Neutral Citation: [2024] UKFTT 1103 (TC)

Case Number: TC09377

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

Taylor House

Appeal reference: TC/2017/05756

*INCOME TAX AND NATIONAL INSURANCE CONTRIBUTIONS – arrangement involving a salary sacrifice in return for payments in respect of subsistence and travel expenses – whether the provision relating to the salary sacrifice was a valid contractual term despite the fact that some matters of detail were not spelled out – yes – whether the payments in question were "round sum allowances" by virtue of there being an insufficient causal link between the expenses in question and the making of the payments – yes, in relation to the payments in respect of subsistence and no, in relation to the payments in respect of travel – whether, based on the evidence, it was possible to conclude on the balance of probabilities that all or a specified percentage of the payments in any category related to mileage or expenses that had actually been incurred – no, there was insufficient evidence to reach that conclusion and, instead, the onus was on the Appellant to show in the case of any particular payment that the relevant payment met that description – whether the payments in respect of subsistence or public transport were covered by the dispensation given by the Respondents – no because they fell outside the terms of the dispensation– whether the Appellant was entitled to a direction under Regulation 72 of the PAYE Regulations that it was not liable to pay the income tax on the basis that it had exercised reasonable care to comply with the PAYE Regulations and its failure to account for income tax was due to an error made in good faith – no, because the Appellant had not exercised reasonable care – whether the first of the determinations to income tax under appeal had been made to best judgment – deferral of the final decision on this question until the stage of the proceedings at which quantum fell to be determined although view expressed to the effect that the determination in question was likely to be found to have been made to best judgment – appeal dismissed except to the extent that the Appellant was able to establish, by reference to the evidence applicable to a specific mileage payment, that the mileage payment in question related to mileage that was actually incurred.*

**Heard on:** 23, 24, 26, 27 and 30 September and 1, 2, 3, 4 and 7 October 2024
**Judgment date:** 6 December 2024

**Before**

**TRIBUNAL JUDGE TONY BEARE**
**MR JULIAN STAFFORD**

**Between**

**THE BEST CONNECTION GROUP LIMITED**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Akash Nawbatt KC and Mr Christopher Stone KC, of counsel, instructed by Peter Wilson Legal

For the Respondents: Mr Richard Vallat KC, Ms Barbara Belgrano and Mr Ben Blades, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

# DECISION



## INTRODUCTION

1. This decision arises out of the following appeals made by the Appellant ("TBC"):

   (1) an appeal under Regulation 80(5) of The Income Tax (Pay As You Earn) Regulations 2003 (the "PAYE Regulations") and Section 31 of the Taxes Management Act 1970 (the "TMA 1970") in relation to a determination made under Regulation 80 of the PAYE Regulations for the tax year ended 5 April 2013 in the amount of £3,353,520 (the "2013 Determination");

   (2) an appeal under Regulation 80(5) of the PAYE Regulations and Section 31 of the TMA 1970 in relation to determinations made under Regulation 80 of the PAYE Regulations for the tax years ended 5 April 2014, 5 April 2015 and 5 April 2016 in the amounts of £2,577,631.60, £2,484,856.60 and £808,261.80, respectively (together, the "2014–2016 Determinations" and, together with the 2013 Determination, the "Determinations");

   (3) an appeal under Section 11 of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 (the "ToFA") in relation to decisions made under Section 8 of the ToFA in respect of Mr Roger Hands and Mr Melvin Short for the tax year ended 5 April 2014 in the amount of £633.36 (together, the "NICs Decisions"); and

(4) an appeal under Regulation 72A(4) of the PAYE Regulations in relation to the Respondents' refusal to make a direction under Regulation 72(5) of the PAYE Regulations (a "Regulation 72 Direction") for the tax years ended 5 April 2013, 5 April 2014 and 5 April 2015 (the "Regulation 72 Appeal").

2. The appeals related to the income tax and national insurance contributions ("NICs") implications of payments made under two schemes which were implemented by TBC in respect of the travel and subsistence expenses of its temporary employees. The first scheme, which was known as BestPay Tax Relief (or the "BTR"), was made available to TBC's employees whose salaries did not generally exceed the national minimum wage (the "NMW") by the amount of £1, whilst the second scheme, which was known as BestPay Salary Sacrifice (or the "BSS") was made available to TBC's employees whose salaries generally did exceed the NMW by that specified amount. The latter category of employees comprised HGV drivers and skilled industrial workers.

3. To the extent that the appeals set out in paragraph 1 above related to the BTR, they were settled by the parties prior to the hearing to which this decision applies. Thus, this decision relates to those appeals only to the extent that they related to the BSS.

4. The dispute between the parties concerns the appropriate income tax and NICs treatment of three different categories of payment which were made by TBC to employees participating in the BSS (each a "participant" and, together, the "participants") over the 4 tax years ending 5 April 2013 to 5 April 2016 (both inclusive), namely:

(1) payments in respect of mileage undertaken by the participants in going to and from their temporary places of work by car, motorcycle or bicycle;

(2) payments in respect of expenses incurred by the participants in going to and from their temporary places of work by public transport; and

(3) payments in respect of expenses incurred by the participants on food and drink while they were away from home in the course of their employment.

5. TBC considered that it did not have to account for income tax or NICs on any of the above payments because, in the case of the payments in respect of mileage, the payments were exempt and because, in the case of the other two categories of payments, the payments fell within the terms of a dispensation that was given to TBC by the Respondents and which covered those payments. TBC believes that, in consequence of the above, and the fact that each participant gave up part of his or her salary in return for the relevant payment:

(1) the relevant participant was better off because:

(a) in contrast to the receipt of salary, no deduction of income tax or employee NICs was required in respect of the relevant payment; and

(b) there was no need for the relevant participant to claim a deduction for the expenses in question in his or her tax return; and

(2) TBC was better off because, in contrast to paying salary, it did not have to account for employer NICs in respect of the relevant payment.

6. The Respondents do not agree. For reasons which will become clear in due course, the Respondents say that TBC should have accounted for income tax and NICs on all of the payments.

7. In addition to the above, TBC submits that, without prejudice to its submissions on the tax implications of the payments, even if the Respondents are correct in their analysis of those tax implications, it took reasonable care to comply with its obligations to account for income

tax in respect of the payments and its failure to do so was due to an error made in good faith. It therefore believes that the Respondents should be directed to make a Regulation 72 Direction for the tax years ended 5 April 2013, 5 April 2014 and 5 April 2015 – it did not apply for a Regulation 72 Direction for the tax year ending 5 April 2016 – in respect of that income tax.

8. Again, the Respondents do not agree. They say that TBC did not take reasonable care to comply with its obligations to account for income tax in respect of the payments and is therefore not entitled to any of the Regulation 72 Directions which it seeks.

9. The final point of dispute between the parties is that TBC submits that the 2013 Determination was not made to the best judgment of the officer dealing with the case and that the 2013 Determination should be set aside for that reason.

10. The Respondents say that the 2013 Determination was made to best judgment and should not be set aside.

11. Following discussions between the parties at the start of the hearing, it was agreed that we would not address in this decision any questions relating to quantum but would instead confine our decision to determining the issues in the appeals as matters of principle, leaving questions of quantum to be determined by the parties by mutual agreement in the light of our decision or, if necessary, by us at a subsequent date. For present purposes, in relation to quantum, we will say only that the parties have asked us to note in this decision that one of the issues to be addressed in relation to the determination of quantum is whether the Respondents should be permitted to seek an increase in the Determinations and the NIC Decisions given that no application to that effect under Section 50(7) of the TMA 1970 was included in its original statement of case (the "SOC").

## THE RELEVANT LEGISLATION

### Introduction

12. The legislation relevant to the appeals in the form which it took at the relevant time is summarised below.

### Income tax

13. Section 6 of the Income Tax (Earnings and Pensions) Act 2003 (the "ITEPA") imposed a charge to income tax on general earnings.

14. General earnings were defined in Section 7(3) of the ITEPA as meaning:

(1) earnings within Chapter 1 of Part 3 to the ITEPA; and

(2) any amount treated as earnings under, inter alia, Chapters 2 to 11 of Part 3 of the ITEPA,

excluding in any case any exempt income.

15. Section 8 of the ITEPA provided that income was exempt income if, as a result of an exemption in Part 4 of the ITEPA or elsewhere, no liability to income tax arose in respect of it as income.

16. Under Section 9(2) of the ITEPA, the amount of general earnings which was subject to tax was the net taxable earnings of each employment.

17. Under Section 11 of the ITEPA, the net taxable earnings of each employment was defined as the total amount of taxable earnings from the employment less the total amount of deductions allowed from those earnings.

18. Section 62(2) of the ITEPA, which was in Chapter 1 of Part 3 of the ITEPA, provided that earnings meant, inter alia, any salary, wages or fee.

19. Section 70 of the ITEPA, which was in Chapter 3 of Part 3 of the ITEPA, stated that a sum paid to an employee in respect of expenses and which was so paid by reason of employment fell within the scope of the chapter to the extent that the relevant sum did not already constitute earnings from employment under any other provision.

20. Section 72 of the ITEPA provided that the relevant sum was treated as earnings from the employment for the tax year in which it was paid.

21. Part 4 of the ITEPA set out provisions relating to exempt income.

22. Section 229 of the ITEPA, which was in Part 4 of the ITEPA, provided that no liability to income tax arose in respect of approved mileage allowance payments for private cars, vans, motorcycles and cycles falling within Section 235 of the ITEPA. For this purpose:

(1) mileage allowance payments were amounts paid to the employee for expenses related to the employee's use of the vehicle for business travel other than as passenger;

(2) such payments were approved if or to the extent that, for the tax year in question, the total amount of all such payments made to the relevant employee for the kind of vehicle in question did not exceed the approved amount for such payments applicable to that kind of vehicle; and

(3) the approved amount for mileage allowance payments was required to be calculated in accordance with Section 230 of the ITEPA.

23. Part 5 of the ITEPA set out provisions relating to the deductions allowed from earnings. For the purposes of this decision, the key provisions in Part 5 of the ITEPA were:

(1) Section 337 of the ITEPA – which provided for a deduction in respect of travel expenses necessarily incurred on travelling in the performance of the duties of employment;

(2) Section 338 of the ITEPA – which provided for a deduction in respect of travel expenses attributable to the employee's necessary attendance at any place in the performance of the duties of employment excluding expenses of ordinary commuting and expenses incurred in private travel; and

(3) Section 339 of the ITEPA – which set out definitions relevant to the preceding two sections.

24. In relation to an expense falling within Sections 337 or 338 of the ITEPA:

(1) Section 333 of the ITEPA stipulated that the relevant expense must have actually been incurred;

(2) Section 334 of the ITEPA stipulated that the mere fact that an expense had been reimbursed did not mean that the relevant employee had not actually incurred the expense as long as the reimbursement payment had been included in the relevant employee's earnings; and

(3) Section 72(3) of the ITEPA made it clear that the mere fact that a reimbursement payment had been treated as earnings did not prevent the making of a deduction allowed under any of the provisions listed in Section 70(3) of the ITEPA, which included Sections 337 and 338 of the ITEPA.

25. Section 359 of the ITEPA provided that no deduction could be made under the travel deductions provisions in respect of those travel expenses incurred in connection with the use by the employee of a private vehicle if, inter alia, mileage allowance payments were made to the relevant employee.

26. From the above summary of the legislation, it can be seen that:

(1) where an employee incurred an expense which fell within either of Sections 337 or 338 of the ITEPA and the employee was reimbursed for the expense by the employer, the amount paid by the employer to the employee by way of reimbursement for that expense formed part of the employee's taxable earnings but the expense was deductible in calculating the relevant employee's net taxable earnings; and

(2) where an employee used a private vehicle and received a mileage allowance payment by the employer in an amount not exceeding the approved amount, the mileage allowance payment by the employer to the employee was exempt income but no deduction could be claimed by the employee in connection with the use of the vehicle.

27. Prior to its repeal in the Finance Act 2015, Section 65 of the ITEPA made provision for the Respondents to provide a dispensation from the usual application of the legislation in certain specific cases. At the time which is relevant to this decision, the section provided as follows:

"65 Dispensations relating to benefits within provisions not applicable to lower–paid employment

(1) This section applies for the purposes of the listed provisions where a person ('P') supplies an officer of Revenue and Customs with a statement of the cases and circumstances in which –

(a) payments of a particular character are made to or for any employees, or

(b) benefits or facilities of a particular kind are provided for any employees,

whether they are employees of P or some other person.

(2) The 'listed provisions' are the provisions listed in s 216(4) (provisions of the benefits code which do not apply to lower–paid employments).

(3) If an officer of Revenue and Customs is satisfied that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in the statement, the officer must give P a dispensation under this section.

(4) A 'dispensation' is a notice stating that an officer of Revenue and Customs agrees that no additional tax is payable by virtue of the listed provisions by reference to the payments, benefits or facilities mentioned in the statement supplied by P.

(5) If a dispensation is given under this section, nothing in the listed provisions applies to the payments, or the provision of the benefits or facilities, covered by the dispensation or otherwise has the effect of imposing any additional liability to tax in respect of them.

(6) If in their opinion there is reason to do so, an officer of Revenue and Customs may revoke a dispensation by giving a further notice to P.

(7) That notice may revoke the dispensation from –

(a) the date when the dispensation was given, or

(b) a later date specified in the notice.

(8) If the notice revokes the dispensation from the date when the dispensation was given

(a) any liability to tax that would have arisen if the dispensation had never been given is to be treated as having arisen, and

(b) P and the employees in question must make all the returns which they would have had to make if the dispensation had never been given.

(9) If the notice revokes the dispensation from a later date –

(a) any liability to tax that would have arisen if the dispensation had ceased to have effect on that date is to be treated as having arisen, and

(b) P and the employees in question must make all the returns which they would have had to make if the dispensation had ceased to have effect on that date."

28. The 'listed provisions' in Section 216(4) of the ITEPA (as mentioned in Section 65(2) of the ITEPA) included the provisions in Chapter 3 of Part 3 of the ITEPA.

29. The parts of Section 65 of the ITEPA allowing the Respondents to revoke a dispensation with either retrospective or prospective effect – which is to say Sections 65(6) to 65(9) of the ITEPA – were preserved by Sections 12(6) to 12(8) of the FA 2015 when Section 65 of the ITEPA was generally repealed.

30. Regulation 72 of the PAYE Regulations provided that, where the amount deducted by an employer by way of income tax from payments which it had made was less that the amount which the employer was liable to deduct from those payments, then the Respondents might direct that the employer was not liable to pay the excess as long as, inter alia, the employer satisfied the Respondents that:

(1) the employer had taken reasonable care to comply with the PAYE Regulations, and

(2) the failure to deduct the excess was due to an error made in good faith.

31. Regulation 72A of the PAYE Regulations made provision for an employer to request the Respondents to make a direction under Regulation 72 of the PAYE Regulations on the basis that the conditions in paragraph 30 above were satisfied and for the employer to appeal to the FTT against any refusal by the Respondents to make such a direction.

32. Regulation 80 of the PAYE Regulations provided that, if it appeared to the Respondents that an employer might have failed to deduct income tax which was payable for a tax year, the Respondents could determine the amount of that tax to the best of their judgment and serve notice of that determination on the employer.

33. With effect from April 2009, the Respondents introduced a system of "benchmark scale rates" (the "BSR") in respect of subsistence expenses – see Brief 24/09 published on 2 April 2009. This was for the administrative convenience of both taxpayers and the Respondents. Before that change, it had been up to each employer on an individual basis to agree its own specific approved scale rates with the Respondents. Under the BSR:

(1) an employee incurring subsistence expenses while away from home working for 5 or more, but fewer than 10, hours was entitled to a subsistence payment of up to £5;

(2) an employee incurring subsistence expenses while away from home working for 10 hours or more was entitled to a subsistence payment of up to £10; and

(3) subject to an exception for employees doing so regularly – for example, because of shift work:

(a) an employee who left home before 6am and incurred subsistence expenses was entitled to a subsistence payment of up to £5 (the "breakfast rate"); and

(b) an employee who finished work after 8pm having worked a normal day and incurred subsistence expenses was entitled to a subsistence payment of up to £15 (the "late dinner rate").

**NICs**

34. In relation to the present appeals, it is common ground that, although the income tax and NICs regimes operated in a slightly different manner, there was no meaningful difference in the results of their operation in the present context.

35. At the relevant time, Class 1 NICs were payable by reference to the relevant employee's earnings pursuant to Section 6 of the Social Security Contributions and Benefits Act 1992 (the "SSCBA").

36. Section 3 of the SSCBA, which defined earnings, required them to be calculated in accordance with the provisions of the Social Security (Contributions) Regulations 2001 (SI 2001/1004) (the "NICs Regulations").

37. Regulation 25 of, and Part VIII of Schedule 3 to, the NICs Regulations provided for payments in respect of travelling expenses and payments in respect of motoring expenditure which did not exceed the mileage allowance to be disregarded – see paragraphs 1, 3 and 7A of Schedule 3 to, and Regulation 22A of, the NICs Regulations.

38. Regulation 67 of, and Schedule 4 to, the NICs Regulations provided for NICs to be paid, accounted for and recovered in the same way as income tax.

39. The NICs legislation did not contain an equivalent provision to Section 65 of the ITEPA so that, technically, a dispensation under that section did not apply for the purposes of NICs. However, the Respondents have conceded that, for the purpose of the appeals against the NICs Decisions, expense reimbursement payments falling within the terms of a dispensation can be disregarded when calculating earnings for NICs purposes.

**THE RESPONDENTS' PUBLICATIONS**

40. At the hearing, we were referred to various publications by the Respondents dealing with payments in respect of travel and subsistence expenses and the interaction of salary sacrifice arrangements with such payments.

41. For example, on 28 March 2014, the Respondents published guidance in relation to the income tax and NICs treatment of business travel by employees ("Guidance 490"). That guidance included the following:

(1) paragraph 5.4, in which the Respondents stated the following as regards the inclusion of subsistence expenses as part of travel expenses:

"Travel expenses includes both the actual costs of travel together with any subsistence expenditure and other associated costs that are incurred in making the journey.

This includes:

- any necessary subsistence costs incurred in the course of the journey

- the cost of meals necessarily purchased whilst an employee is at a temporary workplace

- the cost of the accommodation and any necessary meals where an overnight stay is needed – this will be the case even where the employee stays away for some time";

(2) paragraph 5.9, in which the Respondents stated that:

"To qualify for tax relief, a journey does not have to be made by the shortest route if another route is more appropriate – for example, using the M25 to go around London rather than driving through the middle.

Similarly, a business journey will still qualify for tax relief if the employee makes a short detour for a meal"; and

(3) paragraph 5.10, in which the Respondents expanded on the previous paragraph, noting that:

"There are limits to the flexibility allowed. If an employee makes a significant detour to visit a particular restaurant we would regard that part of the journey as private.

An employee travelling on business who makes a detour for private purposes will still be entitled to tax relief for the full cost of the business part of the journey but not for the private detour."

42. We were also referred to 2 consultation documents which had been issued in the period prior to the implementation of the BSS:

(1) a consultation document entitled "Tax relief for travel expenses: temporary workers and overarching employment contracts", published by the Respondents and HM Treasury in July 2008 (the "Temp Condoc"); and

(2) a consultation document entitled "National Minimum Wage workers: Travel and subsistence expenses schemes", published by the Government in February 2010 (the "NMW Condoc").

43. Paragraphs 3.16 to 3.19 of the Temp Condoc explained that, in most cases, travel expenses incurred by a temporary worker were not reimbursed in addition to the worker's salary but were instead paid as part of a salary sacrifice arrangement. The paragraphs outlined how this gave rise to an income tax and NICs benefit for both employee and employer and stated that, in some cases, the employer would adjust the salary it paid to take account of the income tax and NICs benefits enjoyed by its employees so that the employees did not benefit from the entire tax saving which they would otherwise receive.

44. Paragraphs 3.19 to 3.24 of the Temp Condoc described the dispensation system. They said that:

(1) dispensations were issued in order to reduce the administrative burden on businesses and the Respondents because benefits paid under a dispensation could be paid without having to be notified to the Respondents;

(2) subsistence expenses were a common example of expenses which employers chose to reimburse by means of a scale rate payment rather than by reimbursing the precise expenditure incurred; and

(3) where the Respondents believed that a dispensation was being abused, it could withdraw the dispensation either prospectively or retrospectively.

45. Paragraph 5.5 of the Temp Condoc noted that overarching employment contracts along with the related tax benefits afforded in respect of travel expenses were used by employment agencies to increase their competitiveness in the employment sector.

46. The NMW Condoc explained how:

(1) as a result of the temporary worker's agreement to sacrifice part of his or her salary in return for the reimbursement of travel expenses, the temporary worker obtained income tax and NICs savings and the employer obtained NICs savings;

(2) in some cases, the amount of salary sacrificed by a temporary worker might be greater than the amount which was paid to the worker in respect of expenses, thereby passing to the employer the benefit of some of the tax benefits which were being obtained by the worker;

(3) the use of dispensations for travel expenses – using either the BSR or a scale rate which had been specifically agreed with the Respondents in the particular case – had reporting advantages for the employer;

(4) the Respondents could withdraw a dispensation where they believed that an additional liability to tax existed, for example because workers were claiming reimbursement for expenses which were not being incurred; and

(5) a scheme involving a salary sacrifice in return for payments in respect of expenses gave rise to an NICs benefit for the employer quite apart from the benefit which the employer retained of the income tax and NICs savings obtained by the worker

– see paragraphs 1.2, 2.6 to 2.8, 2.10 to 2.14 and 2.16 of the NMW Condoc.

47. Paragraph 2.16 and 2.17 of the NMW Condoc noted that:

"2.16 There are many different variations of travel and subsistence schemes in operation. It is worth emphasising that the availability of tax relief for travel expenses (and for the expenses to be disregarded for NICs) depends very much on the way in which all these arrangements are implemented. For example, the overarching employment contract must be valid, creating a single employment and the employee must, on the basis of the facts and supporting evidence, be incurring expenses in travelling to a temporary workplace. If, for any reason, the arrangements as implemented are not effective in securing tax relief, then the expenses will be taxable and liable to NICs.

2.17 HMRC polices these arrangements and takes action where appropriate to deal with non–compliance with the PAYE, NICs and NMW rules."

48. Finally in this context, in explaining the concept of salary sacrifice in their Employment Income Manual, the Respondents said as follows at paragraph EIM42752:

"Salary sacrifice is commonly used by employers or employees to take advantage of the exemption from tax or NIC or both of certain benefits. It is important to recognise that employers and employees have the right to arrange the terms and conditions of their employment and to enjoy the statutory tax and NIC treatment that applies to each element in the remuneration package. Arrangements, which are designed to make use of these exemptions, should not be regarded as avoidance."

**THE AGREED FACTS**

49. Most of the facts which are relevant to the appeals are not in dispute either because they are a matter of documentary record or because the parties indicated at the hearing that they were agreed. Those facts are as follows:

***TBC***

(1) TBC is an employment business which supplies temporary workers to its clients. At the time which is relevant to the appeals:

(a) TBC employed approximately 600 permanent staff, approximately 40 of whom worked at the head office and the remainder of whom worked in various branches around the United Kingdom;

(b) although there was an element of seasonality to it – there tended to be an increase at Easter and in the latter part of the calendar year – in any given week, TBC employed approximately 18,000 temporary workers who worked at the businesses of TBC's clients;

(c) the vast majority of the temporary employees were unskilled and relatively low–paid industrial workers and the remainder were HGV drivers and skilled industrial workers who were generally paid at higher rates;

(d) the time over which temporary workers stayed with TBC varied considerably. On average, a temporary worker would stay with TBC for between 13 and 15 weeks although some of them might then return to TBC at a later date. Only a small number of temporary workers stayed with TBC for more than a year. HGV drivers tended to stay with TBC for longer than industrial workers;

(e) TBC operated through a number of branches which were manned by consultants who were responsible for recruiting and then managing the temporary employees and their placement with clients. Those consultants were assisted by branch administrators and were under the control of a branch or divisional manager. The branch or divisional managers reported to an area manager who in turn reported to a regional manager. The regional managers reported to the board of TBC; and

(f) the head office was responsible for operating the payroll and was the main location for staff training;

(2) Mr Andrew Sweeney was the Chief Executive and a part owner of TBC. He was in charge of finance at TBC at all times relevant to the appeals and was responsible for liaising with TBC's advisers in relation to the creation and continuing operation of the BSS;

***The engagement of Aspire***

(3) over the period 2006 to 2009, TBC became aware that a number of its competitors had implemented salary sacrifice schemes for dealing with the travel and subsistence expenses of their employees and was concerned that it was falling behind the market in not offering the same facility to its employees. Accordingly, it sought advice from Aspire Business Partnership LLP ("Aspire") on how to implement its own scheme of that nature. The senior partner of Aspire was a Mr Alan Nolan, who had extensive experience in the area in question;

(4) on 13 July 2010, following two preliminary meetings earlier that year, Mr Nolan wrote to Mr Sweeney, to confirm the terms of Aspire's engagement by TBC. The terms of that engagement were that Aspire would provide consultancy services to TBC in

connection with the introduction of a salary sacrifice arrangement for temporary employees. The terms of engagement provided that Aspire's advice would include:

(a) developing the contractual arrangements and the communication material (including frequently asked questions or "FAQs");

(b) establishing qualifying business expenses and developing a policy document in relation to those expenses;

(c) establishing the eligibility criteria for inclusion in the scheme;

(d) preparing a submission to, and attending a meeting with, the Respondents;

(e) preparing the application for a dispensation;

(f) making changes to TBC's systems and integrating the salary sacrifice into payroll;

(g) developing and implementing a timesheet declaration;

(h) preparing training material for branch staff and rolling out training across the branch network to ensure that the process was fully understood;

(i) carrying out a post–implementation analysis; and

(j) through McGrigors Solicitors, "[providing] the necessary legal input to ensure that the salary sacrifice [was] implemented in accordance with employment law".

Relevantly for the purposes of the appeals, the terms of engagement provided that Aspire would obtain, on behalf of TBC, a dispensation from the Respondents under Section 65 of the ITEPA in relation to various categories of expenses and would then contact the Respondents "to disclose [TBC's] intention to implement a salary sacrifice scheme which will include a submission of all appropriate documentation under Code of Practice 10 'pre–transaction clearance'";

(5) on 13 September 2010, Mr Nolan wrote to Mr Sweeney to say that McGrigors Solicitors were working on first drafts of the employee handbook, the FAQs and a memorandum on the employment law aspects of the BSS;

***The correspondence leading to the dispensation***

(6) on 28 September 2010, following the engagement of Aspire on the terms described above, Mr Nolan wrote to the Respondents to apply for a dispensation for the current and future tax years in respect of various specified types of expenses which included travel and subsistence expenses. Enclosed with the letter was a document entitled "Expenses Policy" which set out the policies that TBC intended to apply in relation to the various categories of expenses to which the application related;

(7) on 23 December 2010, Officer Colin McDonald of the Respondents replied to Mr Nolan. Officer McDonald was part of the Respondents' Specialist Employer Compliance section, the specialists within the Respondents on travel and subsistence schemes. Officer McDonald wrote to say, inter alia, that, before a dispensation could be issued, the relevant officer of the Respondents needed to be satisfied that no income tax or NICs would be payable on the payments which were the subject of the dispensation and therefore that further information was required from Mr Nolan as outlined in that letter. Officer McDonald went on to inform Mr Nolan that, whilst the Respondents were not prescriptive as to the auditing procedures which needed to be in place, before he would be able to grant a dispensation, he would need to be satisfied that:

(a) all participants who wished to claim subsistence were fully aware that they would need to retain all receipts (or a contemporaneous note) pertaining to the expenses they incurred, in case of future audit by the Respondents, and that the expenses policy should be amended to reflect this; and

(b) TBC would keep sufficient records to demonstrate that each participant who received travel and subsistence payments had been engaged in qualifying travel and had incurred the expenses.

Officer McDonald also asked Mr Nolan to let him know what controls were in place to carry out checks to ensure that payments were supported by receipts and to confirm that random periodic retrospective checks would be made on participants;

(8) on 24 January 2011, following discussions with Mr Sweeney, Mr Nolan responded to Officer McDonald's letter of 23 December 2010. After complaining about the length of time which it was taking to agree the dispensation, Mr Nolan, inter alia:

(a) provided the information in relation to TBC and the BSS which Officer McDonald had previously requested;

(b) provided drafts of various documents relating to the BSS including the overarching employment contract, the FAQs, the employee handbook and a form for opting out of the scheme;

(c) confirmed that all participants would be made fully aware of the need to retain receipts or a contemporaneous note pertaining to expenses incurred and that the expenses policy would be amended to reflect this;

(d) confirmed that TBC would maintain sufficient records to demonstrate that a participant receiving payment had been engaged in qualifying business–related travel;

(e) said that it was envisaged that a sufficiently–sized sample of participants (10%) would be contacted on a periodic basis (quarterly) to supply confirmation that an expense had been incurred and TBC would verify the expense against that information; and

(f) said that, in addition, TBC would be at liberty to select a participant at random for verification purposes and that false claims would be dealt with in accordance with TBC's disciplinary and grievance procedures;

(9) on 10 February 2011, Officer McDonald wrote to Mr Nolan to apologise for the delays in dealing with the application and to ask for some further information in relation to the FAQs. In particular, Officer McDonald noted that:

"Nowhere in the FAQ's [sic] does it mention that the employee has to make a claim for subsistence expenses, before they are allowed. Indeed, the guidance at 5.1 and 11.3 almost infers that the scale rate payments will be given but the employees must retain their receipts. Please advise me what procedures your client has in place to confirm that subsistence costs have been incurred, before reimbursement is made";

(10) on 23 February 2011, Mr Nolan replied to Officer McDonald's letter of 10 February 2011. In his response, Mr Nolan:

(a) enclosed a further copy of the FAQs and explained that the FAQs was a document that would be provided to participants to explain the salary sacrifice, the qualification and eligibility criteria and the effect of the scheme on the state pension and benefits entitlement;

(b) explained that, by virtue of the information obtained from each participant on registration, the assignment schedule and the timesheet records, TBC would be able to know that an expense had been incurred, the participant incurring the expense was eligible to receive a tax–free payment and the expense payment was being made for a qualifying purpose; and

(c) explained that, in addition, TBC would be in a position to ask for third–party evidence of the expense in question;

(11) on 7 March 2011, Officer McDonald wrote to Mr Nolan to ask for a copy of the timesheet which would be used "and on which the employees will confirm that they have incurred expenditure on each and every day claimed";

(12) on 15 March 2011, Mr Nolan wrote to Officer McDonald enclosing sample timesheets, which he explained were to be completed by the relevant client and not the relevant participant. He went on to repeat that the participant would self–certify upon registration and that the combination of that self–certification on registration, the assignment schedule and the timesheet, when coupled with the audit procedures undertaken by TBC, would ensure that the qualification and eligibility criteria would be met in full;

(13) on 25 March 2011, Officer McDonald wrote to Mr Nolan to say that, as Mr Nolan was aware, it was necessary for an employer to receive confirmation that an expense had been incurred before the BSR payment was made and that "it is not acceptable that an employee does no more than indicate at the commencement of an employment that they will qualify for relief. It is also not acceptable that all they have to do is contact someone on days when they don't qualify for relief. I do not accept that only advising an employer when you don't qualify is the same as always advising the employer when you do qualify." He went on to say that, consequently, the Respondents required some assurance that, before TBC made a payment to the relevant participant, a claim was made by the participant to the effect that the expense had been incurred, along with a signature and confirmation by the participant that that statement was correct;

(14) on 6 April 2011, Mr Nolan wrote to Officer McDonald to complain once again about the length of time which the application was taking and the fact that the Respondents were asking questions which had been answered in previous correspondence. He then summarised the process which he had outlined in previous correspondence to the effect that:

(a) the relevant participant would set out at the point of registration the information needed to determine that he or she was entitled to join the scheme and the extent of his or her future travel costs and expenditure on food and drink, would confirm that the information was accurate and would undertake to inform TBC if any of those details changed;

(b) timesheets would be completed by the clients; and

(c) sufficient records would be maintained to demonstrate that the participants in question were entitled to the payments they received. This would be done by reference to the information provided at registration, the assignment schedules, the timesheets and the audit procedures.

Mr Nolan added that the participants would be well–informed in relation to the operation of the scheme via the staff handbook and the FAQs;

(15) on 14 April 2011, Officer McDonald wrote to Mr Nolan to reiterate that "the situation remains that the worker must confirm that he/she has incurred the travel and/or subsistence expense, before they are paid or reimbursed". The client was not in a position to say with any certainty how the participant had travelled to work or whether the participant had incurred expenses on subsistence. It was up to the participant to make a claim for these. He suggested that TBC should follow other clients of Aspire in getting its participants to make weekly expense claims which they signed;

(16) on 20 April 2011, Mr Nolan responded to Officer McDonald. After criticising Officer McDonald for various things including his rigid adherence to precedent and his failure to consider TBC's application on a bespoke basis, Mr Nolan reiterated that the scheme would not involve the making of a claim by the participant after incurring an expense, but would instead involve a declaration by the participant at the inception of his or her participation in the arrangement. Mr Nolan explained that this would constitute the relevant participant's "claim" for the days on which he or she worked for the client. He went on "I have also explained, in great details [sic], the rigorous procedures which will be adopted to ensure that employees have incurred expenses. It is however difficult to administer the processing of a weekly declaration as timesheets are completed and submitted to The Best Connection by the client. HMRC will, however, have access to any such records during a PAYE inspection visit";

(17) on 26 April 2011, Officer McDonald informed Mr Nolan that a copy of Mr Nolan's letter had been referred to a specialist for her consideration and he would advise Mr Nolan of the specialist's decision in due course;

(18) on 15 June 2011, the dispensation was issued and sent by Officer McDonald to both TBC and Mr Nolan. So far as relevant to the appeals, the dispensation provided that:

(a) the employees covered by the dispensation included temporary workers engaged under overarching contracts of employment "whose claims are independently checked and authorised by another person", subject to certain exceptions which are of no relevance to the appeals;

(b) the expenses covered by the dispensation included business travel expenses (other than mileage and ordinary commuting) actually incurred by the employees when supported by receipts and subsistence expenses; and

(c) the amount payable in respect of subsistence expenses was to be calculated at the BSR;

***The implementation of the BSS***

(19) following the issue of the dispensation, TBC implemented the BSS by writing to a number of its existing independent contractors to inform them that, with effect from the date of the letter (the "new contract letter"), it was proposing to change the status of such contractors to that of employees under an over–arching employment contract and to introduce a travel scheme. The recipient was told that, if the recipient wished to accept the offer in the new contract letter, then he or she merely needed to sign it and keep it in a safe place whereas, if recipient did not wish to accept that offer, then he or she needed to return the new contract letter to TBC within five days indicating that the offer was being rejected;

(20) the new contract letter was accompanied by a number of documents. Most relevantly for the purposes of the appeals, these were:

(a) the new contract of employment, pre–signed by Mr Sweeney on behalf of TBC;

(b) a letter introducing the BSS and enclosing a pack of documents which included:

(i) the FAQs;

(ii) a declaration and payroll deduction form;

(iii) a sample payslip;

(iv) an expenses record form; and

(v) an opt–out form, indicating that the relevant recipient did not wish to join the BSS;

(21) the contract of employment made no express mention of the BSS. However, clause 3 of the contract provided that:

(a) the participant might be able to claim for expenses incurred in connection with his or her duties in accordance with TBC's expenses policy from time to time, as set out in TBC's temporary employees' handbook; and

(b) the participant was required to inform TBC as soon as it became apparent to the participant that he or she had worked at, or was likely to work at, a particular location for more than 24 months,

and clause 4.2 confirmed that the relevant participant would never receive a rate of pay which was less than the NMW;

(22) the letter introducing the BSS said that:

(a) the BSS had been approved by the Respondents;

(b) in any week when the relevant participant's salary was not high enough for the relevant participant to benefit from the BSS, TBC would carry over any expense allowances to a week when the relevant participant could benefit; and

(c) the relevant participant's net pay would never be less than if he or she was not participating in the BSS;

(23) the FAQs explained, inter alia, that:

(a) the purpose of the BSS was to enable the relevant participant to benefit from tax relief for expenses incurred in travelling to work and for food consumed during the working day without having to make a claim to the Respondents and that participation in the scheme would result in an increase in the relevant participant's take–home pay;

(b) under the BSS, the relevant participant's salary would be reduced but that, in return, the relevant participant would receive a non–taxable payment in respect of expenses;

(c) salary sacrifice was "a legal agreement" between the relevant participant and TBC whereby the participant agreed to give up part of his or her salary in return for a non–taxable benefit in the form of the payment in respect of expenses;

(d) the amount of salary sacrificed could not take the relevant participant below the NMW so that, if the relevant participant did not earn enough in any week to benefit from the BSS, the entitlement would be carried over and applied in a week

in which the relevant participant's earnings were high enough for him or her to benefit;

(e) participation in the BSS depended on an intention to work at a series of workplaces and not being based at one site for 24 months or more;

(f) the relevant participant would be entitled to a payment in respect of expenses only in respect of a "Qualifying Day", being a day when he or she was eligible to participate in the BSS, had not opted out, had been away from home for at least 5 hours and had incurred travel costs together with associated subsistence costs during the working day and that the relevant participant would not qualify for such a payment in respect of a day when he or she was not working;

(g) TBC would monitor the situation closely and undertake periodic checks from time to time to ensure that only eligible employees participated in the scheme;

(h) the Respondents had agreed that the payments in respect of the expenses under the BSS could be made free of income tax and NICs to an eligible employee as long as he or she had incurred travel and subsistence costs during the working day;

(i) if the relevant participant already obtained a deduction from the Respondents in relation to travel and subsistence, he or she should contact the relevant branch as this would affect the relevant participant's eligibility to participate in the BSS;

(j) there was no need to submit receipts but the relevant participant would need to complete the expenses record form and keep the receipts or details of expenditure incurred as it might be required to be presented to the Respondents or to TBC as part of the audit process;

(k) TBC reserved the right to change the amount of the salary adjustment from time to time to reflect any changes to the BSR or mileage allowance rates;

(l) the salary reduction was greater than the amount of the payment in respect of travel expenses because TBC was retaining an amount to cover the costs of administering the scheme;

(m) the relevant participant would receive an increase in his or her net pay as a result of the operation of the scheme;

(n) by opting in, the relevant participant would become an employee of TBC and be required to sign a contract of employment. A person who did not wish to participate in the scheme would need to complete and return the opt–out form no later than 4 weeks after registering. Once a person had opted in or out of the BSS, there were limited circumstances in which that person would be able to change his or her status. Changes could be made within 4 weeks of registration, on each anniversary of employment or on the occurrence of a "Lifestyle Event", being an exceptional event having a major impact on the person's lifestyle such as marriage, birth, death, a house move or something similar. Choosing to opt out would constitute a variation to the relevant participant's contract, as would choosing to rejoin after opting out;

(o) TBC would be "under no obligation to continue to operate this non–contractual arrangement", did not accept any liability to provide any form of compensation for any benefits lost from ceasing to operate the BSS and reserved the right to withdraw the scheme at any time; and

(p) if the relevant participant had any questions in relation to the BSS, he or she should contact the relevant branch;

(24) the declaration and payroll deduction form stated that the relevant participant:

(a) was aware that details of the BSS were set out in the temporary employees' handbook and the FAQs, both of which were available in the branch or on TBC's website;

(b) understood that, unless he or she opted out, he or she would be automatically enrolled as a participant;

(c) understood that his or her claims for expenses related to those incurred in the performance of his or her duties of employment and would apply to each working day unless he or she advised otherwise;

(d) would notify TBC if he or she changed address or the way that he or she travelled to work or if he or she did not incur expenses on a working day;

(e) intended to accept another assignment after completing his or her current assignment;

(f) would notify TBC if his or her current assignment extended beyond 24 months;

(g) would incur "subsistence (food/meals)" relating to his or her duties of employment on each working day;

(h) would maintain a record of his or her travel and subsistence expenses and would produce those records when requested;

(i) would notify TBC if a client reimbursed expenses directly to him or her; and

(j) understood that regular checks would be undertaken to confirm that only qualifying business expenditure had been claimed and that disciplinary action would be taken if his or her claims were found to be false.

The declaration went on to require the relevant participant to tick one mode of transport out of own car, motorcycle, public transport, bicycle and walk and then to return the signed and dated declaration to the relevant participant's branch;

(25) the sample payslip showed:

(a) the number of hours worked by the relevant participant along with the relevant participant's headline hourly rate;

(b) the amount which had been paid to the relevant participant in respect of his or her expenses;

(c) the amount by which the relevant participant's headline salary had been reduced to reflect the expenses payment described in paragraph 49(25)(b) above;

(d) the income tax and NICs which had been deducted from the relevant participant's reduced salary; and

(e) the net amount by which the relevant participant was better off as a result of receiving the expenses payment and a reduced salary;

(26) the sample payslip did not show:

(a) in terms, the manner in which the fee that TBC was going to retain for administering the BSS would be calculated. It was possible for the relevant

participant to determine the amount of the fee in the case of the specific example shown in the sample payslip by looking at the difference between the amount of the expenses payment and the amount shown as the reduction in the participant's salary. However, the relevant participant would have been unable to determine from that information whether the amount so calculated was a fixed sum which was always going to be retained no matter what the amount of the expenses payment or whether the amount so calculated was a fixed percentage of whatever the expenses payment happened to be from time to time;

(b) the amount of the NICs saving made by TBC as a result of making the expenses payment and paying a reduced salary although it was possible for the relevant participant to determine this from the amount shown as the reduction in his or her salary; and

(c) did not set out any information as to the existence of, or the reasons for, any difference between the amount actually paid to the relevant participant in respect of expenses and the relevant participant's entitlement to be paid in respect of expenses;

(27) the expenses record form required the relevant participant to tick a box relating to each of "travel", "subsistence" and "other" for each day of each week of a 13–week cycle and to sign and date the entries relating to each such week. It also required the relevant participant to keep all receipts, and the relevant form, safe and to produce it upon request by TBC;

(28) the opt–out form stated that the relevant recipient wished to opt out of the BSS and would not receive any benefits under the scheme;

(29) a materially similar pack of documents was provided to people who were employed after the BSS was established and were offered the opportunity to participate in the BSS when being taken–on;

***The operation of the BSS***

(30) the BSS operated from April 2012 to March 2016;

(31) the way in which the BSS operated was as follows:

(a) an employee joining the BSS was asked to complete and sign a registration form at inception. Although the form which was used for that purpose over the life of the BSS changed in various respects from time to time, it broadly included the declarations described in paragraph 49(24) above;

(b) the registration form was completed by the participant with guidance from a consultant or manager at the relevant branch who had been trained in how the BSS was intended to operate. (With the assistance of Aspire, TBC established a training programme – which included presentations, a short film, videos, question and answer sessions, discussions and evaluations – for its branch and head office staff in relation to the operation of the BSS;)

(c) the form was then checked by the branch manager although, where the branch manager was the person who had assisted the participant in completing the form, the branch manager checked the form himself or herself;

(d) the registration form had 5 pages. 3 of those pages were sent by the branch to head office. However, crucially, the page of the registration form indicating whether the relevant participant expected to incur subsistence expenses while away from home working was not sent by the branch to head office. Accordingly, head

office, which was responsible for operating the payroll, had no way of knowing whether the relevant participant expected to incur such expenditure;

(e) clients for whom the relevant participant worked from time to time would complete timesheets recording the hours worked. Sometimes a client sent the timesheet directly to TBC and other times the client gave the timesheet to the participant to give to TBC;

(f) the information provided by the relevant participant in his or her registration form, along with the timesheets provided by the clients for whom the relevant participant worked from time to time, were then used by head office to calculate the expense payments to which the relevant participant was entitled in any week. For this purpose, TBC used software provided by Michelin Travel Partner UK Limited (the "Michelin software"):

(i) to calculate the mileage between the relevant participant's home address and the relevant client's work address. In doing so, it was assumed that, on each day that the relevant participant worked, as recorded in the timesheet provided by the client, the relevant participant had travelled to the client from his or her home address and then returned from the client to his or her home address; and

(ii) to calculate the length of time that the relevant participant took to travel to and from the relevant client's work address (for the purposes of determining the time that the relevant participant was away from home for work). In doing so, it was assumed that the relevant participant travelled by car (regardless of the mode of transport which the relevant participant had reported to TBC in his or her registration form at inception) and on the basis of the relevant speed limits between the two addresses – no account was taken of the specific time of day at which the relevant participant had travelled to and from the client or of the actual time spent travelling;

(g) the entitlements to mileage payments were calculated using the rates for approved mileage payments set out in Section 230 of the ITEPA;

(h) the entitlements to subsistence payments were calculated using the BSR although:

(i) the scheme did not take into account unpaid break times in calculating the participant's time away from home. Such times were taken into account only when subsistence payments were examined on audit;

(ii) the scheme did not include provision for the breakfast rate or the late dinner rate;

(iii) the only entitlements for which the scheme provided were the subsistence payment of £5 for incurring subsistence expenses while working for 5 hours or more but less than 10 hours and the subsistence payment for incurring subsistence expenditure while working for 10 hours or more; and

(iv) in April 2015, TBC decided to increase the time away from home which would be required for an entitlement to the £5 subsistence payment from 5 hours to 6 hours and the time away from home which would be required for an entitlement to the £10 subsistence payment from 10 hours to 12 hours;)

(i) the entitlements to public transport payments were calculated at a flat rate of £3.20 per day regardless of the actual expenditure incurred by the relevant participant;

(j) the calculations described in paragraphs 49(31)(g) to (i) above were reflected in reports produced by TBC using its software called "Staff+". These set out the information provided to TBC by the relevant participant and the clients and the consequent expense entitlement of the relevant participant. Those reports are referred to hereafter as the "Staff+ Reports";

(k) the expense entitlements thrown up by the above calculations and shown in the Staff+ Report were then subject to various adjustments before they were reflected in a payment made to the relevant participant for a particular week. These were as follows:

(i) first, TBC did not make a payment to a participant in any week if the amount to which the participant was entitled in that week did not exceed a specified pre–determined de minimis level. (The precise amount of that de minimis level was not made clear to us at the hearing.) If the entitlements did not exceed the de minimis level, then TBC simply carried forward the relevant entitlements as part of the participant's overall carried forward pool of entitlements;

(ii) secondly, because, as a matter of law, the relevant participant could not receive a headline salary which was less than the NMW, entitlements which, when grossed up by the rate of 1.25 (to take account of TBC's fee for running the scheme, in the form of the reduction in salary described in paragraph 49(31)(m) below), would take the relevant participant below the NMW would be commensurately reduced so that that did not happen and the excess entitlements were then carried forward as part of the participant's overall carried forward pool of entitlements;

(iii) thirdly, if, as a result of an audit:

(A) it was discovered that the participant had received an excessive entitlement, the excess was first set off against the participant's overall carried forward pool of entitlements and any residual excess after exhausting that pool was then set off against the relevant participant's future entitlements before calculating the amount to be paid in respect of those entitlements; and

(B) it was discovered that the participant had received an inadequate entitlement, the shortfall was added to the participant's overall carried forward pool of entitlements; and

(iv) finally, if the above operations meant that, in any week, the participant's overall carried forward pool of entitlements had a positive balance, then, to the extent that that balance could be paid without the corresponding salary deduction's taking the participant below the NMW for that week, it was added to the expenses payment for that week;

(l) regardless of whether it was positive or negative at the relevant time, a participant's residual overall carried forward pool of entitlements was written off and given no further effect at the end of the relevant tax year or earlier if the relevant participant left TBC before the end of the relevant tax year. The residual

overall carried forward pool of entitlements did not revive even if the relevant participant rejoined TBC and the scheme;

(m) TBC retained an amount equal to 25% of the amount paid to the relevant participant in respect of expenses as a fee for administering the BSS. It did so by reducing the relevant participant's salary each week by an amount equal to 125% of the amount paid to the relevant participant in that week in respect of expenses;

(n) there was no standard form whereby participants who used a different mode of travel from the one set out on their original registration form or who didn't incur subsistence expenses when they had said on their original registration form that they expected to do so could notify TBC of that fact. The same was true of a change in home address. There was also no system whereby a participant would be asked to confirm that nothing had changed in relation to his mode of transport, his subsistence expenses or his home address whenever he or she started a new assignment; and

(o) the most common way that TBC became aware of mode of transport changes was through the audits;

***Audits***

(32) no audits of BSS participants were carried out until October 2013, some 18 months after the inception of the BSS. Prior to that date, there were only spot checks of participants in circumstances where the computer threw up a discrepancy of some kind. However, after October 2013, a formal audit process was instituted whereby, for a specified 13–week period, all participants in the BSS were asked to send in an employee record form (or "ERF") for checking by a company called BestEx Limited ("BestEx") against the timesheets. No fee was charged by BestEx in respect of its role as auditor;

(33) although all participants were asked to send their ERFs to BestEx, only around 25% of participants replied to each audit request. BestEx manually produced a report (the "BestEx Report") which was intended to compare the information set out in each participant's ERF against the information relating to that participant in the timesheets provided by the relevant clients, as recorded in the Staff+ Reports. If, based on that comparison, BestEx considered that the expenses to which the relevant participant had become entitled was either too low or too high, that did not result in an immediate payment to, or clawback from, the participant. Instead, the amount of the underpayment or overpayment was given effect in the calculation of the participant's overall carried forward pool of entitlements – as to which see paragraph 49(31)(k)(iii) above;

(34) when an audit was completed, the BestEx Report in relation to each audited participant, setting out the adjustments to be made to that participant's overall carried forward pool of entitlements, was sent to TBC's head office and the relevant adjustments were made;

(35) notwithstanding the statement in the FAQs to the effect that participants needed to keep evidence of expenditure and be able to produce it to TBC and the Respondents on request, the language used in the ERF did not require the relevant participant to submit receipts along with his or her ERF in an audit and a participant who failed to send in receipts when submitting his or her ERF in an audit was not subjected to any penalty;

(36) a participant who failed to respond to an audit request was sent 3 reminders in relation to the same audit period. If the relevant participant still did not respond to that audit request, he or she was then removed from the subsistence element of the scheme going forward but:

(a) there was no clawback of subsistence entitlements given prior to the participant's removal from the scheme; and

(b) the participant continued to receive mileage or public transport entitlements even if he or she never replied to audit requests going forward.

If the participant began to return ERFs again, he or she was put back onto the subsistence element of the scheme. Having said that, in at least one case, Christopher Williams, the participant was sent a letter informing him that he was being removed from the subsistence element of the scheme for failing to return his ERF on each of 17 December 2014, 27 March 2015, 26 June 2015, 9 October 2015 and 8 January 2016 so that this particular aspect of the system was clearly not working in Mr Williams's case;

(37) participants who returned ERFs were not notified of the results of the audit or of the consequent adjustments to their overall carried forward pool of entitlements. More generally:

(a) a participant was not notified of the amount of his or her overall carried forward pool of entitlements at any time. Instead, the participant was simply provided with a payslip for the relevant week which reflected the expenses payment which had been made to him or her for that week without an explanation of how the expenses payment had been determined; and

(b) TBC also did not communicate to participants the increases made in April 2015 to the qualifying times needed to obtain subsistence entitlements – as to which, see paragraph 49(31)(h)(iii) above; and

(38) the Agency Workers Regulations 2010, which entitled a participant in the BSS who had worked for the same client for 12 weeks to be treated in the same way as the relevant client treated its permanent workers, was applied by TBC by reference to the relevant participant's gross salary before any sacrifice.

**THE EVIDENCE**

## Introduction

50. Much of the evidence with which we were provided at the hearing was common ground and has accordingly already been outlined in paragraph 49 above. However, we describe below some of the other evidence with which we were provided. That evidence took 2 forms – sample documents from the 4 tax years in question, showing how the BSS was applied in practice in the sampled cases (together, the "Samples Documents"), and witness evidence.

## The Samples Documents

51. The samples in the Samples Documents had been selected at random by the parties and covered selected weeks and selected participants within those weeks. The samples for the tax year ending 5 April 2013 are referred to in what follows as "2012/13 Samples" and the same style has been adopted in relation to the other tax years during which the BSS operated. Where available, the samples in the Samples Documents included declarations made by the sampled participants on registration, Staff+ Reports, ERFs and BestEx Reports so that it was possible to see how the BSS operated in practice for each sampled participant. However, not every participant in the Samples Documents had returned an audit form for the period sampled and some of the documents relating to participants had been destroyed by the relevant participant's branch pursuant to TBC's document destruction policy. Thus, not every sample in the Samples Documents contained all of the above documents in each case.

52. The Samples Documents revealed that:

(1) 8 participants had received subsistence entitlements under the scheme even though they had declared on their registration form that they did not expect to incur subsistence expenses. For example:

(a) David Turner (2014/15 Samples pages 164, 183 and 184);

(b) Kevin Shilson (2014/15 Samples pages 188 and 201);

(c) Richard Steven Lomas (2014/15 Samples pages 345 and 358);

(d) Mark Marshall (2014/15 Samples pages 361 and 371);

(e) Richard Waller (2014/15 Samples pages 841 and 858);

(f) Bernard Holmes (2014/15 Samples pages 1109 to 1130, 1137 and 1162);

(g) Bernard Holmes (2015/16 Samples pages 596 to 617, 624, 649 and 650);

(h) Danny Holland (2015/16 Samples pages 676, 689 and 709 to 712); and

(i) Trevor Powis (2015/16 Samples pages 736, 753 and 754);

(2) 1 participant had received entitlements under the scheme even though the participant had failed to sign the required declaration on registration. For example, Dale Woolley (2013/14 Samples pages 677, 694 to 702, 707 to 719 and 731);

(3) 3 participants had received entitlements under the scheme despite indicating in their registration forms that their first assignment would be greater than 24 months (which meant that they were not entitled to be on the scheme). For example:

(a) Arron Phillips–Latif (2013/14 Samples pages 64 to 67, 74, 75 and 79);

(b) James Tarr (2015/16 Samples pages 257, 268 and 272); and

(c) Danny Holland (2015/16 Samples pages 676, 689 to 694 and 709 to 712);

(4) 2 participants had received entitlements under the scheme in respect of the wrong mode of transport. For example:

(a) Shauib Jibril (2015/16 Samples pages 5 to 9) completed his ERF for the period ending 30 March 2015 by saying that he had travelled by bus and providing a photocopy of his travel card but BestEx approved the mileage entitlements he had been given based on the rate applicable to cars; and

(b) Russell Stockdale (2015/16 Samples pages 356 to 414) completed his ERFs for the audit periods ending 11 January 2015 and 30 March 2015 by saying that he was travelling by both car and motorcycle but BestEx approved the mileage entitlements he had been given based on the rate applicable to cars;

(5) 2 participants had received mileage entitlements under the scheme which did not reflect the fact that the participants had stayed away from home overnight. For example:

(a) Stephen Parkes (2014/15 Samples pages 609 to 638); and

(b) Adrian Kura (2015/16 Samples pages 545 to 588);

(6) 4 participants had erroneously completed a form relevant to the BTR. For example:

(a) Ross Dutton (2014/15 Samples pages 380 to 401);

(b) Danuta Kanicka (2014/15 Samples pages 424 to 450);

(c) Richard Waller (2014/15 Samples pages 835 to 858); and

(d) Bernard Holmes (2014/15 Samples pages 1109 to 1162);

(7) there were 47 examples in the Samples Documents of ERFs' being submitted in an audit – including 2 examples from each of Bernard Holmes and Mark Smith, meaning that there were ERFs from 45 participants in aggregate. Of those 47 examples:

(a) there were 13 examples of participants who had always indicated on their ERFs – either by ticking the subsistence box or by some other method – that they had incurred subsistence expenses on a day they worked and had been given a subsistence entitlement on that basis (apart from Shuaib Jibril, who was not given a subsistence entitlement for some days on which the relevant ERF indicated that subsistence expenses had been incurred and possibly also Carl Southerton). For example:

(i) Mark Tyler (2012/13 Samples pages 32 and 37);

(ii) Andrew Underhill (2013/14 Samples page 276);

(iii) Bogdan Kielbowicz (2013/14 Samples page 349);

(iv) Cain Mazur (2014/15 Samples page 85);

(v) Peter Mander (2014/15 Samples page 244);

(vi) Christine Johnson (2014/15 Samples pages 598, 599 and 602);

(vii) Stephen Parkes (2014/15 Samples page 611);

(viii) Andrew McPhail (2014/15 Samples page 691);

(ix) Roy Board (2014/15 Samples page 741);

(x) Carl Southerton (2014/15 Samples pages 888 and 916);

(xi) Darren Baldwin (2014/15 Samples page 1006);

(xii) Shuaib Jibril (2015/16 Samples page 7); and

(xiii) Michael Piechota (2015/16 Samples pages 277, 282 and 287);

(b) there were 2 examples of participants who had never indicated on their ERFs that they had incurred subsistence expenses on a day they worked and had not been given a subsistence entitlement. For example:

(i) Timothy Robinson (2014/15 Samples pages 1029 and 1030); and

(ii) Jake Searle (2015/16 Samples pages 1068 and 1069);

(c) there were 24 examples of participants who had never indicated on their ERFs that they had incurred subsistence expenses on a day they worked but had been given a subsistence entitlement. For example:

(i) Sidney Howell (2012/13 Samples pages 291, 299, 304 and 336);

(ii) Andrew Cobb (2013/14 Samples pages 90 to 92);

(iii) Rafal Szela (2013/14 Samples page 155);

(iv) Chris Withers (2013/14 Samples page 186);

(v) Aivars Vasilijevs (2013/14 Samples pages 405 and 411);

(vi) Gerald House (2013/14 Samples pages 420, 421,425 and 429);

(vii) Dale Woolley (2013/14 Samples pages 696, 697, 710, 711 and 712);

(viii) John Griffiths (2014/15 Samples page 374);

(ix) Dalubert Duffus (2014/15 Samples page 404);

(x) Danuta Kanicka (2014/15 Samples pages 426 and 445);

(xi) Clive Hart (2014/15 Samples page 494);

(xii) Steven Johnson (2014/15 Samples pages 502 and 505);

(xiii) Philip Jackson (2014/15 Samples pages 569 and 573);

(xiv) Paul Cotton (2014/15 Samples page 756);

(xv) Szymon Bendus (2014/15 Samples pages 793 and 801);

(xvi) Martin Kempster (2014/15 Samples pages 814 and 818);

(xvii) Jason Middleton (2014/15 Samples pages 949, 950, 953 and 958);

(xviii) Bernard Holmes (2014/15 Samples pages 1109, 1111, 1115, 1119, 1123 and 1128);

(xix) Lee Horney (2014/15 Samples page 1166);

(xx) Irene Brown (2014/15 Samples pages 1241 and 1245);

(xxi) Bernard Holmes (2015/16 Samples pages 598, 602, 606 and 610);

(xxii) Trevor Simpson (2015/16 Samples page 653);

(xxiii) Hugh Charles 'Charlie' Herlihy (2015/16 Samples page 922); and

(xxiv) Brian Hardy (2015/16 Samples page 983); and

(d) there were 8 examples of participants who had indicated on their ERFs that they had incurred subsistence expenses on some of the days they worked but not all and had been given a subsistence entitlement for one or more days on which they had indicated that they had not incurred subsistence expenses. For example:

(i) Errol Myers (2013/14 Samples page 138);

(ii) Andrew Godbold (2013/14 Samples pages 642, 646, 647, 651 and 655);

(iii) Chris Ward (2013/14 Samples pages 802 and 810);

(iv) Michael Francis (2013/14 Samples pages 830 and 834);

(v) Mark Smith (2014/15 Samples pages 24 and 28);

(vi) Anthony Litherland (2014/15 Samples pages 1046 and 1052);

(vii) Mark Smith (2015/16 Samples pages 239, 242 and 245); and

(viii) Russell Stockdale (2015/16 Samples pages 362 and 368);

(8) where there were inconsistencies between the aggregate number of days in the audit period on which a participant recorded on his ERF that he had travelled to work (A) and the aggregate number of days in the audit period on which the client had recorded in the timesheet that the participant had worked (B), then BestEx:

(a) made an adjustment to the relevant participant's subsistence entitlements over the audit period by reference to any excess of B over A and without regard to the identity of particular days specified by the participant and the client; and

(b) made no adjustment to the relevant participant's mileage entitlements.

In other words, if, say, in any audit period, the participant recorded that he had travelled to work on 13 days when the clients recorded in the timesheets that he or she had worked on 22 days, so that the participant had received mileage and subsistence entitlements for 22 days, then there was no clawback of the participant's mileage entitlements by reference to the difference between the days worked as recorded by the participant and the days worked as recorded by the clients but the participant's entitlement to 9 days of subsistence was clawed back, reflecting the difference between the 22 days for which the participant had received entitlements in accordance with the timesheets and the 13 days recorded by the participant in his or her ERF as having travelled to work – see Rafal Szela in 2013/14 Samples pages 152 to 173;

(9) although there were examples in the Samples Documents of a clawback of subsistence entitlements in the circumstances described in paragraph 52(8) above, there were no examples in the Samples Documents of a clawback of subsistence entitlements on the grounds that the relevant ERF did not say that subsistence expenses had been incurred on a day on which the participant had travelled to work. For example:

(a) in the case of Martin Kempster, even though he had not ticked subsistence in his ERF in relation to the audit period ending in April 2014, the BestEx Report for that period made an upward adjustment to his subsistence entitlement based on the number of days that he had worked in that period as recorded on the timesheets and the Staff+ Report;

(b) in the case of Philip Jackson, even though he sent a note to BestEx in March 2015 with his ERF in relation to the audit period ending in December 2014 to reiterate that he was not incurring subsistence expenses, not only was there no clawback of the subsistence entitlements given to him in respect of that audit period but also subsistence payments continued to be made to him until the end of June 2015; and

(c) in the case of Cain Mazur (2014/15 Samples pages 83 to 97), no adjustment was made to his subsistence entitlements in relation to the audit period ending in March 2015 even though his ERF in relation to that audit period did not set out the days he had travelled to work and the BestEx Report noted in relation to his travel entitlements that the days could not be checked as he had not reported the days he had worked; and

(10) there were 16 examples of circumstances where TBC did not penalise a participant who had failed to provide receipts in respect of his or her expenses on audit. For example:

(a) Andrew Cobb (2013/14 Samples pages 85 to 110);

(b) Chris Withers (2013/14 Samples pages 184 to 204);

(c) Gerald House (2013/14 Samples pages 418 to 446);

(d) Michael Francis (2013/14 Samples pages 828 to 835);

(e) Cain Mazur (2014/15 Samples pages 83 to 97);

(f) Lee Warner (2014/15 Samples pages 250 to 270);

(g) Dalubert Duffus (2014/15 Samples pages 402 to 423);

(h) Danuta Kanicka (2014/15 Samples pages 424 to 450);

(i) Steven Johnson (2014/15 Samples pages 500 to 519);

(j) Philip Jackson (2014/15 Samples pages 567 to 594);

(k) Richard Waller (2014/15 Samples pages 835 to 858);

(l) Bernard Holmes (2014/15 Samples pages 1109 to 1162);

(m) Mark Smith (2015/16 Samples pages 220 to 254);

(n) Danny Holland (2015/16 Samples pages 676 to 712);

(o) Hugh Charles 'Charlie' Herlihy (2015/16 Samples pages 908 to 939); and

(p) Brian Hardy (2015/16 Samples pages 981 to 992).

**The witness evidence**

53. We heard the testimony of 8 witnesses altogether – 7 on behalf of TBC and 1 on behalf of the Respondents.

***Mr Sweeney***

54. The chief witness for TBC was Mr Sweeney. Although there were some occasions in giving his testimony when he was slow to acknowledge obvious defects in the way in which the scheme had operated, we generally considered Mr Sweeney to be an honest and credible witness who did his best to be helpful.

55. Much of Mr Sweeney's evidence was not disputed and has accordingly been taken into account in our summary of the agreed facts set out in paragraph 49 above. However, in addition, Mr Sweeney said that:

(1) prior to TBC's entering into the BSS, he was aware of the material published by the Respondents referred to in paragraphs 40 to 48 above and that he knew that:

(a) as mentioned in paragraphs 2.16 and 2.17 of the NMW Condoc, compliance was an important issue for the Respondents; and

(b) therefore, in order for an expense payment to be exempt or fall within the dispensation, it needed to relate to mileage or expenses that had actually been incurred;

(2) he had relied on Aspire to ensure that the BSS was lawful and tax effective and Mr Nolan had told him that Aspire had taken advice on the latter from leading tax counsel although he had not asked for, or seen a copy of, that advice;

(3) he had seen the granting of the dispensation as a seal of approval of the BSS by the Respondents. He had not noticed until he was cross–examined on the point at the hearing that the terms of Aspire's engagement had envisaged a 2–stage process in which the granting of the dispensation would be followed by a clearance in relation to the scheme under COP 10 and he accepted that such clearance had not been obtained;

(4) although they had not been asked to advise on it, each of BDO and KPMG, who had at different times during the term of the BSS been TBC's auditors, had been aware that TBC had implemented the BSS and had not raised any issues in relation to it;

(5) he accepted that:

(a) TBC could unilaterally have increased the 25% uplift in the salary sacrifice amount without notifying participants although he noted that TBC had not in fact done so; and

(b) the benefit to TBC of operating the BSS was in most cases (in relation to participants who earned a headline salary of around £150 to £800 per week) 2 to 3 times greater than the benefit to the participant, once TBC's NICs saving and the 25% uplift were taken into account.

However, he said that that was not the reason for implementing the scheme. Instead, TBC's implementation of the scheme was designed to make TBC more competitive with others in the same market, many of whom were offering similar schemes, and with people working through umbrella companies;

(6) at any one time in the 4–year period in which the BSS operated, approximately 1,500 to 2,000 employees were participating in the BSS. There was a low opt–out rate in relation to the BSS and there were no complaints from participants in relation to the way in which the scheme operated;

(7) as regards mileage entitlements:

(a) most participants were HGV drivers and the vast majority of those drivers travelled to work in their own cars. He estimated that 75% of participants drove to work by car, 1% used a motorcycle, 1% went by bicycle, 1% walked and 9% went by public transport;

(b) he would have been concerned about taking on an HGV driver who did not have his or her own car as:

(i) many of clients were in locations that were not easily accessible by public transport;

(ii) even where there was public transport, most driving jobs started early in the day when it would be difficult to get to the client using public transport;

(iii) drivers could not necessarily predict when they would finish; and

(iv) many of the driver assignments required very few drivers or even just 1 driver for each location so that car–sharing was not usually a viable option; and

(c) he had known that the system did not operate properly in relation to unpaid breaks during working hours or in relation to nights away from home in the course of an assignment;

(8) as regards subsistence entitlements:

(a) he found it difficult to imagine that HGV drivers could do their long shifts on the road without eating and he was satisfied from the audit results and the branches' experience of the working practices of drivers that they mostly bought food on the road from driver stops, service stations or cafés;

(b) participants were told at the interview stage that no subsistence would be due if the participant brought his or her own food to work;

(c) he had decided not to apply the breakfast rate or the late dinner rate in the BSR because he had considered that it would be more difficult to administer and check those meals; and

(d) he had known that the branches did not send to head office the page of the registration form which indicated whether or not the relevant participant expected to incur subsistence expenses and accepted that this could have led head office to assume that every participant was intending to claim subsistence entitlements unless it was notified otherwise;

(9) as regards public transport entitlements, he had concluded that it would be too difficult to look at actual expenditure and had reached the figure of £3.20 per day by

analysing bus and tube rates across the country and fixing on an estimated amount which was conservative;

(10) he would have expected a participant who had not incurred a travel or subsistence expense as recorded in his or her registration form to notify TBC of that fact as soon as reasonably possible;

(11) there were 3 members of staff at BestEx who were responsible for managing the BTR and for conducting the audits under the BSS. The staff in question were administrative workers who were given instructions on how to carry out the audits but he could not recall whether they had been given the training on the BSS that had been given to the branch managers;

(12) there were 9 audits during the period in which the BSS operated and, following each audit, BestEx contacted the relevant branch if:

(a) there was a discrepancy between the days on which the participant had said that he or she had travelled to work as set out on the ERF and the days on which the client had said that the participant had worked as set out on the timesheet; and

(b) any other information set out on the ERF did not look correct;

(13) where it became apparent through the audit process that a participant was using a different mode of transport from the one indicated on his or her registration form, then, although no adjustment was made to the travel entitlements which had been given to the participant before the date of the audit, the position was changed to calculate the participant's travel entitlements going forward. We were shown a number of lists which had been sent by BestEx to head office following an audit recording a change in a participant's mode of transport. Several of the entries which appeared on the lists referred to a change in mode of transport to "Lift (bus)". Mr Sweeney did not know how head office would have treated such a person for the purposes of calculating future travel entitlements under the scheme;

(14) he would not have expected BestEx to chase participants who failed to provide receipts in an audit as he considered that completion of the ERF was sufficient for this purpose; and

(15) some 600 to 700 participants had been removed from the subsistence element of the BSS at each audit, either for failing to reply to audit requests or for failing to justify their claims.

***The other witnesses for TBC***

56. The other witnesses for TBC were 4 managers – Mr Paul Crocock, Mr Danny Keyes, Mr Wayne Tighe and Mr Dipak Patel – and 2 HGV drivers – Ms Rachel Lawrence and Mr John Bramwells.

57. The evidence given by the branch managers was largely directed at the extent to which they understood the details of the BSS, how they were trained in relation to it, the way in which the process of interviewing participants was conducted and the way in which the ongoing relationship between participants and the branches was managed.

58. The evidence given by the drivers was largely directed at their relationship with the relevant branch and the extent to which they understood the details of the BSS.

59. In listening to the evidence of the drivers and managers, we took into account the fact that it had been over 8 years since the scheme had ceased and over 12 years since the scheme had first been implemented. Moreover, in the case of the drivers, the scheme was not

necessarily the only travel scheme in which they had participated because they were employed by other companies that had adopted salary sacrifice schemes and, in the case of the managers, the scheme was just one aspect of the overall employment issues with which the managers had had to deal. It was therefore not surprising that their evidence was confusing and contradictory in places. We were satisfied that each manager and driver was honest and was doing his or her best to provide us with the information we required to reach our conclusions as to the facts.

60. Although the testimony which was given by each manager and driver in relation to the above matters differed slightly, the key points arising out of that testimony were as follows:

(1) the branches were not involved in the operation of the BSS, which is to say that they were not involved in calculating the salary sacrifice (which was an automated payroll function conducted by head office) or in conducting the audits (which were carried out by BestEx);

(2) the role of the branch was to deal with the recruitment of the participants and then the management of the participants going forward in terms of their placement with clients;

(3) each of the managers testified that participants were told at registration that payments would be made to a participant under the scheme only if the relevant participant actually incurred expenses of the relevant category;

(4) both drivers said that, after receiving the BSS documentation, they had discussed the scheme with the relevant branch. Although they both knew that:

(a) the BSS involved a sacrifice of salary in return for a payment of expenses;

(b) the amount of salary sacrificed was greater than the amount of expenses paid in order to cover the costs of TBC in running the scheme;

(c) despite that feature of the scheme, the driver would still be better off in after–tax terms because his or her sacrificed salary, had it been paid, would have been subject to income tax and NICs, whereas the expenses payments were expected not to be so subject; and

(d) the application of the NMW meant that not all expenses which a participant incurred in a week would necessarily give rise to an expenses payment in that week and instead entitlements would be carried forward until they could be paid,

neither driver understood the detailed terms of the BSS. In particular, they were unable to explain how the overall carried forward pool of entitlements was calculated from time to time and they did not know how TBC's retention was calculated. In addition, Mr Bramwells was under the impression that the scheme was voluntary and did not form part of the contract between him and TBC;

(5) the managers demonstrated a similar lack of detailed knowledge in relation to the scheme. In particular:

(a) Mr Keyes did not understand that travel entitlements could be claimed without subsistence entitlements and did not understand how the overall carried forward pool of entitlements fell to be calculated;

(b) Mr Crocock did not understand how the NMW cap operated in relation to the scheme or how the mileage entitlements were calculated when there were nights away from home;

(c) Mr Tighe did not know how the distance from the participant's home to the client was calculated or how time spent on travelling to and from the client affected the subsistence entitlement; and

(d) none of the managers was aware of the de minimis limit on entitlements paid in any week;

(6) in addition, there was mixed evidence from the managers in relation to the registration process. For example:

(a) the evidence of Mr Keyes was that:

(i) a participant who travelled to and from work from more than one home address was told to put down on his or her registration form the address most commonly used; and

(ii) a participant who used multiple modes of transport to get to work was told to put down on his or her registration form the mode of transport most commonly used,

although neither Mr Tighe nor Mr Crocock could recall the possibility of multiple home addresses or multiple modes of transport ever being raised;

(b) the evidence of Mr Keyes was that a participant who said that he or she generally incurred subsistence expenses was told to put down on his or her registration form that he or she always expected to do so although Mr Crocock did not recall that variability in subsistence habits was ever raised;

(c) Mr Crocock testified that, although most participants would incur subsistence expenses, there were cases where a participant had said at the registration stage that he or she did not incur subsistence expenses; and

(d) Mr Tighe said that that he could not recall any participant's saying no to the subsistence expense question on the registration form;

(7) there was also mixed evidence from the managers and drivers in relation to the extent to which participants were expected to, and did in fact, notify TBC that they had not incurred a travel or subsistence expense as recorded in his or her registration form when taken together with the timesheet. For example:

(a) Mr Keyes testified that the notification requirement could be met by the participant's completing the ERF and added that he did not expect to be notified by a participant of any such occurrence and could not recall an instance where he had been informed by a participant of any such occurrence;

(b) the other 3 managers testified that they would have expected to be notified by the relevant participant of any such occurrence although, with the exception of Mr Tighe, who recalled one such occasion, they could not recall specific cases where it had happened;

(c) Mr Bramwells testified that he always incurred subsistence expenses on the days he worked; and

(d) Ms Lawrence testified that she did not always incur subsistence expenses on the days she worked but she had understood that she had to notify TBC only if she incurred neither travel expenses nor subsistence expenses on a day when she worked; and

(8) each of Mr Keyes, Mr Tighe and Mr Crocock echoed the evidence of Mr Sweeney in paragraph 55(7) above to the effect that, given the nature of the work carried out by the HGV drivers, and their working hours, he would have been surprised if any of them had travelled to work other than in their own car and Mr Keyes said that he would have been concerned about taking on as an employee a participant who indicated otherwise at interview.

***The Respondents' witness***

61. The only witness for the Respondents was Officer Karen Dalton, the officer responsible for issuing the 2013 Determination.

62. Since Officer Dalton's evidence is relevant solely to the question of whether or not the 2013 Determination was issued to best judgment, we need first to provide the background to that evidence in order to set it in context.

63. On 22 February 2017, Officer Dalton wrote to Mr Sweeney enclosing the 2013 Determination and explaining that the determination was being made for protective purposes because it would shortly become time–barred. In that letter, Officer Dalton noted that the determination was "not an indicator of the final settlement and will not be enforced until notice is given" but she did not set out the basis on which the determination had been calculated. It is common ground, however, that the 2013 Determination was in the amount of £3,353,520 and related to both the BTR (which is now settled) and the BSS.

64. After a response to that letter by Mr Peter Wilson, the representative of TBC, on behalf of TBC, on 14 March 2017, Officer Dalton sent an email to Mr Wilson on 22 March 2017. In that email, Officer Dalton explained the quantum of the 2013 Determination as follows:

"I can also advise that the Tax due for the 2012/13 year was calculated by comparing a period when each of the schemes were operated, against a period when each of the schemes weren't in operation. The figures obtained were then extrapolated to arrive at the amount detailed in the [2013 Determination]".

65. Following a request by Mr Wilson on behalf of TBC on 23 March 2017 to have the 2013 Determination reviewed, Officer CW Agg of the Respondents wrote to notify TBC of the results of his review on 19 June 2017. In that letter, Officer Agg said that:

(1) in relation to the BTR, the Respondents had calculated the amount of income tax due using information provided by BestEx as to the amount of deductions allowed and calculated the amount to be £1,901,058;

(2) in relation to the BSS, the Respondents had "estimated that the average difference in tax for 2012/13 is £72.93, and multiplying this by the 19,917 employees estimated to be involved gives an amount of tax at stake of £1,452,462"; and

(3) adding the 2 amounts above produced a total of £3,353,520, which was the amount set out in the 2013 Determination.

66. On 6 February 2023, Officer Dalton provided her first witness statement in relation to the proceedings. In paragraphs [143] to [152] of that statement, Officer Dalton described the methodology she had used to calculate the component of the aggregate amount set out in the 2013 Determination which was referable to the BSS as follows:

(1) she had compared a period when only the BSS was in operation (April 2015 to March 2016) with a period when neither the BSS nor the BTR was in operation (April 2016 to December 2016);

(2) the Respondents' systems showed that the tax returned in the earlier period was £32,644,447 whereas the tax returned in the later period was £29,222,510 and that "this computes to an additional £3,421,937 tax returned following cessation of the BSS scheme over a 9–month period";

(3) as she did not have a full year's worth of comparative data, she had chosen to use the 9–month period to give rise to a conservative estimate and she had also given TBC the benefit of the doubt as regards the calculation of the numbers of employees from time to time;

(4) using the difference of £3,421,937 described above and the average number of employees over the earlier period of 20,482, she had calculated that the average additional liability per worker if the BSS had not been operating was £167;

(5) she had calculated an average additional liability per worker because it wasn't possible to work out individual liabilities and because the average figure could then be used in each tax year that the BSS was operating;

(6) as she did not have the average number of employees for the tax years ending 5 April 2013 and 5 April 2014, she had used the lowest average number of employees that she did have, which was 19,917 in the tax year ending 5 April 2016, and treated that as being the average number of employees in the tax year ending 5 April 2013;

(7) multiplying £167 by 19,917 gave rise to a figure for the tax year ending 5 April 2013 of £3,326,139 and she had used this figure to inform the 2013 Determination;

(8) she noted that this figure was slightly different from the amount of £3,353,520 set out in the 2013 Determination "which I can only put down to applying a related income figure proportionately"; and

(9) she recalled that the above methodology had been checked and approved by senior managers at the time.

67. On 10 July 2023, Mr Sweeney provided his third witness statement in relation to the proceedings. In paragraphs [97] to [111] of that witness statement, Mr Sweeney pointed out a number of problems with the methodology described by Officer Dalton described in paragraph 66 above. In particular, he drew our attention to the following errors:

(1) Officer Dalton had calculated the difference described in paragraph 66(2) above the wrong way around. In fact, the amount of tax returned in the later period was lower than the amount of tax returned in the earlier period by £3,421,937;

(2) in any event, the amount used by Officer Dalton in respect of the period from April 2015 to March 2016 for the purposes of the comparison was incorrect – the income tax paid by TBC in that period was £13,305,000;

(3) the average number of employees on the BSS in the period from April 2015 to March 2016 was 2,818 and not 20,482;

(4) consequently, the average additional liability per worker if the BSS had not been operating of £167 was incorrect and it was, in any event, different from the average additional liability per worker of £72.93 described by Officer Agg in the review conclusion letter; and

(5) the amount of £3,326,139 calculated by Officer Dalton not only failed to match the amount of £3,353,520 set out in the 2013 Determination but was, in any event, different from the £1,452,462 which had been said to be attributable to the BSS by Officer Agg in

the review conclusion letter. The amount of £3,353,520 set out in the 2013 Determination was attributable to both the BTR and the BSS.

68. On 13 September 2024, a week before the start of the hearing and 14 months after Mr Sweeney's third witness statement, the Respondents applied to admit a further (third) witness statement for Officer Dalton. We exercised our discretion to admit that witness statement (but not its exhibits) for the reasons we describe in the Appendix to this decision.

69. In her third witness statement, Officer Dalton said as follows:

(1) she acknowledged that the figures in her first witness statement seemed confused;

(2) those figures had come from summary amounts which were set out in a note she had prepared previously and she had now revisited the detailed data and information set out in a contemporaneous spreadsheet which she had used to calculate the amount of the 2013 Determination;

(3) in fact, she had calculated the amount of the 2013 Determination as follows:

(a) as regards the BSS, she had compared 2 periods of 9 months – the 9–month period from April to December 2015 with the 9–month period from April to December 2016;

(b) £25,418,488 of income tax and NICs had been paid in respect of the earlier period, whereas £29,222,510 of income tax and NICs had been paid in respect of the later period;

(c) she had then divided the aggregate amount of income tax and NICs paid in respect of each period by the average number of employees for each tax year and this gave amounts of £1,241 of income tax and NICs per employee for the earlier period and £1,408 of income tax and NICs for the later period;

(d) the difference in those figures was £167 per employee, which is how she had calculated the additional amount of income tax and NICs which would have been paid by TBC but for implementing the BSS;

(e) as she did not have the average number of employees for the tax years ending 5 April 2013 and 5 April 2014, she had used the lowest average number of employees that she did have, which was 19,917 in the tax year ending 5 April 2016, and treated that as being the average number of employees in the tax year ending 5 April 2013;

(f) multiplying £167 by 19,917 gave rise to a figure of income tax and NICs for the tax year ending 5 April 2013 in respect of the BSS of £3,326,139;

(g) however, the 2013 Determination related to both the BTR and the BSS and she had therefore calculated the income tax and NICs in respect of the BTR as well as the BSS;

(h) she had done so by extrapolating figures from the fees paid to BestEx in respect of the BTR because BestEx had been paid a percentage of the TBC expenses in respect of the BTR;

(i) that came to a figure of income tax and NICs in respect of BTR of £4,353,424;

(j) this meant that the aggregate income tax and NICs in respect of both schemes for the tax year was £7,679,563 (£3,326,139 plus £4,353,424);

(k) the 2013 Determination related to both schemes but pertained solely to the portion of that figure which was income tax. Accordingly, she had multiplied the aggregate amount of £7,679,563 by the fraction 20/45.8 reflecting the fact that, in the relevant tax year, the rate of income tax was 20%, the rate of employee NICs was 12% and the rate of employer NICs was 13.8%; and

(l) this gave rise to the figure of £3,353,526.96 and that amount, rounded down to the nearest pound, was the amount shown in the 2013 Determination; and

(4) she recalled that the above methodology had been checked and approved by senior managers at the time.

70. We regret to say that we did not form a favourable impression of Officer Dalton as a witness. Leaving aside the contradictions between her initial explanation of the 2013 Determination in her email to Mr Wilson of 22 March 2017 and each of the 2 witness statements described above, we found her oral evidence to be vague, evasive and unilluminating. Having said that, the following were the relevant parts of her testimony insofar as it pertained to the question of best judgment:

(1) she accepted that:

(a) the methodology described in her email to Mr Wilson involved taking both the BTR and the BSS together and comparing a period when both schemes were operating with a period when neither scheme was operating; and

(b) that was a different methodology from the one described in her first and third witness statements, which involved calculating the income tax which was attributable to the BSS separately from calculating the income tax which was attributable to the BTR;

(2) she said that the explanation in her third witness statement was based on a contemporaneous document and that therefore that was the one which was the more accurate. The explanation in her email to Mr Wilson should be seen as an overview without detail but she had in fact calculated the tax liabilities in respect of the BSS separately from the tax liabilities in respect of the BTR;

(3) she accepted that her first witness statement contained a number of errors which had been corrected in her third witness statement. In particular, in her first witness statement:

(a) she had said that she had compared a 12–month period to a 9–month period when in fact she had compared 2 9–month periods;

(b) she had said that more tax had been paid by TBC in the later period than the earlier period when in fact the reverse was the case;

(c) she had said that the £167 per employee had been calculated by taking the difference between the aggregate tax amounts for the 2 periods and dividing that between the number of employees in the earlier period whereas in fact the £167 per employee was the difference between the figures per employee for each period;

(d) she had said that the £167 per employee related only to income tax in respect of the BSS whereas in fact the £167 per employee related to both income tax and NICs in respect of the BSS; and

(e) she had said that the figure of £3,326,139 which appeared in the first witness statement was the amount of income tax attributable to the BSS whereas in fact only 20/45.8 of that figure, being the fraction that the income tax rate in the relevant

tax year bore to the aggregate of the income tax and NICs rates, was the amount of income tax attributable to the BSS;

(4) she accepted that she could have tried to calculate the amount of the 2013 Determination by comparing the income tax and NICs paid in the tax year ending 5 April 2012, when neither the BTR nor the BSS was in existence, to the income tax and NICs paid in the tax year ending 5 April 2013, when both schemes were operating but said that she had not in fact considered doing so and that, if she had done so, she would have had to take into account other possible impacts on the figures, such as whether there might have been an increase in temporary workers as a result of the introduction of the schemes;

(5) she had not taken into account in doing her comparison between the 2 periods the potential impact of the introduction of the national living wage in April 2016 but it had always been open to TBC to respond to the 2013 Determination by challenging the quantum of the calculation on that or any other basis; and

(6) the team at the Respondents who were responsible for dealing with the dispensation were the specialists within the Respondents on travel and subsistence schemes and she had sent the present case to that team to consider revocation.

**FINDINGS OF FACT**

71. Based on the agreed facts and the evidence with which we were provided at the hearing, we make the following findings of fact in addition to the agreed facts:

***The dispensation***

(1) the dispensation was issued by the Respondents in the knowledge that the payments for subsistence and public transport expenses which were described in the dispensation were to be made in the context of a salary sacrifice arrangement. That was apparent from, inter alia, the terms of the FAQs, which Officer McDonald clearly read in the course of the correspondence with Mr Nolan that preceded the issue of the dispensation – see paragraph 49(9) above;

(2) the dispensation was issued by the Respondents on the basis that, although the payments for subsistence and public transport expenses which were described in the dispensation were not to be made on the usual basis – which is to say, a claim after the relevant expenses were incurred, followed by authorisation and payment – the same result would ensue as if that was the case because of the procedure for retrospective notification by a participant of changes to the information provided by the participant on registration, coupled with a rigorous auditing process, all as outlined by Mr Nolan to Officer McDonald in the correspondence which preceded the issue of the dispensation – see paragraphs 49(6) to 49(18) above;

***The participants' understanding***

(3) the participants understood that:

(a) the BSS involved a salary sacrifice, which is to say a reduction in a participant's gross pay in return for an entitlement to payments in respect of the participant's expenses;

(b) the amount of salary to be sacrificed was greater than the amount of the payments to be made in respect of expenses and that was because TBC was retaining monies to cover the administration of the scheme;

(c) despite that feature of the scheme, the participant would still be better off in after–tax terms because his or her sacrificed salary, had it been paid, would have

been subject to income tax and NICs, whereas the payments in respect of expenses were expected not to be so subject;

(d) the application of the NMW meant that not all entitlements which accrued to a participant in respect of expenses in a week could necessarily be paid in that week. If the NMW applied, then the excess entitlements would be carried forward to a week when the participant's gross salary was sufficient to allow for the entitlements to be paid; and

(e) a participant had to incur expenses in order to claim payments in respect of expenses and had to record those expenses on the expenses record sheet and retain receipts for production when required

– see paragraphs 60(3) and 60(4) above;

(4) the participants did not know:

(a) the full extent to which TBC was benefiting from operating the scheme. None of them was aware that the uplift in calculating the salary sacrifice was a fixed 25% of the payments in respect of expenses that were being made and some but not all of them were aware of the NICs saving which TBC was expecting to make by virtue of operating the scheme;

(b) of the details involved in the calculation of the overall carried forward pool of entitlements. As noted in paragraph 71(3)(d) above, they were aware of the fact that the application of the NMW cap might lead to a carrying forward of entitlements to future weeks but they were not aware of the de minimis limit, of the adjustments to the overall carried forward pool of entitlements to which audits gave rise or of the writing off of the overall carried forward pool of entitlements at the end of each tax year or when the participant ceased to be employed by TBC. Instead, they were simply provided in their payslips with the amount of the payment in respect of expenses which was the end result of that process;

(c) the results of an audit or of the impact of the audit on their overall carried forward pool of entitlements; and

(d) that there was a change made during the term of the BSS in the qualifying hours away from home which were needed to qualify for subsistence payments of a particular amount

– see paragraphs 49(31)(h)(iii), 49(37), 60(4) and 60(5) above;

(5) given the above:

(a) it would have been extremely difficult, if not impossible, for even the most financially–astute participant to know from time to time the precise extent of his or her overall carried forward pool of entitlements or whether the amount in respect of expenses set out on the participant's payslip had properly given effect to the procedure described in paragraphs 49(31)(k) and (l) above; and

(b) because the overall carried forward pool of entitlements, whether positive or negative, was reset at the end of each tax year and when a participant left TBC, a negative overall carried forward pool of entitlements at any such point meant that the relevant participant had effectively overclaimed expenses and ought to have notified the Respondents to that effect but the participant had no way of knowing that;

***The operation of the scheme***

(6) there was evidence in the Samples Documents that the basic elements of the scheme were not always administered appropriately. As noted in paragraph 52(1) to (6) above, certain participants were admitted to the scheme despite:

(a) failing to complete the registration declaration;

(b) indicating that their first assignments would be greater than 24 months; and

(c) completing the forms relevant to the BTR;

(7) turning to the manner in which the scheme gave rise to travel entitlements, the scheme operated on the basis that, unless TBC was notified to the contrary by the relevant participant in respect of any day:

(a) the participant went to work from his or her home address and returned from work to his or her home address on each working day; and

(b) the participant used a single mode of transport in order to travel to and from work, that being the single mode of transport set out on his or her registration form.

There were a number of problems with this approach.

First, the evidence shows that there were some occasions when a participant spent the night away from home and therefore made only 1 journey to or from work on a day he or she worked. In those circumstances, the system assumed that the relevant participant made 4 work–related journeys instead of the 2 work–related journeys that he or she had actually made, over the 2 days in question – see paragraphs 52(5) and 55(7)(c) above.

Secondly, there were occasions when 2 modes of transport were specified by the participant either on registration or pursuant to a subsequent notification to TBC and it is unclear how the system operated in such cases. For example, Mr Sweeney was unable to explain how a mode of transport which was expressed as "Lift (bus)" would have been treated under the scheme.

Thirdly, based on the evidence of Mr Keyes, at least so far as he was concerned, the information as to home address and mode of transport set out in the participant's registration form was not always reliable because a participant who said that he or she travelled to and from work from or to more than 1 address was told to put down on his or her registration form the address most commonly used and a participant who said that he or she used more than 1 mode of transport in order to travel to work was told to put down on his or her registration form the mode of transport most commonly used.

Fourthly, although neither Mr Tighe nor Mr Crocock could recall the possibility of multiple home addresses or multiple modes of transport ever being raised by a participant, we think that, particularly in the light of Mr Keyes's testimony, it is highly unlikely that, at the point of registration, not one of the participants registered with TBC through those branch managers would have been intending to travel to and from work from or to more than 1 address or to use more than 1 mode of transport to get to work and it is more likely that 1 or more of the relevant participants simply did not mention those matters to the relevant branch manager.

Fifthly, the system as a whole relied on retrospective notification to the contrary by the relevant participant and yet the evidence of the branch managers was that very few, if any, of the participants ever notified the company of circumstances where they had travelled to or from a client from or to an address other than the one recorded on his or

her registration form or travelled to work using a different mode of transport from the one recorded on his or her registration form.

Whilst we recognise that the average time that a participant worked for TBC was a relatively short one of between 13 and 15 weeks, and we have taken into account the evidence to the effect that participants who were HGV drivers were unlikely to have taken a lift to or from work because of their working hours, we consider that, on the balance of probabilities, it is highly unlikely that a participant failed to travel to work from his or her home address or vice versa as rarely as those situations were notified to TBC or that a participant failed to use the mode of transport set out on his or her registration form as rarely as they were notified to TBC and that it is more likely that a number of participants simply failed to notify TBC when this occurred. As such, we find as a fact that the system did not properly reflect ad hoc changes in a participant's overnight address or mode of transport from time to time, such as when the relevant participant might have stayed with a friend or partner on a particular night or had a lift to work from someone else or changed from a car to a motorcycle.

In making this point, we do not intend to cast doubt on the honesty of the participants. It is simply that human nature being what it is, it is highly likely that a participant might well have forgotten to make a retrospective notification that would deprive him or her of an entitlement. We note that this was the very reason why Officer McDonald was reluctant to agree to the system proposed by Mr Nolan in the correspondence leading to the issue of the dispensation – see, for example, the second paragraph of Officer McDonald's letter to Mr Nolan of 25 March 2011.

Sixthly, the system did not take into account possible diversions which the relevant participant might have made on the journey to and from work – for example, a journey to the shops or to see friends or to attend an event such as a football match. Although paragraphs 5.9 and 5.10 of Guidance 490 made it clear that some flexibility for privately–motivated detours was permitted, the system did not cater for those privately–related detours which were not permitted.

Given all of the points made in this paragraph 71(7), we find on the balance of probabilities that, on any one day that a participant worked:

> (i) unless there was direct evidence to the contrary in the Samples Documents, it was more likely than not that the participant went to work directly from the address recorded in the system and returned from work directly to that address on the same day, in both cases using the mode of transport recorded in the system; but
>
> (ii) even where there was no direct evidence to the contrary in the Samples Documents, there was a meaningful possibility that one or more of those details did not accord with reality and that the system failed to take that into account in calculating the participant's travel entitlements under the scheme for that day;

(8) the public transport entitlements under the scheme were calculated at a flat rate of £3.20 per day and not by reference to the expenses which the participant actually incurred, contrary to the express terms of the dispensation – see paragraph 49(31)(i) above. However, on the basis of Mr Sweeney's evidence to the effect that the rate of £3.20 per day was determined by analysing bus and tube rates across the country and fixing on an estimated amount which was conservative, we find on the balance of probabilities that, on any one day that a participant took public transport, it was likely

that the expenses incurred by the participant on the relevant day would have been at least equal to £3.20 although it was perfectly possible that they did not;

(9) turning to the manner in which the scheme gave rise to subsistence entitlements, the scheme was meant to operate on the basis that, unless TBC was notified to the contrary by the relevant participant in respect of any day, a participant who had said in his or her registration form that he or she expected to incur subsistence would receive an entitlement to subsistence on a day that he or she worked for 5 hours or more and a participant who had said in his or her registration form that he or she did not expect to incur subsistence would receive no entitlement to subsistence.

However, the evidence shows that this is not how the scheme operated in practice so far as subsistence entitlements were concerned because the page on the form which indicated whether or not the participant was expecting to incur subsistence expenses on days that he or she worked was not sent to head office, so that head office, who had responsibility for calculating the payments to be made for subsistence under the BSS, could not know whether the relevant participant expected to incur subsistence expenses. As a result, the scheme operated on the assumption that every participant was entitled to subsistence unless he or she notified TBC to the contrary – see paragraphs 49(31)(d) and 55(8)(d) above.

We therefore find as a fact that, regardless of what a participant had said about subsistence in his or her registration form, that participant was given an entitlement to subsistence for each day in which he or she worked for 5 hours or more unless the relevant participant notified TBC to the contrary.

As for those notifications, the evidence of the branch managers was that very few, if any, of the participants ever notified the company of circumstances where they had not incurred subsistence expenses. Whilst we recognise that the average time that a participant worked for TBC was a relatively short one of between 13 and 15 weeks, we consider that, on the balance of probabilities, it is highly unlikely that a participant failed to incur subsistence expenses on any day as rarely as such failures were notified to TBC and that it is more likely that a number of participants simply failed to notify TBC when this occurred.

As such, taking both of the above points together, not only did the system wrongly assume that, no matter what a participant had said about subsistence in his or her registration form, the relevant participant would be incurring subsistence expenses on each day that he or she worked unless the participant notified TBC to the contrary but the system also failed properly to reflect circumstances where a participant who had said that he or she expected to incur subsistence expenses did not actually do so.

We accept that most, if not all, of the participants would have consumed food and/or drink during their working hours when they were away from home for 5 hours or more. However, a more difficult question to determine is whether, on any particular working day, that food and/or drink was purchased by way of incurring a subsistence expense or instead brought from home.

The evidence on that question was mixed.

On the one hand, Mr Sweeney said that participants were more likely to have incurred subsistence expenses in acquiring food and/or drink than to take their own food and/or drink, Mr Tighe said that he could not recall any participant's saying "no" to the subsistence expense question on the registration form and Mr Bramwells testified that he always incurred subsistence expenses on the days he worked.

On the other hand, Mr Crocock said that most participants would incur subsistence expenses but that there were cases where a participant had said at the registration stage that he or she did not incur subsistence expenses and Ms Lawrence testified that she did not always incur subsistence expenses on the days she worked. There are also examples in the Samples Documents of a participant's saying "no" to that question – see paragraph 52(1) above – and that suggests to us that, despite the experience of Mr Tighe, there will have been other participants who answered that question in the negative.

Taking all of the above evidence into account, we find on the balance of probabilities that, on any one day that a participant worked:

(a) unless there was direct evidence to the contrary in the Samples Documents, it was more likely than not that a participant who had answered "yes" to the subsistence question in his or her registration form incurred subsistence expenses on that day; but

(b) even where there was no direct evidence to the contrary in the Samples Documents, there was a meaningful possibility that that was not the case.

For this purpose, we consider that answering "no" to the subsistence question in the participant's registration form or failing to check the subsistence box in relation to a particular day on the participant's ERF amounts to direct evidence to the contrary. Accordingly, despite the submissions to the contrary on behalf of TBC, we find that it is not more likely than not that a participant who answered "no" to the subsistence question in his or her registration form nevertheless incurred subsistence expenses on any day or that a participant who failed to check the subsistence box in relation to a particular day on his or her ERF nevertheless incurred subsistence expenses on the relevant day;

(10) there were other shortcomings in the way in which the BSS operated in relation to subsistence entitlements. These were as follows:

(a) the software used to calculate the time away from home in the Staff+ Report calculated those hours by reference to journey times to and from the relevant participant's workplace using the Michelin software journey times for travelling by car using the applicable speed limits. That was the case even if the relevant participant had said that he or she would be travelling by an alternative mode of transport or walking and without regard to the time of day at which the journey occurred – see paragraph 49(31)(f)(ii) above. This would potentially have led to anomalies in the amounts of subsistence calculated; and

(b) the software used to calculate the Staff+ Report did not take into account unpaid break times, which meant that, in those cases where the relevant participant had taken an unpaid break during working hours which would have moved the relevant participant above one of the thresholds for a £5 or £10 subsistence payment, the Staff+ Report did not record that. This potentially led to the possibility of an underpayment for subsistence. Although an underpayment was potentially subject to adjustment following an audit, it was not available to participants who failed to return an ERF in the audit – see paragraph 49(31)(h)(i) above;

***The audit process***

(11) the audit process was fundamentally flawed in that:

(a) audits did not begin until October 2013, which was 18 months after the start of the BSS. Prior to that date, there were no audits and merely spot checks when the system threw up an unusual entry;

(b) only around 25% of participants ever replied to an audit request, which meant that the expenses entitlements of some 75% of the participants remained unaudited;

(c) the audit process did not always identify errors in relation to travel entitlements. There were 2 examples in the Samples Documents where a participant received entitlements in respect of the wrong mode of transport – see paragraph 52(4) above;

(d) the audit process frequently did not identify the correct amount of subsistence entitlements, as demonstrated by the fact that:

(i) there were 9 examples in the Samples Documents – relating to 8 participants – where a subsistence entitlement was given even though the relevant participant had stated in his or her registration form that he or she did not expect to incur subsistence expenses – see paragraph 52(1) above. This was not surprising given the lacuna described in paragraph 71(9) above;

(ii) although there were 2 examples in the Samples Documents where a participant who had never indicated on his or her ERFs that he or she had incurred subsistence expenses on a day he or she worked had not been given a subsistence entitlement, there were 32 examples in the Samples Documents – relating to 30 participants – where a subsistence entitlement had been given on a particular day even though the relevant participant had not claimed in his or her ERF actually to have incurred subsistence expenses on that day. Given that the Samples Documents contained only 47 examples of ERFs' being submitted on audit, that amounts to 68% of the examples in the Samples Documents – see paragraphs 52(7)(c) and (d) above;

(iii) the adjustments which were made on audit were primarily based on 3 factors as follows:

(A) whether or not the subsistence entitlement which had been given to the relevant participant reflected the correct amount of hours away from home that the relevant participant had worked based on the timesheets, including unpaid break times, and the journey time calculated by the Michelin software;

(B) by reference to the participant's home address and the client's address; and

(C) whether there were inconsistencies between the days worked as recorded by the participant in his or her ERF and the days worked as recorded by the client in the timesheet. In that case, even though no adjustment was made by reference to any such inconsistencies to the relevant participant's mileage entitlements, the relevant participant's subsistence entitlements were clawed back if the number of days which he or she had recorded as travelling to work in his or her ERF was fewer than the number of days he or she had worked as recorded in the timesheets.

Consequently, a participant falling within paragraphs 71(11)(c)(i) and (ii) above was sometimes given an increase in subsistence entitlement on audit by reference solely to the factors set out in this paragraph 71(11)(c)(iii) – see paragraphs 52(8) and 52(9) above;

(e) despite TBC's having told the participants when they joined the scheme that they needed to keep receipts for expenses in case such receipts were requested by TBC or the Respondents, the language used in the ERF did not require participants to include receipts when submitting their ERFs and there were 16 examples in the Samples Documents where no penalty was imposed on participants who failed to provide receipts with their ERFs – see paragraph 52(10) above;

(f) the penalty for failing to respond to an audit request was nominal. We say that because:

(i) first, in that case, no steps were taken to claw back past payments under the scheme – the only penalty was prospective in nature;

(ii) secondly, the only penalty was to remove the participant from the subsistence element of the scheme going forward. As regards mileage and public transport entitlements, there was no penalty either prospectively or retrospectively. Taken together with the point made in paragraph 71(11)(f)(i) above, this meant that, even if the relevant participant failed to respond to the initial audit request and the subsequent reminders, no steps were taken by TBC either to claw back past mileage, subsistence or public transport entitlements or to stop future mileage or public transport entitlements;

(iii) thirdly, the participant was allowed to rejoin the subsistence element of the scheme if the participant responded to future audit requests; and

(iv) fourthly, there is evidence to suggest that the audit system did not always work perfectly given that Mr Williams was sent 4 materially–identical letters threatening his removal from the subsistence element of the scheme without his apparently being removed; and

(g) given that the average period of employment of a participant with TBC was between 13 and 15 weeks, an audit process with no retrospective sanction was largely toothless because the participant would often have moved on by the time that the prospective penalty in relation to the subsistence element of the scheme kicked in.

**THE ISSUES**

## Introduction

72. Now that we have recorded the facts which are relevant to our decision, we will briefly summarise the issues between the parties.

73. The Respondents maintain that:

(1) TBC should have withheld and accounted for income tax and NICs from each of the three categories of payments set out in paragraph 4 above; and

(2) the Respondents have acted appropriately in refusing to make a Regulation 72 Direction in relation to any of the tax years to which the Regulation 72 Appeal relates.

This gives rise to 6 areas of dispute between the parties which we will summarise briefly.

74. Before doing so, there is one overarching point which we should make by way of introduction to our analysis of the issues. This is that, in addressing the 6 issues, we will necessarily deal with each of the 3 categories of entitlement as giving rise to distinct and separately–identifiable payments to the relevant participant. We will do that because each of the categories gives rise to different issues from the tax perspective. It is therefore necessary

address the issues on that basis and that was how the parties framed their submissions to us at the hearing.

75. However, the reality is a little more complicated than that because of the way in which the scheme as a whole was implemented, as explained above. The effect of operating a single overall carried forward pool of entitlements and then making a single payment under the scheme each week is that identifying the extent to which a particular category of entitlement was reflected in the payment which was made under the scheme in a particular week is not necessarily a straightforward task. However, that is an issue which is best deferred until the question of quantum falls to be addressed. For present purposes, we will refer in the analysis that follows to payments falling within a particular category as if the nature of each payment that was made under the scheme was readily identifiable by reference to its constituent entitlements.

**Issue One**

76. The first area of dispute between the parties – which applies to all 3 categories of payment – arises as a result of the Respondents' contention that there was no valid salary sacrifice as a matter of contract law. The Respondents do not dispute that there was a valid contract between TBC and each participant but they say that that contract did not contain valid provisions to the effect that the participant would give up salary in return for the payments in question because the terms on which that was to occur were too uncertain to be binding on the parties.

77. In response, TBC submits that the terms in question were sufficiently clear to mean that there was a valid salary sacrifice as a matter of contract law.

78. In this decision, we will refer to this issue as "Issue One".

**Issue Two**

79. The second area of dispute between the parties – which also applies to all 3 categories of payment – arises as a result of the Respondents' contention that, even if there was a valid salary sacrifice as a matter of contract law, the payments in question were what the Respondents call in their published guidance free–standing "round sum allowances", taxable as earnings under Section 62 of the ITEPA and Section 3 of the SSCBA, because they were made regardless of whether the mileage or expenses to which they purportedly related were actually incurred. The Respondents say that, in effect, each payment was not intended to be a genuine estimate of the expense to which it purported to relate, as described by Walton J in *Donnelly v Williamson* [1982] STC 88 at 97 – 98 and did not reveal a genuine endeavour to produce an equivalence between the relevant payment and the expenditure, as described by Etherton LJ in *Cheshire Employer and Skills Development Limited v The Commissioners for Her Majesty's Revenue and Customs* [2012] EWCA Civ 1429 ("*Cheshire*") at paragraphs [44] to [59].

80. In response, TBC submit that there was a clear intention on its part to make payments to participants only in circumstances where the mileage or expenses in question had actually been incurred. There was thus a clear causal link between the mileage or expenses in question and the payments made to the participants and the payments to the participants were therefore not round sum allowances.

81. In this decision, we will refer to this issue as "Issue Two".

**Introduction to Issue Three and Issue Four**

82. It is common ground that, if the payments in question were not round sum allowances, then they will still have given rise to an obligation on TBC to withhold and account for income tax and NICs unless:

(1) in the case of a payment in respect of mileage, it related to mileage that was actually incurred (so that the exemption in Section 229 of the ITEPA applied); and

(2) in the case of a payment in respect of subsistence or public transport expenses:

(a) it related to subsistence expenses or public transport expenses that were actually incurred; and

(b) it fell within the terms of the dispensation.

83. This leads naturally to the third and fourth issues between the parties.

**Issue Three**

84. The third issue – which again applies to all 3 categories of payment – concerns how to determine whether payments in respect of mileage related to mileage that was actually incurred and how to determine whether payments in respect of subsistence or public transport expenses related to an expense of the relevant category that was actually incurred. The Respondents say that, because the system for determining the payments which were made was fundamentally flawed:

(1) the onus is on TBC to establish in the case of each payment that the payment related to mileage or an expense of the relevant category that was actually incurred; and

(2) it is not open to TBC to say that:

(a) the circumstances in which such a payment did not relate to mileage or an expense of the relevant category that was actually incurred were so limited that they can be disregarded as de minimis; or

(b) we should find, based on the evidence, that a specified percentage of the payments so made falling within a particular category did relate to mileage or an expense of the relevant category that was actually incurred.

85. In response, TBC submits that the evidence with which we have been presented is sufficient for us to find that:

(1) all payments in respect of mileage or public transport expenses (apart from a number of payments that was de minimis) related to mileage or public transport expenses that were actually incurred; and

(2) 75% of all payments in respect of subsistence expenses related to subsistence expenses that were actually incurred.

86. In this decision, we will refer to this issue as "Issue Three".

**Issue Four**

87. The fourth issue concerns whether, in relation to a payment in respect of subsistence or public transport, even if:

(1) the payment was made in return for a valid salary sacrifice as a matter of contract law;

(2) the payment was not a round sum allowance; and

(3) the payment related to a subsistence expense or public transport expense that was actually incurred,

it fell within the terms of the dispensation. The Respondents say that those payments did not fall within the terms of the dispensation because the payments were not made in accordance

with its terms, as those terms should be construed in the light of the correspondence between Mr Nolan and Officer McDonald prior to the issue of the dispensation.

88. In response, TBC submits that, except to the extent that a payment in respect of public transport expenses on any day related to public transport expenses that were actually incurred on that day of less than £3.20, in which case the amount by which £3.20 exceeded the expenses actually incurred fell outside the terms of the dispensation, the payments do fall within the terms of the dispensation.

89. In this decision, we will refer to this issue as "Issue Four".

**Issue Five**

90. The next area of dispute between the parties arises as a result of TBC's contention that, even if the Respondents are entitled to succeed on any of the above grounds so that TBC should have withheld and accounted for income tax and NICs in respect of the mileage and/or expenses payments, the Respondents should be directed to issue a Regulation 72 Direction in respect of the income tax payable in each of the tax years ending 5 April 2013, 5 April 2014 and 5 April 2015 on the basis that:

(1) TBC took reasonable care to comply with the PAYE Regulations in the relevant tax year; and

(2) the failure to withhold and account for the income tax was due to an error made in good faith.

91. In response, the Respondents submit that, on the facts, TBC did not take reasonable care to comply with the PAYE Regulations in any of the tax years described above so that, even if its failure to withhold and account for the income tax was due to an error made in good faith, it is not entitled to a Regulation 72 Direction in respect of the income tax payable in any such tax year.

92. In this decision, we will refer to this issue as "Issue Five".

**Issue Six**

93. The final area of dispute between the parties arises as a result of TBC's contention that the 2013 Determination was not issued to the best of the Respondents' judgment, as was required by Regulation 80(2) of the PAYE Regulations and that therefore we should hold that the 2013 Determination was invalid.

94. The Respondents accept that, if the 2013 Determination was not issued to the best of their judgment, then the FTT does have the power in appropriate circumstances to determine that the 2013 Determination was invalid. However, the Respondents submit that the 2013 Determination was issued to the best of their judgment.

95. In this decision, we will refer to this issue as "Issue Six".

96. As regards Issue Six, for the reasons which we set out in detail in paragraphs 205 to 213 below, we do not think that we can determine that issue definitively without also addressing the question of quantum. Since the parties have agreed that this is to be a decision in principle and that questions of quantum are to be deferred to a later stage in the proceedings, we have set out in the section of this decision which addresses Issue Six our preliminary view on the issue but without reaching a final conclusion in relation to it.

**PROCEDURAL MATTERS**

97. Before turning to the issues described above, we should mention that, at the start of the hearing, we were required to deal with a number of procedural disputes between the parties as a result of late applications by the Respondents to amend the SOC and to adduce additional

witness evidence. We have described those procedural disputes, and our decisions in relation to them, in further detail in the Appendix to this decision.

98. However, we should record that, as a result of the applications, we necessarily spent a large part of the allocated reading day for the hearing considering the submissions of the parties in relation to the applications and then spent the entirety of the first day of the hearing listening to oral argument on them. It is regrettable that the Respondents chose to make so many changes to their case and to apply to adduce additional witness evidence as late as they did. It was unfair to TBC and its representatives and it inevitably disrupted our preparation for the hearing.

**ISSUE ONE – SALARY SACRIFICE AS A VALID CONTRACTUAL TERM**

## The arguments of the parties

99. It was common ground that the contractual bargain between the parties included the terms of the FAQs.

100. However, Mr Vallat, on behalf of the Respondents, submitted that there was no binding agreement between TBC and each participant to the effect that the participant would sacrifice part of his or her salary in return for payments under the scheme in respect of mileage, subsistence expenses and public transport expenses. In support of that proposition, Mr Vallat said that:

(1) the true bargain between the parties was simply that part of the participant's salary would be re–labelled as payments under the scheme with a consequent increase in the participant's after–tax pay;

(2) neither the written terms which were provided to the participants nor the oral discussions between the branch employees and the participants at the registration stage gave the participants access to the details of the scheme and therefore the precise terms on which the salary sacrifice was to be made were not understood by the participants. In particular, the participants were unaware of the precise relationship between the payments under the scheme and the amount of salary to be sacrificed or the basis on which the overall carried forward pool of entitlements worked – for example, the de minimis limit, the way in which the NMW cap operated, the adjustments on audit and the write–off at the end of each tax year and when the participant ceased to be employed by TBC. As such, the terms of the salary sacrifice were too vague to be valid and binding;

(3) in that respect, Mr Vallat referred us to the 35th edition of Chitty on contracts ("Chitty") which said as follows at paragraphs 4–222 and 4–223:

"4 – 222 An agreement may satisfy the requirement of contractual intention yet be too vague to enforce. Thus, vagueness or uncertainty may be a ground for concluding that the parties had never reached agreement at all. In *Dhanani v Crasnianski* Ramsay J held that an agreement to set up a private equity fund satisfied the requirement of contractual intention but nevertheless lacked contractual force because it was "in essence an agreement to agree" on terms which were "essential for such an agreement to be enforced" and "[w]ithout such further agreement the fund could not be set up", there being "no objective criteria" by which the outstanding points could be resolved.

4 – 223 While the issues of contractual intention and vagueness are conceptually distinct, they may overlap in borderline cases; "the more vague and uncertain an agreement is, the less likely it is that the parties intended it to be legally binding". The question whether an agreement exists will depend on the degree of vagueness, and on whether the vagueness can be resolved, e.g. by applying the standard of reasonableness. In one case "the absence of any intention to create legal relations" was said to have been a ground for holding that no agreement ever came into existence. Thus,

contractual intention may be negatived on the ground of vagueness where the claim is based, not on an express agreement, but on one alleged to be implied from conduct";

(4) Mr Vallat also referred us to Chitty at paragraph 4 – 186, which expressed similar views, referring to the decisions in, inter alia, *G Scammell & Nephew Limited v Ouston* [1941] AC 251 ("*Scammell*"), *Blue v Ashley* [2017] EWHC 1928 (Comm), *Kyte v The Commissioners for Her Majesty's Revenue and Customs* [2018] EWHC 1146 (Ch), *George v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 509 (TC) and *Broomhead v National Westminster Bank plc* [2018] EWHC 1574 (Ch). In each of those cases, a contractual term was held to be too vague to be contractually binding; and

(5) finally, Mr Vallat reminded us that Mr Bramwells' understanding of the BSS was that it was not a contract and was merely voluntary and of the reference in the FAQs to the effect that the scheme was a "non–contractual arrangement".

101. In response, Mr Nawbatt and Mr Stone, on behalf of TBC, submitted that the mere fact that participants were unaware of a number of details in relation to the operation of the BSS did not mean that the term of the contract between each participant and TBC which provided for the participant to sacrifice salary in return for payments under the scheme in respect of mileage, subsistence expenses and public transport expenses was not contractually binding. Relying on the Court of Appeal decision in *Openwork Limited v Alessandro Forte* [2018] EWCA Civ 783 ("*Openwork*"), and the cases cited in *Openwork*, they said that those authorities showed that a court should try if at all possible to give effect to a term which the parties to the contract intended to be legally binding, even if the contract was silent as to some details.

**Discussion**

102. Whilst we agree with Mr Vallat that there are circumstances in which a term in a contract can be too vague to be contractually binding, we do not think that the circumstances of this case fall within that category. It is apparent from the authorities that a contractual term which the parties intend to be contractually binding and whose overall effect is explicit but whose detailed terms are incomplete should be given effect by the courts.

103. In *Openwork,* the Court of Appeal considered whether a provision in a contract that provided for a clawback of commission was enforceable, notwithstanding the fact that the provision did not contain an express formula for calculating the clawback. In concluding that it was, the Court of Appeal referred to the authorities stipulating that courts should strive to give some meaning to contractual clauses agreed by the parties if it is at all possible to do so.

104. For example, in *WN Hillas & Co Limited v Arcos Limited* (1932) 147 LT 503 ("*Hillas*"), the House of Lords upheld the enforceability of an option to buy standards of softwood timber even though the option did not contain an option exercise price and there was no specification as to the type or quality of the timber. In so doing, Lord Wright said as follows:

"But it is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion: modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the Court to construe such documents fairly and broadly, without being too astute or subtle in finding defects, but, on the contrary, the Court should seek to apply the old maxim of English law, 'verba ita sunt intelligenda ut res magis valeat quam pereat.' [words are to be understood such that the subject matter may be more effective than wasted]. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is just and reasonable to be ascertained by the Court as matter of machinery where the contractual intention is clear but the contract is silent on some detail. Thus, in contracts for

future performance over a period, the parties may neither be able nor desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain: with that implication in reserve they are neither incomplete nor uncertain. As obvious illustrations I may refer to such matters as prices or times of delivery in contracts for the sale of goods, or times for loading or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced, if the fair meaning of the parties can be extracted."

105. Later, he added this:

"Such matters may require, as the performance of the contract proceeds, some consultation and even concessions between the sellers and the buyers, but there is no uncertainty involved because, if there eventually emerge differences between the parties, the standard of what is reasonable can, in the last resort, be applied by the law, which thus by ascertaining exact dates makes precise what the parties in the contract have deliberately left undefined. Hence in view of this legal machinery id certum est quod certum reddi potest … [that is sufficiently certain which is made certain]".

106. In *Openwork,* the Court of Appeal referred to:

(1) the dicta of Lord Wright in *Scammell* to the effect that a court "will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation. Difficulty is not synonymous with ambiguity as long as definite meaning can be extracted";

(2) the observation of Leggatt J (as he then was) in *Astor Management AG and anor v Antalaya Mining Plc and anor* [2017] EWHC Comm ("*Astor*") to the effect that holding that a clause is too uncertain to be enforceable is a last resort; and

(3) statements to similar effect in *Petromec Inc v Petroleo Brasileiro SA Petrobas* [2005] EWCA Civ 891 at paragraph [121], *Whitecap Leisure Limited v John H Rundall Limited* [2008] EWCA Civ 429 at paragraph [21] and *Durham Tees Valley Airport v Bmibaby* [2010] EWCA Civ 485 at paragraph [88].

107. Applying the principles set out above in the present case, we think that there can be little doubt that both TBC and the participants intended the contract between them to include the salary sacrifice. We say that notwithstanding the view expressed by Mr Bramwells in his testimony to the effect that the salary sacrifice was not contractually binding. We think that that view flies in the face of all the other evidence with which we have been provided apart from the statement in the FAQs to the effect that the scheme was a "non–contractual arrangement" and, in our view, that statement should be construed, in context, as saying no more than that TBC reserved the right to terminate the scheme without facing a claim from participants to the effect that it was not entitled to do so. Indeed, the FAQs stated that, if a participant chose to opt out of the BSS at a later date, that would "constitute a variation to your contract" and that could hardly be the case if participation in the scheme, and the salary sacrifice which that necessarily entailed, were not intended to be contractually binding.

108. We agree that the participants were not made aware of the detailed terms on which the salary sacrifice would operate but that is no different from the clawback provision in *Openwork* or the option to buy standards in *Hillas* and, in both cases, the relevant court considered that the relevant provision should be upheld and sought to give effect to its terms. In this case, it was apparent from the written terms of the contractual documentation that the amount of salary that each participant would be required to sacrifice would be greater than the amount of the payment which the participant would receive in respect of mileage, subsistence expenses or

public transport expenses and that an entitlement in respect of mileage, subsistence expenses or public transport expenses would be carried forward in circumstances where payment of that entitlement and the consequent adjustment to salary would take the participant below the NMW.

109. It is possible that, had a court been asked to resolve a contractual dispute between TBC and a participant as to a point of detail such as whether or not TBC was entitled to apply a de minimis in calculating the payment to be made in any week in respect of a participant's entitlements or entitled to write off the overall carried forward pool of entitlements at a particular time, the court might have had difficulties in determining whether or not those were part of the terms on which the salary sacrifice was agreed. However, to quote Lord Wright in *Scammell* and Leggatt J in *Astor*, those are simply difficulties in interpreting the relevant terms. In this case, we do not have to consider the answers to those questions for the simple reason that there never was a dispute between the parties in relation to the terms of the salary sacrifice. Those difficulties in relation to the details do not mean that the salary sacrifice as a whole was too vague to be a valid and binding contractual term.

110. For the reasons set out above, we have concluded that the terms of the contract between TBC and each participant relating to the salary sacrifice were valid and therefore that TBC succeeds in relation to Issue One.

**ISSUE TWO – ROUND SUM ALLOWANCES**

## The arguments of the parties

111. Mr Vallat submitted that all of the payments made to participants under the BSS were round sum allowances, in respect of which TBC was required to withhold and account for income tax and NICs, because the inadequacy of the checks relating to each of the 3 categories of payment meant that there was an insufficient causal link between, on the one hand, the incurring of the mileage, subsistence expenses or public transport expenses which were necessary to give rise to payments under the scheme and, on the other hand, the payments in question. The absence of any such causal link meant that, even if, in a particular case, the relevant mileage or expenses had actually been incurred, the payment in question would still be a round sum allowance and fall outside the exemption or dispensation, as the case may be. In other words, it was not sufficient for there merely to be a correlation in a particular case between mileage or expenses that were actually incurred and the payment in question. Instead, there needed to be a causal link between them.

112. In this regard, Mr Vallat distinguished between, on the one hand, a system like the present one which was fundamentally broken in terms of achieving that correlation and, on the other hand, a human error made in the course of operating a system which was fit for purpose. He said that, in the latter case, the necessary causal link did exist despite the human error. Whilst the human error might lead to the making of a payment which should not have been made – and that particular payment would then be incapable of falling within an exemption or a dispensation – that was a question to be addressed when considering whether that particular payment related to mileage or expenses that had actually been incurred (in other words, in the present case, at the stage when Issue Three fell to be considered). The mere fact that human error had led to that particular payment's being incapable of falling within an exemption or dispensation would not invalidate the system as a whole and thus the payment in question, and the other payments made under the system, would not be round sum allowances.

113. Mr Vallat went on to say that the necessary causal link between mileage or expenses that had actually been incurred and the payments in question was not merely a matter of intention. By way of example, he referred to an employer which intended to make payments in respect of mileage or expenses that had actually been incurred but simply did not ask the employees in

question whether the relevant mileage or expenses had actually been incurred before making the payments to the employees. In that case, the intention to make payments in respect of mileage or expenses that had actually been incurred would be present but the payments would nevertheless be round sum allowances because the necessary causal link would not exist.

114. In response, Mr Stone said that the legislation specified that it applied to a payment "for" mileage or a payment "in respect of" expenses incurred and thus there was no place in the statute for the sort of metaphysical distinction which Mr Vallat was seeking to draw. He said that, at this stage of the analysis, which is to say Issue Two, all that mattered was intention and that there was no reason to distinguish between, on the one hand, human error in implementing an effective system and, on the other hand, a defective system. He accepted that, when it came to Issue Three, it would be necessary to address the question of whether or not the mileage or expenses in respect of which the relevant payments had been made had actually been incurred. A payment made for mileage or an expense that had not actually been incurred could not fall within the exemption or the dispensation but that was a failure at the stage of considering Issue Three. All that mattered at the stage of considering Issue Two was the intention with which the payments had been made and, once a payment was made with the requisite intention, Issue Two should be determined in TBC's favour regardless of whether the failure of that payment to relate to mileage or expenses that were actually incurred was down to human error within an effective system or down to a defective system.

115. The problem with Mr Vallat's approach was that a system which was defective because it failed to identify that a relatively small number of payments had been made in circumstances where the mileage or expenses had not actually been incurred would lead all of the payments that had been made under the system to be characterised as round sum allowances. That could not be the right approach.

116. Mr Stone said that, in this case, notwithstanding the errors in the system, TBC's intention in making payments under the scheme was clearly to confine those payments to circumstances where the relevant mileage or expenses had actually been incurred. That could be seen in the fact that:

(1) mileage payments had been determined by reference to the relevant participant's home address and the shortest route between that address and the client using the Michelin software;

(2) mileage and public transport payments had been determined by reference to days on which the participant was reported to have worked by the client on the timesheet;

(3) in the FAQs, it had been made clear to participants that they could claim subsistence payments only in relation to days on which they incurred subsistence expenses and the evidence of the managers was that they had said the same to the participants at registration;

(4) Mr Sweeney had testified that, as a result of each audit, TBC had taken 600 to 700 participants off the subsistence element of the scheme. An example of this was Philip Jackson (2014/15 Samples pages 567 to 594);

(5) there were examples in the Samples Documents of a participant's being subjected to a downward adjustment in his or her subsistence payments on a day when the participant had reported in his or her ERF that he or she had not worked – see Mark Smith (2014/15 Samples at pages 22 to 61);

(6) there were examples in the Samples Documents of a participant's being subjected to a downward adjustment in his or her subsistence payments on a day when the

participant had not checked the box for subsistence in his or her ERF – see Carl Southerton (2014/15 Samples pages 888 to 916);

(7) there was also the fact that, whereas no downward adjustment was made to the mileage payments in circumstances where the participant had recorded travelling to work on fewer days than the client had recorded, a downward adjustment was made .to the participant's subsistence payments in those circumstances, reflecting the fact that the participant could not have incurred subsistence on a day on which he or she had not recorded travelling to work;

(8) Mr Sweeney had testified that TBC had not operated the BSR so far as it pertained to the breakfast rate or the late dinner rate because he had considered that it would be more difficult to administer and check those meals, thereby showing how seriously the company was taking the requirement to make subsistence payments only in the appropriate circumstances; and

(9) the same intention could be seen in the fact that TBC had decided in April 2015 to adopt higher thresholds for making the £5 and £10 BSR subsistence payments.

117. Moreover, given the evidence of Mr Sweeney to the effect that most participants would have incurred subsistence expenses on the days they worked, it should not be assumed that a participant who did not check the subsistence box on his or her ERF had not incurred subsistence expenses. It was more likely in such cases that the relevant participant had simply made an error in completing his or her ERF.

118. In this case, at least in the case of payments in respect of mileage, it was apparent that a limited number of system errors had led to an insignificant number of cases where payments had been made incorrectly. However, even where system errors potentially led to a greater number of cases in which payments had been made incorrectly, the clear intention was that payments should be made only in circumstances where the relevant mileage or expenses had actually been incurred. It followed that the right approach was not to treat all of the relevant payments as round sum allowances but instead to identify those cases in which the system had led to payments' being made in the absence of mileage or expenses that were actually incurred and subject just those payments to income tax and NICs.

**Discussion**

***The law***

119. We should start our analysis by saying that we do not agree with Mr Vallat's propositions to the effect that:

(1) intention has no part to play in determining this issue and that, instead, it is simply a matter of finding what Mr Vallat termed a causal link between the payments made to the participants under the scheme and mileage or expenses that were actually incurred; and

(2) in determining whether or not there is such a causal link, a human error in the course of operating a system which is generally effective in identifying the circumstances in which mileage or expenses have actually been incurred does not break the causal link whereas a system which is defective in identifying those circumstances does do so.

120. Having said that, nor do we agree entirely with the position advanced by Mr Stone to the effect that this issue can be determined solely by reference to the stated intention of the employer in making the payments.

121. Instead, we think that the position is a little more nuanced than that and lies somewhere between those 2 positions.

122. We agree with Mr Stone that the starting point in determining whether or not payments are round sum allowances is to ascertain whether the intention of the employer in making the relevant payments was to do so only in circumstances where mileage or expenses have actually been incurred or instead to do so regardless of whether those circumstances existed. The latter would clearly be round sum allowances whereas the former would not.

123. However, we do not think that a stated intention to make payments only in circumstances where mileage or expenses have actually been incurred is enough in and of itself to avoid characterisation of the payments as round sum allowances if the evidence suggests that the stated intention was carried out so recklessly or negligently that the stated intention should be discredited. In other words, it is possible to conceive of circumstances where, even if the employer has said that its intention was to make payments only in circumstances where mileage or expenses have actually been incurred, that intention has been carried out so haphazardly that the stated intention is insufficient. Putting it another way, it is not enough for the employer to say that its intention was to make payments only in circumstances where mileage or expenses were actually incurred if the actions which the employer has taken in ostensibly giving effect to that intention casts doubt on that assertion. In effect, the intention needs be evidenced by the actions taken. To that extent we agree with Mr Vallat.

124. Where we do not agree with Mr Vallat is that we do not see why the dividing line in that regard is to be drawn between, on the one hand, a human error in the course of operating a system which is generally effective in identifying the circumstances in which mileage or expenses have actually been incurred and, on the other hand, a system which is defective in identifying those circumstances. We say that because a defective system can be just as much the result of human error as a mistake made in the course of operating an effective system. It cannot simply be the case that one type of human error is acceptable in this context whereas another is not.

125. Instead, we think that, in the case of a defective system, one needs to identify and examine the nature and extent of the defects in the system to ascertain whether they are so egregious as to suggest that, viewed in objective terms, the employer really did not care whether the payments in question were made only in circumstances where mileage or expenses were actually incurred. One such case was the example provided by Mr Vallat at the hearing – an employer who does not ask the relevant employees whether the relevant mileage or expenses were actually incurred before making payments to the employees.

126. In contrast, an employer might create a system which is generally effective in achieving the employer's purpose of ensuring that payments are made only in circumstances where mileage or expenses have actually been incurred but, as a result of human error, that system might not be perfect and might give rise to some circumstances where that is not the case. To say that all payments made under such a system are round sum allowances seems to us to be wrong. Viewed objectively, the fact that the system was generally effective in ensuring that payments were made only in circumstances where mileage or expenses were actually incurred evidences the intention to achieve that goal even if that was not always the case because of a human error in creating the system. Paraphrasing the approach outlined by Etherton LJ in *Cheshire* at paragraphs [44] to [59] and the FTT in *NWM Solutions Limited v The Commissioners for His Majesty's Revenue and Customs* [2023] UKFTT 364 (TC) ("*NWM*"), at paragraph [54(2)], as long as a system evidences a genuine endeavour to produce an equivalence between the payments made under the system and the expenses to which they purport to relate, it does not matter that the system occasionally fails to give rise to that equivalence.

127. In summary, we consider that a defective system can in some cases negate a stated intention to ensure that payments were made only in circumstances where mileage or expenses were actually incurred but that that will not be the case for all defective systems. Exactly where the dividing line is to be drawn is ultimately a matter of subjective judgment looking at all of the facts in the round.

***The subsistence payments***

128. Applying the above principles in the present case, we agree with Mr Vallat that the defects in the system for determining the circumstances in which subsistence payments were made in this case were so egregious that they should properly be regarded as discrediting the stated intention that such payments would be made only in the appropriate circumstances. In particular, the fact that the page of the registration form which indicated whether or not the relevant participant expected to incur subsistence expenses was not sent to head office, so that it was simply assumed in operating the system that every participant would be entitled to subsistence payments meant that, in our view, the system in relation to subsistence payments did not differ meaningfully from the example given by Mr Vallat and described in paragraph 113 above.

129. In effect, even before taking into account all of the other defects in the system pertaining to subsistence entitlements which we have outlined in paragraphs 71(9) and 71(11) above, the system in relation to the determination of the subsistence payments was so fundamentally broken that it is hard to see how it evidenced an intention to confine the payments in respect of subsistence to those circumstances in which subsistence expenses had actually been incurred. The equivalence to which reference was made in *Cheshire* was simply not present.

130. In reaching the above conclusion, we have taken into account the points made by Mr Stone in paragraph 116 to 118 above and weighed them in the balance. For the reasons set out in paragraph 71(9) above, we do not accept the proposition referred to by Mr Stone in paragraph 117 above to the effect that a participant who did not check the subsistence box on his or her ERF had still incurred subsistence expenses and had simply made an error in completing his or her ERF. As for the other points described in those paragraphs, we think that they are outweighed by the matters described in paragraphs 128 and 129 above.

131. Given the analysis set out above, we agree with Mr Vallat that the subsistence payments in this case were round sum allowances.

132. In saying that, we recognise that it is perfectly possible that a significant percentage of the subsistence payments may well have been made in circumstances where subsistence expenses had actually been incurred. In our view, that is irrelevant. That felicitous correlation does not alter the fact that, when the subsistence payments were made, TBC did not have the requisite intention to create that equivalence because it could not know which of the recipients were entitled to the payments for the simple reason that it had ignored the answer to that question in the registration form.

***The mileage and public transport payments***

133. It is much less clear to us that the same conclusion should be drawn in relation to the mileage and public transport payments under the BSS.

134. We agree with Mr Vallat that there were defects in the system in relation to calculating both types of payment.

135. However, at least in the case of the public transport payments, those defects were largely computational. In other words, the relevant payments were made a flat daily rate and without regard to the public transport expenses that were actually incurred. Whilst that is a matter to be considered at the stage when Issue Three and Issue Four fall to be addressed, we do not see

how it can be said to discredit the stated intention to make such payments only in circumstances where public transport expenses were actually incurred. As such, we agree with Mr Stone that the public transport payments were intended to be made only in circumstances where public transport expenses had actually been incurred and were not round sum allowances.

136. The position in relation to the mileage payments is more nuanced. As we have outlined in paragraph 71(7) above, the system did not identify when a participant spent the night away from home while on assignment, travelled to and from work indirectly or travelled to and from work from or to an address other than his or her home address. In addition, it did not deal properly with cases where there was a mixed mode of transport or a change in the usual mode of transport on an ad hoc basis. In addition, as we have outlined in paragraph 71(11) above, there were also defects in the audit process ranging from the poor response rate, the lack of sanctions for failure to comply with the audit process and the failure to make retrospective adjustments to entitlements by reference to what had been reported on the ERF. As such, there will inevitably have been cases where a mileage payment was made in circumstances where the mileage in question had not actually been incurred. We would not wish to make light of these defects. As will be seen when we come to address Issue Three, they make it impossible on any logical basis to conclude that a specified proportion of the mileage payments were made in circumstances where mileage was actually incurred.

137. However, that does not necessarily compel the conclusion that the payments in question were round sum allowances. The question which we need to address is whether those defects were so egregious that, when considered in the round as part of the evidence as a whole, they demonstrated an absence of any genuine intention on the part of TBC to confine the mileage payments to circumstances where mileage was actually incurred.

138. In our view, they do not. Looked at as a whole, the system by reference to which the mileage payments were made was designed to ensure that those payments were made only in the appropriate circumstances. That was why the registration form completed by each participant required the participant to designate his or her mode of transport and his or her home address and why the payments were made only in respect of days on which the participant was reported to have worked by the client on the timesheet. As we have summarised in paragraph 136 above, there were defects in the system as so designed but those defects were of a different magnitude to the defects in the system relating to subsistence payments. There was nothing akin to the failure on the part of the branches to send to head office the page which recorded the participant's answer to the subsistence question. So, although the system in relation to mileage payments was not perfect, it was clearly intended to give rise to mileage payments only in circumstances where the mileage had actually been incurred and, as such, we have concluded that it would be inappropriate to conclude that the defects in the system should render all mileage payments made pursuant to that system round sum allowances.

139. The conclusions set out in paragraphs 135 to 138 above mean that, in our view, unlike the subsistence payments, we agree with Mr Stone that the mileage and public transport payments were not round sum allowances. Of course, those of such payments that were made in circumstances where the relevant mileage or expenses were not actually incurred need to be identified and addressed at the stage of determining which payments were capable of falling within the exemption (in the case of mileage) or were potentially capable of falling within the dispensation (in the case of public transport expenses) and we will deal with that question when we address Issue Three. But to say that the very existence of those cases (and the systemic failures which led to them) mean that all mileage and public transport payments were round sum allowances seems to us to be giving insufficient weight to the parts of the system which clearly manifested TBC's intention in setting up the system to limit such payments to the appropriate circumstances.

***Conclusion***

140. For the reasons set out above, we have concluded that:

(1) the subsistence payments under the BSS were round sum allowances so that we find for the Respondents in relation to Issue Two in respect of those payments and, subject to our conclusions in relation to Issue Five and Issue Six, those payments gave rise to an obligation on the part of TBC to withhold and account for income tax and NICs; and

(2) the mileage and public transport payments under the BSS were not round sum allowances so that we find for TBC in relation to Issue Two in respect of those payments.

**ISSUE THREE – IDENTIFYING PAYMENTS RELATING TO MILEAGE OR EXPENSES**

**The arguments of the parties**

141. It was common ground that, even if the payments under the scheme were not round sum allowances:

(1) a number of such payments had been made in circumstances where the relevant mileage or expenses had not actually been incurred; and

(2) those payments clearly could not qualify for the exemption or be capable of falling within the dispensation.

However, the parties disagreed on how to identify such payments.

142. Mr Vallat said that, since the circumstances in question arose as a result of defects in the system, as opposed to isolated human error, they could not be dismissed as de minimis without TBC's identifying the specific payments which had been made in the relevant circumstances. In other words, TBC could not simply allege that, on the balance of probabilities, a significant percentage of the payments made under the scheme were likely to relate to mileage or expenses that were actually incurred because TBC had not demonstrated which of the payments had been affected by the errors in the system. The onus was on TBC to show, in relation to each payment, that that particular payment related to mileage or expenses that had actually been incurred.

143. In response, Mr Nawbatt and Mr Stone invited us to find that all of the mileage and public transport payments (apart from a de minimis number of payments which could be disregarded) related to mileage and public transport expenses that had actually been incurred because:

(1) those payments had been made only in relation to days on which the client had reported that the participant had worked and in relation to travel to a location verified by the client. That was a robust, independent source of information;

(2) the vast majority of the participants would have travelled by car because of the necessities of their job;

(3) the payments made in respect of mileage were calculated by reference the shortest possible route, as determined by the Michelin software;

(4) the unchallenged testimony of Mr Sweeney had been that the benchmark scale rate of £3.20 per day which was paid for public transport expenses had been chosen as a cautious and not particularly generous estimate based on a detailed survey of public transport costs across the country and, as such, on the balance of probabilities, participants who incurred public transport expenses on a particular day were likely to have incurred at least £3.20 on that public transport on that day;

(5) in addition to the information provided by the clients, the calculation of the payments depended on information provided by the participants on registration in

relation to their mode of transport and home address. Given the short average duration of each participant's employment by TBC, it was unlikely that the information in question would have changed for most of the participants during their employment;

(6) on each working day, the participant would have travelled to the client and then back home again by the mode of transport indicated on the participant's registration form except where:

(a) the participant was obliged to stay away from home for the night; or

(b) the participant got a lift with someone without informing TBC.

As regards paragraph 143(6)(a) above, the Respondents had failed to establish that those occurrences were any more than de minimis. As regards paragraph 143(6)(b) above, we should assume that the participants were honest and would have complied with their obligation to tell TBC if they taken a lift and, in any event, the evidence of the witnesses was that it was impractical for the participants who were HGV drivers to share a car with anyone else;

(7) the Respondents had argued that the system did not take account of private journeys which might have been made by a participant in journeying between home and work but that failed to take into account the Respondents' own guidance to the effect that short detours would not prevent a payment from qualifying for the exemption or the expense from qualifying for relief and that, even in the case of a significant detour, the exemption or relief would still apply in respect of the business part of the journey. In any event, on the balance of probabilities, participants who were HGV drivers were unlikely to have made a significant detour before or after a long driving shift;

(8) the Respondents had argued that the system did not take account of cases where the participant travelled to work from an address other than his or her home address – for example, a partner's home – and vice versa. However, a mileage payment in respect of such a journey would still qualify for exemption and a public transport expense in respect of such a journey would still qualify for relief and so the only issue was whether the alternative address was nearer to or further from the client than the participant's home address. There was no way of knowing that and this too could be disregarded as de minimis; and

(9) finally, the Respondents had argued that changes made to a participant's mode of transport following a notification made on an ERF were merely prospective and not retrospective. Those changes affected on average only 23 participants per audit and, taking into account the number of such participants, the short delay in implementing the change in mode of transport could be regarded as de minimis.

144. Mr Nawbatt and Mr Stone then invited us to find that 75% of the subsistence payments related to subsistence expenses that had actually been incurred because:

(1) those payments were made only on days on which the relevant participant was recorded by the client as having gone to work;

(2) the calculation of the participant's time away from home was robust, relying as it did on the time sheets completed by the client and the shortest possible journey time between the participant's home and the client by reference to the Michelin software;

(3) applying a realistic appreciation of the industry in which the participants were working – for example, the limited space and lack of refrigeration or storage facilities in an HGV – participants were likely to have incurred subsistence expenses on days when

they were away from home for at least 5 hours and that conclusion was supported by the evidence of Mr Sweeney, Ms Lawrence, Mr Crocock and Mr Tighe;

(4) of the 47 participants who had submitted ERFs in the Sample Documents, 24 (or 51%) had never indicated on their ERFs that they had incurred subsistence expenses for a day they worked but had been given subsistence entitlements. However, it was inherently unlikely that those participants had never incurred subsistence expenses, given the evidence described above and the fact that all but 1 of them had completed his or her registration form on the basis that he or she expected to incur subsistence expenses. A more plausible explanation was that the relevant participants erroneously thought that they needed merely to tick the days on which they had worked. As such, on the balance of probabilities, the failure by those participants to check the subsistence box in relation to any day should not be regarded as a statement by them that subsistence expenses had not been incurred on that day; and

(5) of the remaining 23 (or 49%) of the participants:

(a) 14 had always indicated on their ERFs– either by ticking the subsistence box or by some other method – that they had incurred subsistence expenses on a day they worked and had been given a subsistence entitlement on that basis;

(b) 3 had never indicated on their ERFs that they had incurred subsistence expenses on a day they worked and had not been given a subsistence entitlement; and

(c) 6 had indicated on their ERFs that they had incurred subsistence expenses on some of the days they worked but not all and had been given a subsistence entitlement for one or more days on which they had indicated that they had not incurred subsistence expenses.

**Discussion**

***The mileage and public transport payments***

145. We start our analysis by considering the mileage and public transport payments, as we have concluded in addressing Issue Two that they were not round sum allowances and therefore the next stage in the process is to determine which of such payments related to mileage or public transport expenses that were actually incurred.

146. We agree with Mr Nawbatt and Mr Stone that, for the reasons set out in paragraph 143 above, a significant proportion of the mileage and public transport payments were likely to have related to mileage or public transport expenses that were actually incurred. Our findings of fact in paragraph 71(7) tend to support that conclusion. However, it is one thing to reach the conclusion that, on any one day that a participant worked, subject to the limited circumstances where there was direct evidence to the contrary, the system was likely to have given rise to mileage and public transport payments of the correct amount. It is quite another to conclude that, on that basis:

(1) the circumstances in which mileage or public transport payments did not relate to mileage or public transport expenses that were actually incurred were so rare that they can simply be disregarded as de minimis; or

(2) a specified proportion of each category of such payments which should be regarded as relating to mileage or public transport expenses, as the case may be, that were actually incurred can be determined.

147. We say that because the number of deficiencies in the system used by TBC to determine the mileage and public transport payments made under the scheme, as recorded in paragraphs

71(7), 71(8) and 71(11) above, meant that, on any one day that the participant worked, there was a meaningful possibility that the system failed to give rise to mileage and public transport payments of the correct amount. The first of the above conclusions would require us to overlook those deficiencies entirely whilst the second of the above conclusions would require us to reach a view on exactly what impact in percentage terms those deficiencies would have had on the ability of the system to give rise to mileage and public transport payments of the correct amount. We do not see how we are equipped to do either of these things because of the sheer scale of the deficiencies and the uncertain impact of the deficiencies on the operation of the system.

148. For instance:

(1) on any working day, there was a possibility that:

(a) the relevant participant did not make 2 journeys – a journey both to and from work – but only made 1 journey – a journey to or from work;

(b) the relevant participant did not actually use the mode of transport used by TBC to calculate the mileage or public transport payments;

(c) the relevant participant did not travel to work from the address used by TBC to calculate the mileage payment for that day, or vice versa;

(d) the relevant participant travelled to or from work indirectly and incurred private mileage; and/or

(e) the relevant participant travelled on public transport and incurred public transport expenses which were less than £3.20;

(2) audits did not start until the scheme had been in operation for 18 months and, even then, only around 25% of participants submitted an ERF at each audit;

(3) a participant who failed to submit an ERF in an audit remained on the mileage and public transport elements of the scheme and was removed only from the subsistence element of the scheme; and

(4) changes made to modes of transport following notification in an audit were prospective and not retrospective.

149. In view of all of those uncertainties, and, in particular, the points made in paragraphs 148(2) to 148(4) above, we cannot see how it is possible for us either to conclude that the circumstances in which mileage or public transport payments did not relate to mileage or public transport expenses that were actually incurred were so rare that they can simply be disregarded as de minimis or to determine that a specified proportion of each category of such payments should be regarded as relating to mileage or public transport expenses, as the case may be, that were actually incurred. Instead, we consider that the onus is on TBC to establish that a particular mileage or public transport payment related to mileage or an expense that was actually incurred.

150. We recognise that, particularly given the time that has elapsed since the BSS operated and the number of mileage and public transport payments which were made under the scheme, this may well be an impossible task but we can see no other way on which this issue can be addressed based on the evidence provided to us.

151. The facts in this case are a long way from the facts in *NWM*, where claims for subsistence were made after the subsistence expenses to which the claims related had been incurred and the FTT was prepared to infer from the terms of the form on which the claims were made that the relevant subsistence expenses had actually been incurred – see *NWM* at paragraphs [32] to

[42]. In *NWM*, the Respondents did not seek to impugn the veracity of the claims that had been made whereas, in this case, the Respondents have demonstrated, with reference to a plethora of evidence, that a payment in respect of mileage or public transport expenses might often have been made in circumstances where the relevant mileage or expenses were not actually incurred.

152. We understand that this conclusion will be a disappointment to TBC but it is an inevitable consequence of creating a system which relied on:

(1) information provided by the participants in advance and not in arrear;

(2) an inadequate system for reporting, and giving effect to, changes in that information; and

(3) an inadequate auditing system.

The outcome would have been easily avoidable by the simple expedient of creating a system whereby participants claimed retrospectively after incurring the mileage or public transport expenses in question and, in the case of the public transport payments, by calculating those payments by reference either to the expenses that were actually incurred or by reference to a benchmark scale rate which was agreed with the Respondents. That is the basis on which such payments are generally made and it is not entirely surprising that the adoption by TBC of such a radically different system in this case has given rise to an unwelcome result.

***The subsistence payments***

153. Turning then to the subsistence payments, although we do not need to consider them in the context of Issue Three because of our conclusion, in addressing Issue Two, that they were round sum allowances, our views are similar to those described above.

154. For the reasons recorded in paragraphs 71(9) to 71(11) above, and applying the same reasoning as that set out in paragraphs 146 to 149 above, we have concluded that it is not possible for us to determine that a specified proportion of the subsistence payments should be regarded as relating to subsistence expenses that were actually incurred. For instance:

(1) the page of the registration form relating to subsistence was not sent to head office, so that it is impossible to know how many participants who said that they were not expecting to incur subsistence expenses actually received subsistence payments. We have seen from the Samples Documents that there were at least 9 participants in that category but there are very likely to have been more;

(2) the software used to calculate the time away from home calculated those hours by reference to journey times to and from the relevant participant's workplace using the Michelin software journey times for travelling by car using the applicable speed limits even if the relevant participant had said that he or she would be travelling by an alternative means of transport or walking and without regard to the time of day at which the journey occurred. This was an imperfect way in which to determine the time away from home and may well have given rise to subsistence payments of the wrong amounts;

(3) audits did not start until the scheme had been in operation for 18 months and, even then, only around 25% of participants submitted an ERF to be audited;

(4) there are numerous examples in the Samples Documents where, on audit, no account was taken of whether or not the relevant participant had claimed in his or her ERF actually to have incurred subsistence expenses on the relevant day during the audit period to which the ERF related; and

(5) a participant who failed to submit an ERF in an audit was removed from the subsistence element of the scheme but only prospectively – there was no retrospective

adjustment – and the evidence in relation to Mr Williams indicates that even prospective removal from the subsistence element of the scheme did not always occur.

155. In the circumstances, if we had not already held that subsistence payments under the BSS were round sum allowances, we do not see how we would be able to come up with a specified proportion of the subsistence payments which should be regarded as relating to subsistence expenses that were actually incurred. Any such determination would necessarily involve guesswork as it would be based on insufficient information and too many variables. As such, the position would be as it is in relation to mileage and public transport payments – the onus would be on TBC to establish that a particular subsistence payment related to subsistence that was actually incurred.

***Conclusion***

156. We therefore determine Issue Three in favour of the Respondents.

**ISSUE FOUR – EFFECT OF THE DISPENSATION**

## The arguments of the parties

157. It was common ground that Issue Four related solely to payments made under the scheme to the extent that they:

(1) were not round sum allowances; and

(2) related to subsistence expenses or public transport expenses that were actually incurred.

It had no relevance to payments made under the scheme to the extent that they were round sum allowances (because in that case the dispensation was irrelevant) or to the extent that they were not round sum allowances and related to mileage actually incurred (because, in that case, the payments in question fell within the exemptions in Section 229 of the ITEPA and Regulation 22A of the SS(C)R 2001).

158. Issue Four arises out of the fact that, even if a payment under the scheme was not a round sum allowance and related to subsistence or public transport expenses actually incurred, that would still have given rise to an obligation on the part of TBC to withhold and account for income tax and NICs unless the payment in question fell within the terms of the dispensation.

159. Mr Vallat said that the subsistence and public transport payments which had been made in this case clearly fell outside the express terms of the dispensation. That is because, when one looked at those terms, it was clear that the system and audit failures in this case were fatal to TBC's case on this issue.

160. The dispensation on its face said that the only employees covered by paragraph B of the dispensation were those whose "claims [were] independently checked and authorised by another person". That was standard language in cases of dispensations and clearly envisaged the usual process adopted in such cases whereby, first, the relevant expense was incurred and that was then followed by a claim which was checked and authorised.

161. Mr Vallat did not say that, in the present case, that language needed to be construed literally, which is to say in the form set out in the dispensation itself. Instead, he accepted that the relevant language needed to be construed in the light of the correspondence which took place between Mr Nolan and Officer McDonald in the period preceding the issue of the dispensation. As such, he agreed that there was no need for the system to have required there to be claims made by the participants only after incurring the relevant expenses and for those claims then to have been independently checked and authorised before payment. Instead, a system which involved a declaration on registration followed by notification in the event that circumstances changed and comprehensive auditing with retrospective adjustments to

payments wrongly made could fall within the language of the dispensation as so amended. However, it was clear that that was not what had occurred in this case.

162. In response, Mr Nawbatt agreed that language used in the dispensation to the effect that claims had to be independently checked and authorised by another person needed to be read in the context of the correspondence which preceded the issue of the dispensation. However, he submitted that it was apparent from that correspondence that the Respondents had clearly accepted that the system of declaration at the registration stage, followed by a retrospective notification by the participant in the event of a change in facts, and payment based that information coupled with the timesheets produced by the clients, complied with the terms of the dispensation.

163. Mr Nawbatt added that the Respondents' position on this question amounted to an attempt to disapply the dispensation by reference to a failure to meet extraneous conditions relating to compliance. This question had been addressed by the FTT already in *NWM*. In *NWM*, the Respondents had issued a dispensation to the employer which was expressed to be subject to a number of "qualifying conditions". The FTT concluded that the employer had in fact met the "qualifying conditions" and that it was therefore unnecessary for it to decide whether the "qualifying conditions" had been validly incorporated within the dispensation. However, at paragraphs [69] to [79] of its decision, it noted that:

(1) both parties in the proceedings before it had assumed that the "qualifying conditions" had been validly incorporated within the dispensation;

(2) it had therefore heard no argument on the question; but

(3) although its conclusion on the point had played no part in its decision, it had concluded that those of the "qualifying conditions" which did not derive from the statutory requirements themselves were ultra vires and therefore had no force.

164. In reply, Mr Vallat said that the point which had been at issue in *NWM* was different from the point which was at issue in this case. The Respondents' position in this case was simply that, because of the way that paragraph B of the dispensation was worded and because of the manner in which that language was required to be construed in the light of the correspondence preceding the issue of the dispensation, the payments in question fell outside the express terms of the dispensation. The Respondents were not alleging that the dispensation contained extraneous qualifying conditions which TBC had failed to meet.

165. He added that, in any event, the FTT's decision on the qualifying conditions point in *NWM* was obiter, had been reached without the benefit of hearing argument and was wrongly decided as it was contrary to obiter comments which had been made in relation to the dispensation regime by the FTT in *Mainpay Limited v The Commissioners for His Majesty's Revenue and Customs* [2023] UKFTT 16 (TC) ("*Mainpay FTT*") at paragraphs [183] to [189] and approved by the Upper Tribunal (the "UT") in *Mainpay Limited v The Commissioners for His Majesty's Revenue and Customs* [2024] UKUT 00233 (TCC) ("*Mainpay UT*") at paragraph [113]. In its comments, the FTT had noted that:

(1) Section 65 of the ITEPA was an administrative provision whose purpose was to reduce work for the employer and the Respondents by removing the need for certain expenses to be notified to the Respondents;

(2) in issuing a dispensation, the Respondents were entitled to impose conditions in allowing the reimbursement of expenses without seeking proof of each individual item of expenditure; and

(3) those conditions could include the Respondents' being satisfied that "the employer has a proper system for monitoring whether all of the qualifying conditions for the deduction of the expenses which are being reimbursed are met".

166. Mr Nawbatt pointed out that, in relation to *Mainpay FTT* and *Mainpay UT*, Mr Vallat was seeking to rely on obiter comments made by the UT in respect of obiter comments made by the FTT. The decisions in question did not relate to circumstances where a dispensation had been given. In contrast, *NWM* related to a case where a dispensation had been given and so the issue of whether or not a dispensation could include qualifying conditions was squarely before the tribunal. The Respondents had not engaged with the conclusion reached in *NWM* or with the fact that, in *NWM*, the FTT had noted that the Respondents' remedy in a case where extraneous conditions were not satisfied was to revoke the dispensation, if necessary retrospectively. In addition, the Respondents had not appealed against the decision in *NWM*. Moreover, in this case, the dispensation had been referred to the dispensation specialists within the Respondents and they had declined to revoke it. There was therefore no reason for us to depart from the decision in *NWM*.

167. Mr Vallat pointed out that the conclusion in *NWM* to the effect that the Respondents were not empowered to include conditions in a dispensation were themselves obiter and had been reached without the benefit of argument on the subject, as both parties had assumed that the Respondents were so empowered and the FTT had in any event concluded that the taxpayer in *NWM* had satisfied the conditions. He said that the obiter comments of the UT in *Mainpay UT* trumped the obiter comments of the FTT in *NWM*.

168. He went on to say that that the public transport payments of £3.20 per day which were made under the scheme fell outside the terms of the dispensation for a further reason – namely that the dispensation referred to the reimbursement of actual expenditure and not the payment of a fixed amount no matter what the actual expenditure had been. That was the case even in those circumstances where the expenditure actually incurred on the relevant day had been at least £3.20. On this point, Mr Vallat accepted that, if the dispensation had been worded so as to reimburse the participant for actual expenditure up to a cap of £3.20 per day, then a payment of £3.20 per day in circumstances where the actual expenditure was at least that amount would have satisfied the relevant language but that was not how the dispensation in this case had been worded.

169. Mr Vallat added that, by parity of reasoning, the decisions in *Mainpay FTT* and *Mainpay UT* were also indicative of the fact that it is not open to an employer to apply its own benchmark scale rates in circumstances where the terms of the dispensation expressly refer to actual expenses. In that case, the two courts had rejected the employer's argument to the effect that, as long as the benchmark scale rate which it had applied was intended to provide a genuine reimbursement to its employees of actual expenses they had incurred, the employee should be entitled to a deduction for an amount equal to the amount so paid.

170. In response, Mr Stone pointed out that the test posed by Section 70 of the ITEPA was whether the payments in question were in respect of public transport expenses and the dispensation referred to expenses actually incurred. It followed that, in a case where a participant had actually incurred public transport expenses on the relevant day which were at least £3.20, the £3.20 per day payment was in respect of expenses actually incurred and fell within the terms of the dispensation. It was only in a case where the public transport expenses actually incurred on the relevant day were less than £3.20 that the payment fell outside the terms of the dispensation.

**Discussion**

***The subsistence and public transport payments***

171. The conclusion we have reached in relation to Issue Two to the effect that the subsistence payments under the BSS were round sum allowances means that, strictly speaking, it is not necessary for us to deal with the subsistence payments in the context of Issue Four. However, we will do so because, with the exception of paragraph 175 below, which is specific to the public transport payments only, the points made in this section of our decision are pertinent to both categories of payment.

172. We agree with Mr Vallat that, even if payments made under the scheme were not round sum allowances and related to subsistence or public transport expenses that were actually incurred, those payments did not fall within the terms of the dispensation.

173. This is because those payments did not fall within the language which was used in paragraph B of the dispensation, as that language was required to be construed in the light of the correspondence between Mr Nolan and Officer McDonald leading up to the issue of the dispensation. Paragraph B of the dispensation said that the employees covered by the dispensation were employees "whose claims are independently checked and authorised by another person". Clearly that language on its face envisaged a situation where claims were made after the day on which the relevant expense had been incurred and then subsequently subjected to check and authorisation and, equally clearly, that was not the case here. However, that language needs to be construed in the light of what was said by Mr Nolan to Officer McDonald in the correspondence leading up to the issue of the dispensation. It cannot simply be ignored on the basis that it is inconsistent with the structure described by Mr Nolan.

174. In particular, in his letters of 23 February 2011, 15 March 2011, 6 April 2011 and 20 April 2011, Mr Nolan sought to allay Officer McDonald's concerns about the unusual structure of the arrangement by assuring Officer McDonald that the arrangements would be such as to ensure that payments would be made under the scheme only in appropriate cases. For instance, in his letter of 20 April 2011, Mr Nolan assured Officer McDonald that "rigorous procedures will be adopted to ensure that employees have incurred expenses". It was on the basis of those assurances that Mr Nolan was able to persuade Officer McDonald to issue the dispensation. However, it is apparent from the facts set out above that that is not how matters transpired in relation to the scheme and, for that reason, we do not see how participants who received subsistence or public transport payments can properly be said to fall within paragraph B of the dispensation as that paragraph is required to be construed in the light of the correspondence.

175. Leaving aside for the moment the general point made above, as regards the public transport payments, there is the additional point that the terms of the dispensation referred to the actual expenses incurred by employees on public transport and not the benchmark scale payment of £3.20 per day devised by TBC. We would not go so far as Mr Vallat in saying that, as such, the payments made by TBC to a participant who had actually incurred public transport expenses could never fall within the dispensation regardless of the quantum of those expenses. We believe that a payment of £3.20 per day made to a participant who had actually incurred public transport expenses on the day in question of at least £3.20 would be capable of falling within the dispensation. To reach the opposite conclusion would in our view involve an excessively literal construction of the language used in the dispensation. However, given the conclusion we have reached in paragraphs 171 to 174 above based on the description of the employees who fell within the dispensation, the point is academic.

176. The conclusion set out above is specific to the terms on which the dispensation in this case was issued and the correspondence leading up to that issue. It means that it is unnecessary for us to express a view on the general question of whether or not it is open to the Respondents

to include non–statutory qualifying conditions within the terms of a dispensation and then to allege that the dispensation has never applied because one or more of those conditions has not been satisfied. However, we can see no reason to differ on that question from the conclusion reached by the FTT in *NWM* at paragraphs [69] to [79]. It seems to us that, for the reasons given in those paragraphs, it is not open to the Respondents to grant a dispensation which is conditional on the satisfaction of qualifying conditions that have no basis in the legislation and then subsequently to disavow the dispensation because one or more of those qualifying conditions have not been satisfied.

177. However, that is not to say that the Respondents can have no redress in a case where, instead of limiting the categories of employees falling within the ambit of the dispensation by reference to the administrative requirements, as they have done in this case, they have instead chosen to refer to those administrative requirements as qualifying conditions and then the employer to which they have given the dispensation fails to meet one or more of those qualifying conditions.

178. That is because:

(1) in the first place, the Respondents always have the power to require an employer to demonstrate on the balance of probabilities that a particular payment which is alleged to fall within the scope of a dispensation actually does so – in other words, that the payment is not a round sum allowance and relates to an expense of the specified type that has actually been incurred. This is, in effect, the questions which we addressed at Issue Two and Issue Three respectively in the present case. A payment which is a round sum allowance or which does not relate to an expense of the specified type that has actually been incurred will not fall within the dispensation. As such, in a case where the employer has failed to meet one or more compliance–related qualifying conditions, the Respondents can always put the employer to proof that a particular payment actually falls within the terms of the dispensation; and

(2) in the second place, the Respondents can always revoke the dispensation with retrospective effect, as mentioned in *NWM* and *Mainpay FTT*, if it considers that the scheme is not operating properly.

179. We believe that it is against the background of that second point that the comments which were made by the FTT in *Mainpay FTT* in paragraphs [183] to [189] and approved by the UT in *Mainpay UT* at paragraph [113] should be construed. In our view, the relevant tribunals were not saying that it was open to the Respondents to disavow a dispensation on the basis that there has been a breach of one or more qualifying conditions. Instead, they were simply making the point that the Respondents can always revoke a dispensation prospectively or retrospectively if they have granted it on condition that the employer adopts procedures for ensuring that payments alleged to fall within the scope of the dispensation actually do so and then reach the view that those procedures have not been adopted.

***Conclusion***

180. For the reasons set out above, we have concluded that, regardless of whether the subsistence payments or the public transport payments were round sum allowances or were related to expenses that were actually incurred, they do not fall within the terms of the dispensation and therefore, subject to our conclusions in relation to Issue Five and Issue Six, those payments gave rise to an obligation on the part of TBC to withhold and account for income tax and NICs.

181. We therefore determine Issue Four in favour of the Respondents.

## The arguments of the parties

182. The arguments at the hearing focused on the first limb of the condition in Regulation 72(3) of the PAYE Regulations – namely, whether or not TBC had taken reasonable care to comply with the PAYE Regulations – and not the second limb of that condition pertaining to whether or not the errors made by TBC had been made in good faith.

183. As regards that first limb, the parties disagreed on two things, as follows:

(1) first, as to how to construe the phrase "reasonable care" in this context; and

(2) secondly, whether, on the basis of that construction, TBC had exercised reasonable care on the facts.

184. In relation to the first question, Mr Nawbatt said that we should follow the decision of the FTT in *Sci–temps v The Commissioners for Her Majesty's Revenue and Customs* [2020] UKFTT 314 (TC) ("*Sci–temps*") at paragraph [78] to the effect that the question of reasonable care was essentially the same as whether there was a reasonable excuse and that therefore the guidance in relation to reasonable excuse which had been given by the UT in *Perrin v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKUT 156 should be followed. As such, we should consider whether, taking into account the experience and other relevant attributes of Mr Sweeney, as the controlling mind of TBC in this context, and the situation in which Mr Sweeney found himself at the relevant time, Mr Sweeney had a reasonable excuse for the actions of TBC in relation to the BSS.

185. In response, Mr Vallat submitted that the view set out in *Sci–temps* was obiter and wrong. He accepted that a person who had taken reasonable care would also have a reasonable excuse but it did not follow that a person who had a reasonable excuse would always, of necessity, have taken reasonable care. The question at issue in a reasonable excuse case was whether there was a good reason to relieve the taxpayer of the burden of the tax that was in dispute. As such, it involved an exercise in balancing the competing claims of the taxpayer and the Respondents. In contrast, the question at issue in a reasonable care case was whether the taxpayer had acted with reasonable care taking into account the circumstances. In this case, TBC was attempting to shift a tax liability from itself to the participants in circumstances where that tax liability had arisen as a result of TBC's actions and so the relevant question was whether TBC had exercised sufficient care in order to do that.

186. In relation to the second question, Mr Nawbatt said that we should bear in mind that the BSS was not an aggressive tax avoidance scheme. Instead, it was a lawful salary sacrifice arrangement of a kind which was familiar to the Respondents, as could be seen in the Temp Condoc, the NMW Condoc and the Respondents Employment Income Manual at paragraph EIM42752 – see paragraphs 40 to 48 above. It was apparent from the evidence that Mr Sweeney had sought to adopt the BSS for TBC simply in order to enable TBC to keep pace with its competitors. In so doing, Mr Sweeney was entitled to rely on Aspire as the experts in the area of salary sacrifice and travel expenses – see *Hanson v The Commissioners for Her Majesty's Revenue and Customs* [2012] UKFTT 314 at paragraph [24] and *Mainpay UT* at paragraph [141].

187. Moreover, Mr Sweeney was entitled to take comfort from the fact that, in the course of the correspondence between Mr Nolan and Officer McDonald which preceded the issue of the dispensation, the Respondents had been fully apprised of how the BSS was to operate. As a result of that correspondence, Mr Sweeney was entitled to assume that the system of declaration at the registration stage, followed by a retrospective notification by the participant in the event

of a change in facts, and payment based that information coupled with the timesheets produced by the clients, complied with the terms of the dispensation.

188. In addition, Mr Sweeney had exercised reasonable care in ensuring that a thorough and detailed training programme had been implemented within TBC and had commissioned BestEx to carry out audits in relation to how the scheme was being implemented.

189. Mr Vallat submitted that TBC had failed to show reasonable care in 2 respects as follows:

(1) first, it had failed to operate the BSS in the manner that the scheme had been explained to the Respondents in applying for the dispensation; and

(2) secondly, in any event, the scheme as operated did not ensure that participants received payments under the scheme only if they had actually incurred mileage or subsistence expenses or public transport expenses. Mr Sweeney had known of this at the time, as he had admitted in giving his evidence. Moreover, he had allowed the scheme to proceed on that flawed basis despite knowing of the importance to the Respondents of compliance in relation to payments in respect of expenses, as set out in paragraphs 2.16 and 2.17 of the NMW Condoc.

**Discussion**

***Reasonable care***

190. We do not propose to spend any time addressing the first question described above – the question of whether there might be circumstances in which a taxpayer who has a reasonable excuse might nevertheless not have taken reasonable care. It seems to us that the question is somewhat academic in the present context because, even if we adopt Mr Nawbatt's approach of equating the 2 tests, it is hard to see how, in introducing and operating the BSS, Mr Sweeney, as the controlling mind of TBC in this context, can be said to have had a reasonable excuse for the shortfall in income tax withheld under the PAYE Regulations or to have taken reasonable care to comply with the PAYE Regulations.

191. Turning to the latter question, which is the one which we are required to address in the Regulation 72 Appeal, we agree with Mr Nawbatt that Mr Sweeney did take reasonable care to comply with the PAYE Regulations insofar as he:

(1) took comfort from the fact that other employers operated travel schemes involving salary sacrifice; and

(2) relied on Aspire, as experts in the area, to create a scheme that would be lawful and tax effective.

192. However, in our view, Mr Sweeney did not take reasonable care to comply with the PAYE Regulations when he:

(1) did not ask to see a copy of the opinion of leading tax counsel on the tax–effectiveness of the scheme to which Mr Nolan had referred him. Although Mr Sweeney was relying on Aspire as the relevant experts, it was incumbent on him to read the legal advice on which Aspire said it was relying;

(2) took comfort from the fact that neither BDO nor KPMG had raised issues in relation to the BSS in the course of their audits. This is because those firms had not been asked for their advice in relation to the scheme and therefore their failure to raise issues hardly amounted to a compelling endorsement of the scheme;

(3) apparently did not enquire why the way in which the BSS was set up – with a system of declaration on first registration and then subsequent notification and audit –

differed from the system used by Aspire's other clients, as mentioned in Officer McDonald's letter to Mr Nolan of 14 April 2011 – see paragraph 49(15) above;

(4) did not notice that the second stage in the process of dealing with the Respondents in relation to the scheme, as outlined in the Aspire letter of engagement, was meant to be obtaining a clearance in relation to the scheme from the Respondents under COP 10 and that that clearance had not been sought or obtained;

(5) did not ensure that the scheme was operated in accordance with what was said to Officer McDonald by Mr Nolan in the correspondence leading to the issue of the dispensation, particularly given that he was aware of the importance to the Respondents of compliance in connection with expenses payments. More specifically, he did not ensure that:

(a) the TBC payroll system properly dealt with the problems outlined in paragraph 71(7) above in relation to mileage payments;

(b) the page of the registration form relating to subsistence expenses was sent by the branches to head office, thereby leading to an assumption's being made by head office that every participant was entitled to subsistence even in those cases where the participant had said on the registration form that he or she did not expect to incur subsistence expenses;

(c) TBC followed the terms of the dispensation as regards public transport but instead simply paid to participants who took public transport a fixed sum of £3.20 per day – see paragraph 71(8) above;

(d) audits were carried out until 18 months after the start of the scheme;

(e) there was greater compliance with the auditing process by participants than in fact occurred; and

(f) the audit process was effective, given the flaws in the process set out in paragraph 71(11) above.

193. Whilst the lack of reasonable care was more apparent in the case of the subsistence payments and the public transport payments than in the case of the mileage payments, we have concluded that the lack of reasonable care extended to all of the payments which are the subject of the appeal.

194. It is therefore unnecessary for us to address in this decision the question which we put to both parties at the hearing as to whether or not we would have the power to direct the Respondents to make a Section 72 Direction in relation to one category of payments but not others. However, we note that both parties were of the view that we do not have the power to distinguish between categories of payments in that way, albeit that we do have the power to direct the Respondents to make a Section 72 Direction in relation to some participants but not others and in relation to some months but not others.

***Conclusion***

195. In view of the above conclusion, we consider that TBC fails the reasonable care limb of the condition in Regulation 72(3) of the PAYE Regulations in relation the payments made under the scheme and we decline to direct the Respondents to make a Regulation 72 Direction in relation to any of the relevant tax years.

196. As such, we determine Issue Five in favour of the Respondents and the Section 72A Appeal fails.

## The arguments of the parties

197. It was common ground that:

(1) the question of best judgment in this case is to be determined by the Court of Appeal decision in *Pegasus Birds v Customs and Excise* [2004] EWCA Civ 1015 ("*Pegasus*"). Although that decision was addressing best judgment in the VAT context, the FTT has held in *Michael Rangos v The Commissioners for Her Majesty's Revenue and Customs* [2015] UKFTT 0262 (TC) at paragraph [61] that the position in a direct tax context is exactly the same;

(2) in a case where a determination is not made to best judgment, the FTT has a discretion either to set aside the determination as a whole or to correct the amount of the determination to what it considers to be a fair figure based on the evidence before it. It can do the former where the defect is so serious and fundamental that justice requires the whole determination to be set aside and it can do the latter where it considers that justice can be done simply by amending the determination – see *Pegasus* at paragraph [29];

(3) it is not always necessary for the FTT to consider the best judgment issue at the same time as considering quantum. There can be circumstances where the question of best judgment should be considered in advance of quantum – for example, where the process followed by the relevant officer was so deficient that the FTT would be able to determine that the officer had failed the best judgment test without itself considering and determining quantum – see *Pegasus* at paragraph [38]; and

(4) the burden of proof is on the Respondents to demonstrate that a determination has been made to best judgment.

198. Mr Vallat submitted that, as laid down in *Pegasus* at paragraph [21], best judgment required an honest and genuine attempt by the relevant officer of the Respondents to determine the tax due. Whilst a determination of an unreasonable amount might raise a question as to whether the relevant officer had made an honest and genuine attempt to calculate the right amount, that question could be answered in the affirmative as long as the attempt was honest and genuine, even if the amount in question had been reached as a result of a mistake or as a result of incompetence.

199. In response, Mr Stone said that the test laid down by *Pegasus* was not wholly subjective. Even an honest and genuine attempt to determine the tax due could fail the best judgment test if the errors made by the officer were such that no inspector seeking to exercise best judgment would have reached the same view. In a case where there was no explanation for the determination, the proper inference might be that the determination was arbitrary and therefore failed that test. In saying that, he relied on *Pegasus* at paragraphs [21], [22] and [77] to [79] and *Rahman v Customs and Excise Commissioners (No 2)* [2003] STC 150 at paragraph [32].

200. Mr Stone went on to say that an essential part of meeting the burden of proof on best judgment was for the Respondents to establish how the 2013 Determination had actually been calculated. That was a necessary preliminary stage before considering whether the method used was reasonable. In respect of that preliminary stage:

(1) Officer Dalton had, on 3 separate occasions, provided contradictory explanations for the method she had used to calculate the 2013 Determination – see paragraphs 64 to 69 above;

(2) in the review conclusion letter, Officer Agg had said that separate calculations had been carried out for each of the BTR and the BSS and that the income tax due in respect

of the BSS had been calculated by comparing a period when the BSS was operating and a period when it was not and that that process had given rise to a figure for the BSS alone of £72.93 per employee for income tax;

(3) Officer Dalton was not a credible witness given the entirely different explanations for her calculations described above, the very late application to submit her third witness statement (a week before the hearing) and her vagueness in giving oral evidence; and

(4) moreover, Officer Dalton had provided no evidence to support her assertions, in both her first witness statement and her third witness statement, to the effect that her calculations had been sent to, and approved by, senior managers at the Respondents.

201. In response, Mr Vallat said that:

(1) the description by Officer Dalton in her email of 22 March 2017 of the process she had followed in making the 2013 Determination was incomplete – as Officer Dalton had admitted in giving her oral evidence – because she had not explained in that email that she had calculated the liabilities for the BTR and the BSS separately. However, essentially it was the same method as the one she had described in her first and third witness statements;

(2) the method described in both of those witness statements was that, as regards the BSS, she had compared a period in the tax year ending 5 April 2016 with a period in the tax year ending 5 April 2017 to come up with a figure of £167 of additional income tax and NICs per employee and then multiplied that figure by an assumed number of employees;

(3) Officer Dalton had made certain errors in the way that she had described that method in her first witness statement. She had said in her first witness statement that she was comparing a 12–month period in the earlier tax year to a 9–month period in the later tax year whereas, in her third witness statement, she had said that, in fact, she had compared 2 9–month periods. However, the method she had described in each witness statement was essentially the same;

(4) the figure of £72.93 per employee for income tax given by Officer Agg in the review conclusion letter was entirely consistent with the figure of £167 per employee for income tax and NICs given by Officer Dalton in her third witness statement because the former figure reflected the portion of the latter which was attributable to income tax (20/45.8) and Officer Agg was dealing with income tax alone in his letter; and

(5) there had been no challenge in the course of the hearing to the method described in Officer Dalton's third witness statement. Moreover, Officer Dalton had explained that the lateness of that witness statement was attributable to points made by TBC in its skeleton argument before the hearing.

202. Mr Stone accepted that, in mathematical terms, the figure reached by Officer Dalton in her third witness statement aligned with the figure given by Officer Agg in the review conclusion letter. However, Officer Agg had not set out the methodology by which he had reached that figure and clearly the methodology set out by Officer Dalton in her third witness statement was different from the methodology set out by Officer Dalton in her first witness statement.

203. He went on to say that, even if we were to accept Officer Dalton's most recent explanation of her method of calculation – the one given in her third witness statement – that method was unreasonable because:

(1) Officer Dalton had chosen to compare the income tax and NICs paid over a period in the tax year ending 5 April 2016 with the income tax and NICs paid over a period in the tax year ending 5 April 2017 when a comparison to a period in the tax year ending 5 April 2012 would have been a more direct and effective way of looking at the impact of the BSS; and

(2) in making her assessment by reference to the comparison with the period in the tax year ending 5 April 2017, Officer Dalton had not taken into account an obvious factor of which she was aware, which was the introduction from 1 April 2016 of the national living wage. That would have had a significant impact on the hourly rates which were paid to TBC's employees and, hence, on the amounts of income and NICs which were paid in the later period.

204. In response, Mr Vallat said that the method described by Officer Dalton in her first and third witness statements was a reasonable method to apply and was, in any event, at the very least an honest and genuine attempt to determine the income tax due. As regards the criticisms made by Mr Stone, Mr Vallat said that:

(1) Officer Dalton had repeatedly asked TBC for information in order to make her determination and TBC had refused to provide it – see her letters of 12 August 2015 and 10 June 2016 and TBC's refusal to provide that information on 19 October 2015 and 6 September 2016. It therefore ill–behoved TBC now to allege that Officer Dalton had failed to take a relevant factor into account;

(2) as regards the first challenge, in the tax year ending 5 April 2012, the people who were subsequently to join the BSS as employees of TBC were working for TBC as independent contractors or for umbrella companies and were not TBC employees. They became employees only when the scheme was established in the following tax year. It followed that a comparison involving a period in the tax year ending 5 April 2012 was not viable; and

(3) the second challenge was minor in nature, touching as it did on the impact of an inflationary event. It went to quantum and was not the sort of challenge that would undermine the validity of the assessment.

**Discussion**

***Best judgment***

205. We should preface this final part of our decision by saying that it is clear from the decision in *Pegasus* that:

(1) the primary task of the FTT is to find the correct amount of tax so far as possible on the material properly available to it;

(2) in all but the very exceptional cases, that should be the focus of the hearing and the FTT should not allow itself to be diverted into an attack based on whether or not the relevant officer of the Respondents exercised best judgment in making the relevant determination;

(3) there may be a few cases where the best judgment challenge can be dealt with shortly as a preliminary issue but, unless it is clear that that will save time, the better course is to allow the hearing to proceed on the issue of quantum and leave any submissions on failure of best judgment and its consequences to be dealt with at the end of the hearing;

(4) the best judgment issue is entirely subjective – the question is whether the relevant officer of the Respondents made an honest and genuine attempt to make a reasoned

assessment of the amount of tax payable. The fact that the decision might be wholly unreasonable does not necessarily mean that the officer failed to do that. An assessment which is far outside the bounds of being reasonable might lead the FTT to conclude that the officer was not doing his or her honest best but that would be an evidential inference from the facts. The very fact that the assessment is unreasonable does not, in and of itself, mean that the officer did not exercise best judgment; and

(5) the consequence of a finding that the relevant officer has not exercised best judgment in making the assessment can be that the assessment should be discharged but that is not necessarily the case,

see *Pegasus* at paragraphs [16] to [29], [38], [77] to [92] and [94].

206. In our view, it follows from the above that, in the context of a decision in principle such as this one, where the question of quantum has been deferred to a later stage in the proceedings, we should not reach a final conclusion on the question of best judgment unless this is one of the very exceptional cases mentioned in *Pegasus* at paragraphs [38(i)] and [38(iv)] – in other words, where dealing with the best judgment challenge as a preliminary issue and before considering quantum will save time. In our view, the exceptional cases where such an approach would be justified are likely to be those where "the defect [in the assessment] is so serious or fundamental that justice requires the whole assessment to be set aside" and the two–stage approach of dealing with best judgment before considering quantum might obviate the need to address quantum and thus save time – see *Pegasus* at paragraphs [18], [19] and [29].

207. Notwithstanding the considerable shortcomings and inconsistencies in the various explanations for the 2013 Determination which have been provided by Officer Dalton and which are outlined in our summary of her evidence in paragraphs 61 to 70 above, we consider that this is not such an exceptional case. We say that because, despite those deficiencies, we think that there is enough in Officer Dalton's evidence to suggest that the 2013 Determination was not issued arbitrarily but instead reflected an honest and genuine attempt on her part to calculate the appropriate income tax liability in respect of the BSS for the relevant tax year. As such, we believe that this is not a case where the best judgment question should be determined as a preliminary issue in advance of considering quantum.

208. Indeed, we would go further than that and add that, although we have declined to reach a final conclusion on this question prior to any consideration of quantum, our present view is that the evidence in this case points firmly in the direction of concluding that the 2013 Determination was issued to best judgment and that, therefore, it would be surprising if we were ultimately to reach the contrary conclusion when the question of quantum falls to be considered.

209. That view is based on our observation that:

(1) the explanation for the amount of the 2013 Determination which was provided by Officer Dalton in her third witness statement appears logical and, in our view, indicates an honest and genuine attempt on the part of Officer Dalton to calculate the appropriate income tax liability; and

(2) that explanation is entirely consistent with the terms of Officer Agg's review conclusion letter.

In both cases, it is clear that the income tax and NICs liabilities in respect of the BTR were calculated independently, and by reference to a different method, from the income tax and NICs liabilities in respect of the BSS. In addition, the figure of £72.93 per employee for income tax alone in respect of the BSS which was set out in the review conclusion letter dovetails exactly with the figure of £167 per employee for both income tax and NICs in respect of the BSS which

was set out in Officer Dalton's third witness statement. As such, were it not for the deficient explanations provided by Officer Dalton in her email to Mr Wilson of 22 March 2017 and in her first witness statement, we would have no reason to think that the 2013 Determination was not issued to best judgment.

210. In addition, we agree with Mr Vallat that:

(1) Officer Dalton's failure to use a period within the tax year ending 5 April 2012 as a comparator period was entirely logical given that the participants in the BSS had been independent contractors or had worked for umbrella companies over that tax year; and

(2) the question of whether Officer Dalton should have made an allowance for the introduction of the national living wage in April 2016 in carrying out her comparison is not one which goes to whether or not she exercised best judgment but is rather a matter to be addressed when quantum falls to be determined.

211. Having said that, we do not think that Officer Dalton emerges with great credit from the process.

212. At the hearing, Mr Vallat made a valiant attempt to describe the explanation which Officer Dalton provided in her email to Mr Wilson of 22 March 2017 as merely "incomplete" but the reality is that the process it described – one of calculating the income tax liabilities attributable to both the BTR and the BSS together using the same method – was wholly inconsistent with the process set out in Officer Dalton's third witness statement (and, for that matter, Officer Dalton's first witness statement).

213. Similarly, we do not agree with Mr Vallat's characterisation of Officer Dalton's first witness statement as effectively describing the same method as the one described in Officer Dalton's third witness statement, albeit with some minor errors. The content of Officer Dalton's first witness statement was shockingly poor for a document given under oath which was required to inform the FTT of the facts which led to the 2013 Determination. We have set out in paragraphs 67 and 70(3) above the many errors which it contained. Had Mr Sweeney not pointed out those errors in his third witness statement and thereby allowed Officer Dalton the opportunity to provide a more cogent explanation for the 2013 Determination in her third witness statement, the tentative conclusion which we describe above might well have been very different.

***Conclusion***

214. In conclusion on Issue Six, we have decided to defer to the stage of the proceedings at which quantum falls to be addressed our final conclusion as to whether the 2013 Determination was issued to best judgment but observe at this stage that, on the basis of the evidence, we would be surprised if we were ultimately to conclude that the 2013 Determination was not issued to best judgment.

**DISPOSAL**

215. We would summarise the conclusions set out above as follows:

(1) Issue One – we have concluded that the salary sacrifice was a valid and binding contractual term;

(2) Issue Two – we have concluded that the subsistence payments under the scheme were round sum allowances but that the mileage payments and the public transport payments under the scheme were not;

(3) Issue Three – we have concluded that, on the basis of the evidence provided to us, it is not possible for us to determine a specified proportion of the payments made under the scheme which should be regarded as relating to mileage or subsistence expenses or

public transport expenses, as the case may be, that were actually incurred and that, instead, the onus is on TBC to demonstrate that that was the case in respect of a particular payment;

(4) Issue Four – we have concluded that the subsistence payments and the public transport payments fell outside the terms of the dispensation;

(5) Issue Five – we have concluded that it is not appropriate to make a Regulation 72 Direction in relation to any tax year because TBC did not take reasonable care to comply with the PAYE Regulations in respect of the tax years to which the Regulation 72 Appeal relates; and

(6) Issue Six – we have concluded that, although we should not reach a final conclusion on the issue of best judgment until the stage of the proceedings when quantum falls to be determined, we would be surprised if we were ultimately to conclude that the 2013 Determination was not issued to best judgment.

216. It follows from the above that the appeals fail except to the extent that that they relate to those mileage payments which TBC is able to show relate to mileage that was actually incurred and therefore fall within the exemptions in Section 229 of the ITEPA and Regulation 22A of the SS(C)R 2001).

**RIGHT TO APPLY FOR PERMISSION TO APPEAL**

217. 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 "Tribunal Rules"). The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First–tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**TONY BEARE**
**TRIBUNAL JUDGE**

**Release Date: 06th DECEMBER 2024**

**APPENDIX**

**PROCEDURAL MATTERS**

## Introduction

1. On 4 July 2024, the Respondents applied to amend the SOC in a number of respects and, on 5 September 2024, the Respondents applied for permission to rely on an additional (second) witness statement by one of its witnesses, Officer Nicola Beggs. The two applications were heard by Tribunal Judge Alastair Rankin MBE on 6 September 2024. Judge Rankin allowed the application to rely on the additional witness statement but refused the application to amend the SOC in the manner requested. Instead, he directed that the SOC could be amended only in the respects agreed by TBC. The SOC with those agreed amendments is referred to hereafter as the "Agreed SOC".

2. Judge Rankin said that he would provide written reasons for his decisions in due course. Although such written reasons had in fact been sent to the FTT by the start of the hearing, neither we nor the parties were aware of that when the proceedings commenced. However, it was common ground at the hearing that Judge Rankin had indicated orally at the case management hearing that he was dismissing the application to amend the SOC on the ground that it was "very late" – the phrase "very late" being a technical one used in the authorities to mean changes which are proposed so late as potentially to threaten the hearing date (see, for example, Bryan J in *Invest Bank PSC v El–Husseini and others* [2024] EWHC 1235).

3. On 4 September 2024, TBC served its skeleton argument on the Respondents with a copy to the FTT.

4. On 11 September 2024, the Respondents served their skeleton argument on TBC with a copy to the FTT.

5. On 13 September 2024, the Respondents made an application to rely on an additional (third) witness statement by another of its witnesses, Officer Dalton.

6. On 19 September 2024, TBC served a supplemental skeleton argument on the Respondents with a copy to the FTT:

(1) objecting to the admission of Officer Dalton's additional witness statement on the grounds of lateness; and

(2) objecting to the inclusion of a number of submissions set out in the Respondents' skeleton argument on the basis that they fell outside the scope of the Agreed SOC.

7. On the afternoon of 20 September 2024, which was the reading day for the hearing of the appeals, the Respondents served a supplemental skeleton argument on TBC with a copy to the FTT, responding to the submissions made by TBC in TBC's supplemental skeleton argument.

### The submissions to be permitted in the appeals

8. Turning first to the question of which of the submissions set out in the Respondents' skeleton argument could be admitted at the hearing, we first needed to determine in general terms and without regard to any specific submission the nature of the submissions which should be admitted.

9. In that regard, the position of Mr Nawbatt was that only those submissions which had been included in the Agreed SOC could be made because to do otherwise would be contrary to the decision of Judge Rankin at the case management hearing on 6 September 2024 and because the submissions were "very late" so that TBC did not have time to respond to them. He said that fairness dictated that each party to litigation should be apprised of the case which it had to

answer long before the hearing so that it was in a position to deal with the case properly at the hearing. That was the purpose of pleadings – see, for example, *Allpay Limited v The Commissioners for Her Majesty's Revenue and Customs* [2018] UKFTT 273 (TC) ("*Allpay*") at paragraphs [9] to [25]. Mr Nawbatt said that the Respondents were effectively "trying to have a second bite at the cherry".

10. In response, Mr Vallat said that the submissions which the Respondents were allowed to raise at the hearing should not necessarily be confined to the submissions set out in the Agreed SOC. In his view:

(1) the fact that the Respondents' application to amend the SOC had been refused did not of itself mean that submissions which were not in the Agreed SOC could not be heard;

(2) Judge Rankin had rejected the application to amend the SOC on a wholesale basis simply on the basis that the application had been made very late. That did not mean that certain of the submissions which were set out in the proposed amendments should not now be admitted. Judge Rankin had not considered the merits of each submission in isolation;

(3) there were two distinct issues to be considered in connection with the admission of the submissions;

(4) the first was the question of jurisdiction, which was to say the scope of the appeals. This was to be determined by reference to the documents leading up to the appeals – see *Daarasp LLP, Betex LLP v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKUT 87 (TCC) at paragraph [25]. Submissions falling within the ambit of those documents were clearly within the scope of the appeals;

(5) the second was whether a particular submission, which fell within the scope of the appeals, could be made at the hearing, which was to say a question of exercising case management powers;

(6) the first issue was not relevant in the present case because all of these submissions clearly fell within the scope of the hearing. Instead, it was the second issue which needed to be considered;

(7) in that regard, a submission falling within the ambit of the existing pleadings, which, in the case of the Respondents in these appeals, was the Agreed SOC, either expressly or by necessary implication, could clearly be advanced at the hearing. As for a submission which fell outside the ambit of the existing pleadings, we had wide powers of case management. A party should be given permission to advance a submission which fell within the scope of the appeals but was not set out in the pleadings if that was necessary in order to deal fairly with the case; and

(8) in particular, in this case, where a submission in the Respondents' skeleton argument raised a discrete point of law, which could be addressed by TBC without having to draw on additional evidence and in reasonably short order, that should be admitted even if it had not been included in the Agreed SOC. To do otherwise would be contrary to the objectives of avoiding unnecessary formality and seeking flexibility in FTT proceedings – see *The Commissioners for Her Majesty's Revenue and Customs v Ritchie* [2019] UKUT 71 (TCC) at paragraphs [34] to [45].

11. Mr Vallat went on to say that the Respondents intended to appeal against the case management decision of Judge Rankin so that, even if we were to consider that a particular submission should not be admitted for the reasons given by Mr Nawbatt, we ought to hear argument in relation to the submission at the present hearing and reach a conclusion in relation

to it so that, following that appeal, all issues would be capable of determination by the UT without the need to remit the case back to the FTT.

12. In reply, Mr Nawbatt pointed out that a party would be entitled to assume that a submission which appeared in the documents leading up to the appeal but which had not been included in the pleadings was no longer intended to be advanced at the hearing – see *Allpay* at paragraphs [28] and [29].

13. Our conclusions in relation to this issue were conveyed to the parties at the end of the first day of the hearing and were as follows:

(1) as a general rule, and subject to the exception referred to in paragraph 13(2) below, the Respondents would not be allowed to make submissions at the hearing which were not included in the Agreed SOC because TBC was entitled to assume that the case which it had to answer was the one set out in the Agreed SOC. Accordingly, subject to that exception, the Respondents would be permitted to make only those submissions which could properly be seen as having been included in the Agreed SOC, either expressly or by necessary implication;

(2) however, we recognised that there might be a submission which was not contained in the Agreed SOC but which it would be fair to admit to the hearing on the basis that it was a discrete legal argument to which TBC could respond without recourse to additional evidence and without excessive legal research in the time available. The overriding objective requires striking a balance between injustice to the applicant if the amendment is refused and injustice to the opposing party if the amendment is allowed – see *Quah Su–Ling v Goldman Sachs International* [2015] EWHC 759 at paragraph [38]; and

(3) in response to the point made by Mr Vallat as described in paragraph 11 above, we were not prepared to hear argument in relation to submissions which we considered not to be admissible on the basis of the principles set out in paragraphs 13(1) and 13(2) above simply in order to forestall the need for a future remission of the case back to the FTT. The reason for ruling that a particular submission was not admissible was that it would not be fair to require TBC to respond to it in the time available. It would therefore be illogical and unfair to require TBC to make arguments in relation to that submission at the hearing.

14. Applying the principles set out above in the context of the specific submissions in the Respondents' skeleton which were in dispute between the parties, we made the following determinations:

(1) as regards the question of whether a particular participant was attending a temporary workplace for the purposes of Section 339 of the ITEPA, the Respondents would not be entitled to require TBC to prove anything other than that the relevant participant had worked on more than one short term contract or assignment for TBC. TBC would not be required to prove that the relevant participant satisfied any of the other conditions set out in that section in relation to attendance at a temporary workplace. We reached this conclusion on the basis that:

(a) paragraph [34] of the Agreed SOC implied that the only two issues relating to attendance at a temporary workplace to which TBC was being put to strict proof was whether or not the particular participant was engaged under an overarching employment contract and whether or not the relevant participant had worked on more than one short term contract or assignment for TBC;

(b) paragraph [44] of the Agreed SOC, which expressly referred back to the prior paragraph, should necessarily be construed as containing the same implication;

(c) although paragraph [46] of the Agreed SOC did not refer back to the earlier two paragraphs, it was reasonable in context to construe the paragraph as containing the same implication;

(d) the Respondents had already indicated in their skeleton argument that they would not be pursuing the overarching contract point; and

(e) therefore, in the time available, it would be unfair to require TBC to address the other conditions set out in Section 339 of the ITEPA in relation to attendance at a temporary workplace;

(2) the Respondents would not be entitled to submit that, in order to qualify for a payment in respect of subsistence under the BSR on any particular day, a participant would need to have incurred expenditure on both food and drink as opposed to incurring expenditure on food and/or drink. The Respondents conceded this point at the start of the hearing in any event but asked us to record in this decision that, as a general matter, that remains their view and therefore their concession was without prejudice to their position in other cases;

(3) we would allow the Respondents to submit that each participant's benefit under the BSS was money's worth and to invite a response from TBC on that point because, although it was not included in the Agreed SOC either expressly or by necessary implication, it was a discrete legal point to which TBC could respond without recourse to additional evidence and without excessive legal research in the time available and therefore fell within the exception mentioned in paragraph 13(2) above. (As it transpired, the Respondents chose not to argue this point at the substantive hearing, after they heard the evidence);

(4) we would allow the Respondents to submit that TBC did not intend there to be a salary sacrifice and to invite a response from TBC on that point because:

(a) it could reasonably be inferred from paragraph [51(5)] of the Agreed SOC that the Respondents did not accept that TBC had acted in good faith in connection with the operation of the BSS;

(b) although that was in the context of the Regulation 72 Appeal and not the Determinations or the NIC Decisions and did not contain the specific allegation that TBC did not intend there to be a salary sacrifice, it inevitably meant that TBC was on notice that the good faith or otherwise of TBC at the relevant time was something which TBC would need to address at the hearing; and

(c) in any event, this was something that had been recognised by TBC's main witness, Mr Sweeney, because he had addressed in his witness statements the question of TBC's beliefs at the time when it implemented the BSS. Thus, even if it could be said that the reference to bad faith in paragraph 51(5) of the Agreed SOC could not properly be construed as extending to an allegation of a lack of intention to have a salary sacrifice, there could be no prejudice to TBC in allowing the Respondents to make the relevant submission at the hearing and it fell within the exception mentioned in paragraph 13(2) above; and

(5) we would allow the Respondents to submit that the payments made by TBC under the BSS were round sum allowances and were insufficiently linked to the expenses to which they were alleged to relate and to invite a response from TBC on that point because it was implicit in paragraphs [35(4)], [36] and [51(6)] of the Agreed SOC that the Respondents intended to make that submission at the hearing.

**The additional witness statement**

15. Turning then to the question of whether or not to admit Officer Dalton's additional (third) witness statement despite the lateness of the application, we noted that, in that witness statement, Officer Dalton sought to explain, by reference to a contemporaneous spreadsheet and a contemporaneous note which she had exhibited to the additional witness statement but which were not appended to her previous witness statements, how she had calculated the amount set out in the 2013 Determination.

16. We were referred by the parties to the UT decision in *Eyedial Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 432 (TCC) ("*Eyedial*"). It was apparent from *Eyedial* at paragraphs [37] and [38] that, in considering whether to permit late evidence of this nature, a distinction should be drawn between:

(1) evidence which seeks to clarify or update evidence that has previously been provided; and

(2) evidence which is entirely new and of a supplementary nature.

Evidence falling within the former category can properly be admitted by the FTT in the exercise of its judicial discretion whereas evidence falling within the latter category should not be so admitted.

17. In *Eyedial*, a witness for the Respondents had appended flow charts to her original witness statements for the purposes of the hearing before the FTT. Those flowcharts were based on transaction enquiry reports which were not so appended. It subsequently became apparent to the witness that her original flow charts were incorrect and therefore the Respondents sought to admit into evidence replacement flow charts along with the transaction enquiry reports on which those replacement flow charts were based. The FTT gave its permission to the admission of both the replacement flow charts and the transaction enquiry reports but, on appeal, the UT held that the FTT had made an error of law in doing so.

18. The UT held that, whilst it was an appropriate exercise of the FTT's discretion in that case to admit into evidence the replacement flow charts because they were merely clarifying or updating the evidence that had previously been provided, the FTT should not have permitted the admission of the transaction enquiry reports because they had not previously been provided and were entirely new and supplementary evidence. That was the case even though the transaction enquiry reports were supporting the revised flow charts.

19. In considering whether to admit the additional evidence in this case, we took into account:

(1) the relevant provisions in the Tribunal Rules – notably Rule 2 of the Tribunal Rules setting out the overriding objective of dealing with cases fairly and justly, which included avoiding unnecessary formality and seeking flexibility, and Rule 15 of the Tribunal Rules allowing the FTT to give directions as to the nature of the evidence it required;

(2) the distinction made in *Eyedial* between evidence of a clarificatory or updating nature and new and supplementary evidence;

(3) the fact that an accurate explanation by Officer Dalton of how she had calculated the amount of the 2013 Determination was of considerable importance in the context of Issue Five; and

(4) the fact that the application to admit the evidence had been made extremely late.

20. Having reflected on the above, we determined that it would be an appropriate exercise of our discretion to admit the additional witness statement despite the lateness of the application.

It seemed to us that it would be in the interests of justice for us to hear the witness's updated explanation of how she had calculated the amount of the 2013 Determination. However, applying the distinction referred to in *Eyedial*, we concluded that, if we were to admit into evidence the contemporaneous spreadsheet or the contemporaneous note which were exhibited to that witness statement, that would amount to an error of law. Accordingly, we directed that the witness statement could be admitted but without the exhibits.