to deal with matters informally if possible (at [55]). As with formal enquiries under section 9A TMA, an informal enquiry must be undertaken for a proper purpose (that is without malice or as a capricious exercise (at [52])).

250. Ms Brown submitted that the facts of *JJ* and the facts of this case as they were different meant that HMRC in this case did not have the power to conduct an informal enquiry. Ms Brown said that in *JJ* HMRC were 'testing the water', but here the informal enquiry needs to be set against the entire history of repeated enquiry against a compliant taxpayer.

251. In *Revenue and Customs Commrs v Tooth* [2021] 1 WLR 2811 ('Tooth') Lords Briggs and Sales JJSC (with whom the rest of the court agreed) examined, amongst other issues, section 29 TMA. Although strictly speaking *obiter* there is no reason whatsoever to do anything other than follow the Supreme Court's decision.

252. Viewing section 29 overall they said:

"**83** There are a number of protections for the taxpayer in relation to exposure to a discovery assessment. As explained above, the new version of section 29 of the TMA which came into effect in 1996 contained important new conditions in relation to the previously much wider power to issue a discovery assessment. The taxpayer also has the protection of the statutory time limits, which as we have explained are linked to different levels of culpability on their part. It is typically only in relation to what amounts to fraud or is akin to fraud that the time limit becomes as long as 20 years. These are matters which fall within the scope of an appeal to the FtT against an assessment: sections 29(8), 31(1)(d) and 50(6) of the TMA."

253. In terms of the operation of section 29 they said:

"**72** This view of the operation of section 29(1) is supported by other authority as well. In *Sanderson v Revenue and Customs Comrs* [2016] 4 WLR 67, para 25, Patten LJ explained that:

"The exercise of the section 29(1) power is made by a real officer who is required to come to a conclusion about a possible insufficiency based on all the available information at the time when the discovery assessment is made."

From this and other authorities the UT (Morgan J and Upper Tribunal Judge Berner) in *Anderson v Revenue and Customs Comrs* [2018] 4 WLR 90 derived a series of propositions (para 24), including that in section 29(1) the concept of an actual officer discovering something involves an actual officer having a particular state of mind in relation to the relevant matter, which requires the application of a subjective test (explained further at paras 25—28). There is also an objective test, in that mere suspicion of an under-assessment of tax is not sufficient and the belief which the officer forms regarding the under-assessment has to be one which a reasonable officer could form (paras 24 and 29—30). The UT in *Anderson* rightly acknowledged that section 29(1) set out public law powers and its interpretation was informed by principles of public law.

73 On the question of what qualifies as a discovery for the purposes of what is now section 29(1) of the TMA, *Cenlon Finance Co Ltd v Ellwood* [1962] AC 782 is the leading authority. …Viscount Simonds (p 794), with the agreement of the other members of the appellate committee, approved the judgment of Lord Normand in the decision of the Court of Session in *Inland Revenue Comrs v Mackinlay's Trustees* 1938 SC 765 and added:

"I can see no reason for saying that a discovery of undercharge can only arise where a new fact has been discovered. The words are apt to include any case in which for any reason it newly appears that the taxpayer has been undercharged and the context supports rather than detracts from this interpretation."

Lord Denning observed (p 799): "Every lawyer who, in his researches in the books, finds out that he was mistaken about the law, makes a discovery. So also does an inspector of taxes."

254. In part of a paragraph in *HMRC v Charlton* [2012] UKUT 770 ('Charlton'), which survives the decision of the Supreme Court in *Tooth* (at [64] – [65]), the Upper Tribunal outlined that for an officer to make a discovery [at 37]:

"All that is required is that it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

255. The series of propositions referred to in *Tooth* are found at [24] in *Anderson v Revenue and Customs Comrs* [2018] 4 WLR 90 ('Anderson'). The Upper Tribunal said:

"… We consider that the following propositions are now established by the various authorities:

(1) section 29(1) refers to an officer (or the Board) discovering an insufficiency of tax;

(2) the concept of an officer discovering something involves, in the first place, an actual officer having a particular state of mind in relation to the relevant matter; this involves the application of a subjective test;

(3) the concept of an officer discovering something involves, in the second place, the officer's state of mind satisfying some objective criterion; this involves the application of an objective test;

(4) if the officer's state of mind does not satisfy the relevant subjective test and the relevant objective test, then the officer's state of mind is insufficient for there to be a discovery for the purposes of subsection (1);

(5) section 29(1) also refers to the opinion of the officer as to what ought to be charged to make good the loss of tax; accordingly, the officer has to form a relevant opinion and such an opinion has to satisfy some objective criterion;

(6) although section 29(1) directs attention to the position of the actual officer, section 29(5) refers to the position of a hypothetical officer: *Sanderson v Revenue and Customs Commissioners* [2016] 4 WLR 67, para 25;

(7) although there might be some points of contact between the real and the hypothetical exercises required by subsection (1) and subsection (5) respectively, the tests for the two exercises are different: *Sanderson*, at para 25;

(8) the actual officer referred to in section 29(1) is not required to consider whether the test required for section 29(5) is satisfied: *Hankinson v Revenue and Customs Comrs*;

(9) for the purposes of section 29(5), one question is what a hypothetical officer would have been "aware of";

(10) for the purpose of section 29(5), the meaning of "awareness" does not require the hypothetical officer to resolve points of law nor to forecast and discount what the response of the taxpayer might be; it is enough that the information made available to the hypothetical officer would justify an amendment to the tax return: *Revenue and Customs Comrs v Lansdowne Partners LP*, at para 56; "awareness" is a matter of perception and understanding, not of conclusion; in order to be "aware" of something, it is not necessary to form a conclusion that the thing is more probable than not: *Lansdowne Partners*, at para 70; and

(11) the purpose of section 29(5) is to provide for a cut-off point beyond which an actual officer is not able to raise a discovery assessment; an actual officer is not entitled to raise a discovery assessment under subsection (1) if a hypothetical officer could have been reasonably expected at an earlier defined point in time, on the basis of the information made available to him before that time, to be aware of the manner which the actual officer claims to have discovered under subsection (1); this cut-off point is not reached if before the defined point in time a hypothetical officer would only have had "a mere whim" that there was an insufficiency of tax or could only have "speculated" as to that possibility: the UT in *Sanderson* [2014] STC 915, para 50, upheld on appeal, [2016] 4 WLR 67, para 35."

256. In terms of the subjective test, in *Clark v The Commissioners for Her Majesty's Revenue and Customs* [2020] EWCA Civ 204 ('Clark') Henderson LJ (with whom Nicola Davies and Bean LJJ agreed) said in the Court of Appeal:

"106. In the first place, I agree with Mr Jones that the scope of the assessment, and of any appeal from it, must be defined by the subjective discovery that the assessing officer has made. That is the only assessment which the officer has jurisdiction to make, and the scope of the assessment, as opposed to the arguments which may be used to support it, cannot in my view be extended by virtue of the appeal process. The correct approach was in my judgment that stated by Kitchin LJ (as he then was) in the *Fidex* case at [45], in the context of an appeal from a closure notice:

> "In my judgment the principles to be applied are those set out by Henderson J [in the *Tower MCashback* case, at first instance] as approved by and elaborated

upon by the Supreme Court. So far as material to this appeal, they may be summarised in the following propositions:

> (i) The scope and subject matter of an appeal are defined by the conclusions stated in the closure notice and by the amendments required to give effect to those conclusions.
>
> (ii) What matters are the conclusions set out in the closure notice, not the process of reasoning by which HMRC reached those conclusions.
>
> (iii) The closure notice must be read in context in order properly to understand its meaning.
>
> (iv) Subject always to the requirements of fairness and proper case management, HMRC can advance new arguments before the FTT to support the conclusions set out in the closure notice."

(emphasis added)

257. As to the objective test, our attention was drawn to [28] and [29] of *Anderson* as referenced in *Tooth*. There it was said:

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

258. Finally, insofar as the information available to the hypothetical officer by reference to section 29 (5) and (6) TMA we are further assisted by *Charlton*. Again, in passages undisturbed by the Supreme Court in *Tooth*, the Upper Tribunal said (at [66]) having dealt the nature and characteristics of the hypothetical officer:

> "This conclusion does not have the consequence that the hypothetical officer must be regarded as the embodiment of HMRC as a whole. He cannot in this way be treated as possessing information relevant to his awareness that is held elsewhere within HMRC or is known to any particular officer, including the officer dealing with the case. That is clear from *Langham v Veltema* [[2004] STC 544], and from the exhaustive nature of the information that can be considered to be made available to the hypothetical officer in accordance with section 29 (6). Our conclusion relates only to the knowledge and skill to be attributed to the hypothetical officer in each case. In particular, we do not accept Mr Gordon's argument that the reference to "an officer" in section 29 (5) should be construed as a reference to HMRC as a whole."

259. The Upper Tribunal also considered the width of section 29 (6) (d) (i) and said (at [70]) having set out the relevant part of the statute:

> "From this we can immediately conclude that the test is again an objective test, looking at what the hypothetical officer could reasonably infer from the taxpayer's return or any claim, and accompanying documents, or documents, accounts or particulars produced or furnished by the taxpayer or his agent for the purpose of HMRC enquiries. The information is only treated as made available for s 29 (5) purposes if both its existence and relevance could be reasonably inferred."
>
> (emphasis added)

260. They also cited (at [71]) in support of that, paragraph 51 of *Langham v Veltema* to similar effect in particular noting that the information in section 29 (6) (a)-(c) are all categories of information actually supplied by the taxpayer.

261. What matters, for information to be 'available' to the hypothetical officer is that it comes from the taxpayer into whom HMRC may be enquiring (either formally or informally).

262. On this basis, we are compelled to the conclusion that information more widely held by HMRC – even if connected on the facts – for example provided by a charity claiming gift aid relief based upon the donations by a person within the cut off period – is not 'available' to the hypothetical officer.

iii) Drawing the threads together

263. Section 9 of the Commissioners of Revenue and Customs Act 2005 as interpreted in *JJ* provides HMRC with wider powers to ensure that a taxpayer is paying the correct amount to the Crown. Nothing in *JJ* leads us to the conclusion that because of the facts in that case being different to this the principles set out do not apply. In our judgment they do and were intended to do so.

264. It would be a peculiar situation if the power to begin an informal enquiry depended upon the overall outcome in relation to chargeability to tax which was the effect, as we understood it, of Ms Brown's submission here. In other words, if the informal enquiry had found that the taxpayer did not have a chargeability to tax HMRC's decision to undertake it was lawful but if subsequent formal enquiries showed the contrary the informal enquiry would be rendered unlawful.

265. If it could be shown that the use of the informal enquiry was capricious or with malice (see *JJ* at [52]) that would be a different matter but does not arise on the facts of this case. But simply because there is an informal enquiry followed by the use of formal powers which led to a chargeability to tax being imposed, without more, is not enough to render an informal enquiry unlawful.

266. Thereafter, despite the litigation that section 29 TMA has given rise to, in the end the position is in our judgement straightforward.

267. The terms of section 29 TMA and the decisions in *Tooth*, *Anderson* and *Clark* that we have set out above do not support Ms Brown's submission that the discovery that HMRC must prove is the actual loss of tax by way of relief that HMRC seek to uphold in this appeal *and* the statutory pathway relied upon. That is simply not what the statutory language requires.

268. First, what is required is the subjective and objective tests are proven by HMRC in line with the *Anderson* criteria to show Officer Kempall's discovery that the relief claimed was excessive was, first, honestly and reasonably held. That will determine whether:

> " … it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment. That can be for any reason, including a change of view, change of opinion, or correction of an oversight."

269. The discovery may, depending upon the facts in any given discovery, identify at that stage the tax loss (in this case due to excessive relief) by reference to an individual statutory provision as to *why* the relief given was excessive. But it may not, and it is not required as a matter of law.

270. Secondly, that the hypothetical officer at the relevant time could not have been reasonably expected on the basis of the information made available to them, to be aware of the loss of tax (here by way of excessive relief) in line with section 29 (5) and (6). In particular, we note the limitations imposed by section 29 (6) with regard to what is exhaustively listed as being capable of being 'available' to the hypothetical officer. That does not include information provided outwith that sub-section, however closely related to the facts of any enquiry it may be.

271. As we have said we do accept Ms Brown's submission that the existence of, and information provided in, any informal enquiry prior to the discovery process is something we can consider in considering whether the objective test is met as being 'available'.

272. If HMRC fail to prove a discovery assessment was valid then, as Ms Hughes accepted, that would be the end of the HMRC's defence on one or both tax years.

DISCUSSION AND ANALYSIS

273. As we have said, as the issue of whether the principal donations are "qualifying donations" is common to both appeals we shall consider this first. If they were then that would dispose of the appeals without the need to consider whether the discovery assessments in Mr Harvey's case only were valid.

274. Our ratiocination is as follows.

(i) Have the Appellants shown that the principal donations made by Mr Harvey were "qualifying donations"?

275. For a gift to be a "qualifying donation" it must meet six conjunctive criteria (conditions A – F). A failure to meet any single criterion will disqualify the gift.

276. Before turning to the three conditions that are in issue, we must reflect upon a submission made by Ms Hughes in closing for the first time. With the appropriate diffidence and tentativeness directed toward a late point being taken after the evidence has concluded, Ms Hughes submitted that the Tribunal might like to consider whether the payments made by Mr Harvey were gifts at all. If they were not then whether the donation was a "qualifying donation" would not arise, and no relief would be available to either Appellant.

277. Ms Brown objected to the injection of a late point such as this being taken in closing submissions for the first time.

278. There is no definition of "gift" in the legislation, but in our judgment the ITA seems to contemplate a difference between a gift and a "qualifying donation". Deciding whether that is so and, if so, what this difference is, may be an issue of some complexity.

279. As it has not been the subject of evidence or sufficient argument for us to consider this we prefer to leave it to a case where the issue properly arises. We therefore agree with Ms Brown that it is too late for HMRC to take this point. We will proceed on the basis that Mr Harvey's payments to the charity were gifts.

280. We reiterate two other conclusions, neither of which was in dispute. First, Mr Harvey controlled the company within the meaning of section 450 ITA (see [205] above). Secondly, and as a result, Mr Harvey and the company are connected persons for the purposes of section 993 (see [204] above).

Condition E

281. We start with Condition E. We remind ourselves of our analysis of the law at [228] – [233] above. In our judgment condition E is not met as three of the six routes to non-compliance are not met (only one of which need not be met).

282. The facts are, as both Mr Harvey and Ms Reid agreed, that the principal donations were made to the charity on the basis that the charity would loan the company the money on terms for repayment and be repaid interest. As Mr Harvey said, it killed two birds with one stone. The company received loans, and the charity received income from loan interest. Ms Brown's impressive attempts to disassociate Mr Harvey's answers (see [62] above) by emphasising the word "effectively" in Ms Hughes' question about the conditional nature of the principal donations fails. It simply places more weight on that word than it can bear in the context of the questions and answers we have set out. Mr Harvey said the conditionality was "implicit, if not actual". Contrary to Ms Brown submissions, Mr Harvey was not saying it was "effectively implicit" – but not actual. He was saying it was at least implicit if not actually explicit. Ms Reid knew. The conditional nature of the principal donations as being for the loans which were to be repaid to the charity by the company was explicit.

283. And the conditionality of the principal payments for the loan repayments and the interest was for, in our judgment, the acquisition of property. Whether the crane itself became property owned by the charity is something of a red herring.

284. We do not accept Ms Brown's submission that somehow the property needed to pre-exist before it could fall foul of Condition E, as opposed to being created. Nothing in the statute supports that proposition. Indeed, it would do violence to the purpose behind the legislation that we have identified were the condition so easily circumvented. The obligation to repay the loan with interest is property. That the loans were commercial and there was effective security from Mr Harvey does not change this. That this obligation only came into being after the principal donations were relevantly made does not make the acquisition of property any less a condition of the principal donations.

285. Mr Harvey (and Ms Reid) both accepted in their own words that the principal donations would not have been made without the charity making the loans to the company to be repaid with interest. As a result, the payments to the charity by Mr Harvey were conditional on the acquisition of property by the charity from a person connected with Mr Harvey, namely the company in the form of the repayment of the loans with interest.

286. If more were needed, there was an arrangement for Mr Harvey to receive money by way of repayments to his DLA. Then the money was to be given to the charity before being loaned to the company and repaid to the charity with interest. That is in large part what occurred (although there was the error payment (see [78] above) and the first £100,000 of the third loan was transferred by the charity to the company before Mr Harvey paid the charity. However, given the width to be given to the word arrangement, this series of pre-planned steps falls within it.

287. The principal donations by Mr Harvey were a part of (or at the very least associated with) that arrangement involving the acquisition of property by the charity from a person connected with Mr Harvey, namely the company.

288. In our judgment, the Appellants have not shown that which they need to in relation to Condition E.

289. That is sufficient to dispose of the charity's appeal (save for the variation on the concession of HMRC sought). It also means we need to consider the issue of whether the discovery assessments were valid in Mr Harvey's case.

290. Before we turn to discovery assessments, although strictly speaking unnecessary to our decision, we consider Conditions F and B out of deference to the evidence and submissions placed before us. We do so, however, in less detail than we otherwise would.

Condition F

291. We remind ourselves of the analysis of the law at [234] – [236] above. It is not suggested that we need to concern ourselves with whether restrictions on benefits have not been breached. The issue is whether there are any benefits associated with the gifts or not.

292. We have set out, under Condition E above, our conclusions as to the arrangement or pre-planned steps that existed in this case. Again, it is accepted, for the purposes of section 417 ITA, which informs Condition F, that the company is a person connected with Mr Harvey.

293. As a result, there are benefits associated with the gifts. The loans to the company are benefits to the company and they were a consequence of Mr Harvey making the gifts, whether commercial or not. As a result, the associated company and Tibbett were able to purchase the crane. We do not accept the submission that the commerciality of the loans, or that equivalent loans could have been obtained from banks (assuming that to be true) makes any difference. Equally the fact that the loans were repaid early does not assist the Appellants. It would be to unduly narrow the meaning of 'benefits' were it to be read to such qualifications in the context of the broad meaning that word has extinguishing it to the point of having no meaning.

294. In our judgment, the Appellants have not shown that which they need to in relation to Condition F.

Condition B

295. We remind ourselves of the analysis of the law at [227] above.

296. Ms Hughes submitted in writing that the payments to the company that followed the principal donations are 'repayments' that mean condition B is not met. Alternatively, she submitted to us orally that in this case the repayments were the payments from the company to Mr Harvey the majority of which came before the principal donations to the charity.

297. We do not accept that 'repayment' can be read as 'onward payment' to a different person, even if connected. As we have set out (see [202] above) the condition simply does not say that. Had it meant that it could have easily said so. Whilst we give the expressions that are undefined a broad and purposive construction Ms Hughes' primary submission does violence to Condition B even with that approach.

298. However, we do accept that a broad purposive construction could admit of a temporal order of events where the principal donations are subject to a condition of repayment where the repayment came first. The concept of repayment is sufficiently broad to permit that reading and the purpose of the statute we have identified supports this. Anything else would enable Condition B to be easily circumvented and relief to be obtained when it should not be.

299. However, in this case we accept that Condition B is met on the facts. We do not find that there was any condition as to repayment and there was no such repayment. Here the company paid down Mr Harvey's DLA. As Mr Harvey told us, and we accept, that timing was propitious, and it enable a series of pre-planned steps that has caused the Appellants to fail to meet

Conditions E and F. The plan certainly included the charity providing loans to the company, and Mr Harvey providing the principal donations to the charity for that purpose, not it was not a condition of those payments that the company (re) paid Mr Harvey. Had there not been repayments of the DLA (as opposed to the principal donations) Mr Harvey still would have made them.

300. We are fortified in that conclusion in that the payments are not circular from whence they begin. In largest part they go from the company to Mr Harvey, to the charity and then to the company. However instead of Mr Harvey being repaid, the repayment of the loans (with interest) reposes with the charity.

301. In our judgment, the Appellants have shown that which they need to in relation to Condition B.

(ii) Have HMRC shown the discovery assessments in relation to Mr Harvey were valid?

302. There are two primary aspects to the arguments raised. We have sought to distil the arguments without disrespect to the detail of that which we received in writing and orally, all of which we have considered.

303. Principally, it was submitted by Ms Brown that HMRC have failed to prove valid discovery assessments as Officer Kempall had not subjectively discovered the relevant loss to tax of due to the lack of "qualifying donation". What he purported to discover was a loss of tax due to a "tainted donation". Reliance now upon "qualifying donations" was a shift in the grounds of the discovery assessments that rendered them invalid as the 'discovery' had changed. Further it was not 'reasonable' by the application of public law concepts (see *Anderson* at [30]) for Officer Kempall to have made the discovery he did as the 'third bite' of the cherry.

304. HMRC submit that Officer Kempall's discovery was where, in the words of *Charlton,* "… it has newly appeared to an officer, acting honestly and reasonably, that there is an insufficiency in an assessment … for any reason, including a change of view, change of opinion, or correction of an oversight." HMRC were not required to prove the discovery was based upon what was ultimately found to be the 'correct' reason why the tax relief claimed was excessive. Therefore, there was no shift in the grounds of the discovery as the discovery itself had not changed. No question of 'bites' arises, provided the criteria are met.

305. Secondarily, it was submitted by Ms Brown HMRC have failed to prove validity as the information available to the hypothetical officer meant that it ought to have been made during the time limit imposed by the TMA namely by (a) 12 July 2017 for the self-assessment for the tax year ending 5 April 2016 (that is 12 months after the return was delivered to HMRC and (b) 26 March 2019 for the tax year ending 5 April 2017 (that is the date of the final closure notice issued).

306. HMRC submit that the information available at the relevant times did not allow the hypothetical officer to have been aware of the insufficiency to tax.

307. We remind ourselves of our analysis of the law at [263] – [272] above.

Officer Kempall's discovery

308. In our judgment Officer Kempally made a valid discovery. He was of the honest and reasonable view that there was a loss to tax based upon excessive relief relating to gift aid being claimed (see [154] above).

309. As the Court of Appeal said in *Clark* (see [256] above):

> "…the scope of the assessment, and of any appeal from it, must be defined by the subjective discovery that the assessing officer has made. That is the only assessment which the officer has jurisdiction to make, and the scope of the assessment, as opposed to the arguments which may be used to support it, cannot in my view be extended by virtue of the appeal process."

310. The scope of the assessment was the subjective discovery that Officer Kempall made that there was a loss to tax by way of a claim for excessive relief. That has not changed in this appeal. What did change between the discovery assessment was the arguments used to support that. Officer Kempall had originally concluded that the excessive relief was based upon "tainted donations". However, as further information became available, he concluded that the excessive relief (rightly as things have turned out) was due to the principal donations not being "qualifying donations".

311. He at no stage ruled out that the principal donations were not "qualifying donations" but did not positively conclude that at the time of the discovery assessments.

312. As we have said, the statute and the application of *Tooth*, *Anderson* and *Clark* does not require the discovery to identify the exact statutory pathway for the loss to tax, as opposed to the discovery of such a loss.

Information available to the hypothetical officer

313. In our judgment, for both of the discovery assessments issued, a hypothetical officer at both relevant 'cut off' dates would not have been able to infer a loss of tax by way of excessive relief for the purposes of section 29 (1) TMA.

314. The 'cut off' dates are different for the two self-assessments. It is 12 July 2017 for the self-assessment for the tax year ending 5 April 2016 (that is 12 months after the return was delivered to HMRC and there was no formal enquiry) and 26 March 2019 for the tax year ending 5 April 2017 (that is the date of the final closure notice).

315. Dealing with the information available to the hypothetical officer on or before 12 July 2017 it was sparse. Mr Harvey and his agents had provided (and so the hypothetical officer had 'available' to him (a) Mr Harvey's self-assessment for that tax year (see [68] above), (b) Mr Harvey's self-assessments for the previous two years (c) the information provided to the informal enquiry (see [86] above). That included a schedule of payments made by Mr Harvey to the charity and some details about the charity as well as the charity's repayment claim summary and gift aid schedule. After a request, Mr Harvey's agents presented the bank statements showing proof of payment but with the 'money in' column redacted (see [88] above). The payments from the company reducing Mr Harvey's DLA in the same sum as the principal donations to the charity in that tax year were not therefore apparent. After further dialogue the matter rested (see [91] above).

316. There was no reason to challenge at this stage Mr Harvey's return. From the limited information 'available' (from the list in section 29 (6) ITA which is exhaustive) in our judgment there is nothing that would cause the hypothetical officer of appropriate skill and competence to be expected to be able to infer a loss of tax by way of excessive relief.

317. Turning to the information available to the hypothetical officer on or before 26 March 2019 it is critical to distinguish between what the hypothetical officer is deemed to have available and what she is not by reference to section 29 (6) and *Charlton*.

318. Again, the information provided by Mr Harvey and his agents was sparse. Mr Harvey and his agents had provided (and so the hypothetical officer had 'available' to him (a) Mr Harvey's self-assessment for that tax year (see [94] above), (b) Mr Harvey's self-assessments

for the previous two years including the information provided to the informal enquiry for the tax year ending 5 April 2016 (c) the gift aid claims for year ending 5 April 2016 and 2017 and (d) information provided to HMRC on 29 August 2018 (see [101] above) simply setting out the amount of the 'gift aid donations'.

319. The opening of a formal enquiry which ended with the closure notice unsurprisingly at that stage, given the limited information actually available, did not amend Mr Harvey's return in the way now sought by the discovery assessment. In our judgement, again from the information 'available' there is nothing that would cause the hypothetical officer of appropriate skill and competence to be expected to be able to infer a loss of tax by way of excessive relief.

320. That conclusion is one that arises due to the limits of the information exhaustively set out as being capable of being to be 'available' by the narrowness of section 29 (6).

321. The 'sharing' of information between the teams does not matter for these purposes as this conflates the information that the officer making the discovery had with the information available to the hypothetical officer at the 'cut off' date. Officer Kempall only began his involvement in July 2019 which was after the 'cut off' date.

322. Were it the case that the hypothetical officer did have 'available' material supplied in the course of HMRC's enquiry into the charity then, given the content of the letter supplied by the charity's agents on 29 August 2018 (see [101] above) we would unhesitatingly have held that the objective test was not met in relation to Mr Harvey's self-assessment for the tax year ending 5 April 2017 and the discovery assessment therefore invalid. The information in that letter would have alerted the hypothetical officer to be able to reasonably infer a loss to tax.

323. However, that is not the law.

CONCLUSIONS

324. For those reasons the appeal of Mr Harvey against the discovery assessments is dismissed.

325. We vary the closure notices against the charity to £75,000 for each year under appeal on the concession of HMRC. Aside from those variations, the appeal of the charity is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

326. 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.

NATHANIEL RUDOLF KC
TRIBUNAL JUDGE

Release date: 06th DECEMBER 2024