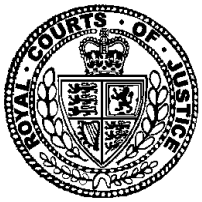

Neutral Citation Number: [2021] EWHC 1914 (Admin)

Case No: CO/3186/2019

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/07/2021

Before:

MR JUSTICE CHAMBERLAIN

- -

Between:

HUGH MURPHY and WINIFRED LINNETT	**Claimants**
- and -	
H.M. REVENUE AND CUSTOMS	**Defendants**

- -
- -

WILLIAM MASSEY QC and BEN ELLIOTT (instructed by **Howes Percival**) for the **Claimants**
APARNA NATHAN QC and ISHAANI SHRIVASTAVA (instructed by **HMRC Solicitor's Office**) for the **Defendants**

Hearing dates: 22-23 June 2021

- -

Approved Judgment

Mr Justice Chamberlain:

Introduction

1 The main question in this case concerns the construction of an extra-statutory concession, ESC B18, issued by HM Revenue and Customs ("HMRC"). The parties have reduced the question to an agreed form:

> "In circumstances where a UK beneficiary of a non-resident discretionary trust receives from the trust a payment of income, the underlying source of which is income on which the trustees have actually paid UK income tax, whether:
>
> (a) as HMRC contend, ESC B18 on its proper construction limits the amount of credit which may be claimed by the UK beneficiary for the UK tax paid by the non-UK resident trustees to the amount of UK tax paid by them on income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made, or
>
> (b) as the Claimants contend, ESC B18 on its proper construction imposes no such limit on the amount of credit which is available to the UK beneficiary."

2 This question arises in judicial review proceedings brought by the Claimants to challenge a decision of HMRC communicated orally on 15 May 2019 and in writing thereafter, by which they rejected in part the Claimants' claims under ESC B18.

3 If the question in para. 1 above is answered as the Claimants contend it should be, a further question arises as to whether I should refuse relief in the exercise of my discretion.

4 If the Claimants succeed in quashing the challenged decision, they are entitled to a further credit. The amount of the credit has still to be calculated. It is in the region of £4 million.

5 Permission to apply for judicial review was granted by Jay J on 26 February 2020.

Background

6 In granting permission, Jay J directed the parties to prepare a brief agreed statement of facts and issues. This was a very helpful direction, which could usefully be considered in other cases where it is apparent that the claim turns on a pure point of construction. The following summary is taken from the agreed statement filed pursuant to the direction.

7 The Claimants are the beneficiaries of a discretionary settlement known as the Charles Street Funded Unapproved Benefit Scheme, a retirement trust established by a company of which they were directors ("the Trust"). The trustees of the Trust have at all times been resident for UK tax purposes in Guernsey and not in the UK. The Claimants were at all material times resident in the UK. The trustees received UK source income in the form of interest, on which they were liable to and did pay UK income tax. The net amounts generated further income as overseas bank interest.

8 On 26 September 2018, Magma Chartered Accountants ("Magma"), acting for the Claimants, wrote to HMRC seeking confirmation that ESC B18 applied to allow tax credit

on distributions from the Trust with no limitation for payments out of income received by the trustees more than 6 years before the year of assessment of the payment.

9 On 20 November 2018, the HMRC case officer responded that, in HMRC's view, credit under ESC B18 was limited to payments out of income received not more than 6 years before the year of assessment of the payment. Magma sought reconsideration.

10 In January 2019, before HMRC had replied to the request for reconsideration, the Trust Deed was varied to allow the assets (a cash sum of £9,652,320) to be distributed and the entire sum was distributed to the Claimants. The distributions constituted income in the hands of the Claimants for tax purposes for the tax year 2018/19. Each of the Claimants paid UK income tax on the distributions, but then made claims for tax credit under ESC B18 for the UK income tax paid by the Trust in respect of all past tax years on the income out of which the distributions were made.

11 HMRC allowed the claim for credit for UK income tax paid by the trustees on UK source income arising to the trustees from and including tax year 2012/13 and have repaid the income tax so paid. However, they rejected the claims for credit in respect of the UK income tax paid by the trustees on UK source income arising in tax years before that.

12 After correspondence between the Claimants and HMRC, the Claimants issued these proceedings on 8 August 2019.

The relevant statutory provisions

13 Section 16 of the Finance Act 1973 ("the FA 1973") provided that income arising to the trustees of discretionary trusts, in addition to being potentially chargeable to income tax at the basic rate, is chargeable at the additional rate. In accordance with what the parties agree are generally applicable principles of tax law, the additional rate was payable under s. 16 on all income (whether from a UK source or not) of UK-resident trustees and on UK-source income of non-resident trustees.

14 If s. 16 had stood alone, the effect would have been to tax the income received by the beneficiaries of discretionary trusts twice – once in the hands of the trustee (at the rate applicable under s. 16) and then again in the hands of the beneficiary (at his marginal rate of income tax). But s. 16 did not stand alone.

15 Section 17 provided what the parties have termed a "credit mechanism" designed to address this issue in the case of UK-resident trustees. Its material terms were as follows:

> "(2) The payment shall be treated as a net amount corresponding to a gross amount from which tax has been deducted at a rate equal to the sum of the basic rate and the additional rate in force for the year in which the payment is made; and the sum treated as so deducted shall be treated—
>
> (a) as income tax paid by the person to whom the payment is made; and
>
> (b) so far as not set off under the following provisions of this section, as income tax assessable on the trustees.

> (3) The following amounts, so far as not previously allowed, shall be set against the amount assessable (apart from this subsection) on the trustees in pursuance of subsection (2)(b) above:
>
> (a) the amount of any tax on income arising to the trustees and charged at the additional as well as at the basic rate in pursuance of section 16."

16 The effect was to treat the payment as a net sum in the hands of the beneficiary after notional deduction of tax at the basic plus the additional rate. The notional deduction was treated as income tax paid by the beneficiary and also as income tax assessable on the trustees. The latter, however, could set off any tax arising to them under s. 16. Provided that there was such tax arising (i.e. that the trustees had what is known as "tax capacity") and that such tax had been paid, the effect was to ensure that the income was taxed only once, not twice.

17 This mechanism applied whether the payments were made out of UK source or non-UK source income and whether to UK resident or non-UK resident beneficiaries. If it had stood alone, it would disadvantage a UK-resident trustee making a payment out of non-UK source income on which overseas tax had been paid in cases covered by double taxation treaties. In such a case, the beneficiary would be entitled to treat the payment as a net sum after deduction of tax, but the deduction would be assessable on the trustee. Because under the double taxation treaty the trustee would have no liability (or a reduced liability) under s. 16, there would be nothing (or not enough) to set off against his liability under s. 17(2). So, the trustee would end up being taxed twice – once overseas, when the non-UK source income arose to him, and once in the UK when making the payment to the beneficiary.

18 Section 18 partially addressed this problem by providing a means by which the beneficiary could "look through" the trust and treat the payment as if it were income received directly from its source. It provided as follows:

> "(1) Subsection (2) of this section shall apply if a payment made by trustees falls to be treated as a net amount in accordance with section 17(2) of this Act and the income arising under the trust includes income in respect of which the trustees are entitled to credit for overseas tax under Part XVIII of the Taxes Act (in that subsection referred to as 'taxed overseas income').
>
> (2) If the trustees certify—
>
> (a) that the income out of which the payment was made was or included taxed overseas income of an amount and from a source stated in the certificate; and
>
> (b) that that amount arose to them not earlier than in the year 1973-74 and not earlier than six years before the end of the year of assessment in which the payment was made;
>
> the person to whom the payment was made may claim that the payment, up to the amount so certified, shall be treated for the purposes of the said Part XVIII as income received by him from that source and so received in the year in which the payment was made."

19 The effect of this was to avoid the problem caused by ss. 16 and 17 for trustees who had paid overseas tax on non-UK source income by relieving the trust of the liability that would otherwise be imposed on it. As can be seen, the relief applied only where the trustees certified that the payment was or included taxed overseas income that arose to them not earlier than six years before the end of the year of assessment in which the payment was made. Furthermore, s. 18 applied only to payments to which s. 17(2) applied (i.e. payments from UK-resident trustees).

20 This created two further difficulties. First, because s. 18 applied only to "taxed overseas income", it did not apply where the income was that of a non-UK resident beneficiary of a UK resident trust. Second, because s. 18 applied only to payments from UK resident trustees, it did not deal with the situation of a non-resident beneficiary of a non-resident trust with UK source income.

21 These difficulties were addressed by ESC B18 in its original (1978) version, which provided as follows (with headings in square brackets inserted by me for ease of exposition):

> "**B18. Payments out of a discretionary trust: entitlement to relief from United Kingdom tax under the provisions of the Income Tax Acts or of double taxation agreement.**
>
> [1. UK resident trusts]
>
> If a payment made by Trustees falls to be treated as a net amount in accordance with Section 17(2), Finance Act 1973 and the income arising under the Trust includes income in respect of which the beneficiary would, if such income came to him directly instead of through Trustees, be entitled to relief under the provisions of the Income Tax Acts, e.g.
>
> Section 27, Income and Corporation Taxes Act 1970 (claims for personal reliefs by non-residents);
>
> Section 99, Income and Corporation Taxes Act 1970 (claims for exemption from tax on certain United Kingdom Government Securities held by persons not ordinarily resident in the United Kingdom);
>
> Sections 100 and 159, Income and Corporation Taxes Act 1970 (claims for exemption from United Kingdom tax or income from overseas securities by persons not resident in the United Kingdom);
>
> or under the terms of a double taxation agreement,
>
> such relief will be granted to the beneficiary on a claim made by him to the extent that the payment is of income which arose to the Trustees not earlier than in the year 1973-74 and not earlier than six years before the end of the year of assessment in which the payment was made, provided that the Trustees have submitted for each year Trust Returns which are supported by the relevant income tax certificates and which detail all sources of trust income arising and payments made to beneficiaries.

> [2. Non-UK resident trusts]
>
> A similar concession will operate where the payment made by the Discretionary Trustees is not within Section 17(2), Finance Act 1973 but constitutes income arising from a foreign possession (e.g. where non-resident Trustees exercise their discretion outside the United Kingdom) provided the Trustees: -
>
> (i) submit Trust Returns, supported by the relevant income tax certificates, which detail all sources of Trust income arising and payments made to beneficiaries; and
>
> (ii) pay the Additional Rate Tax chargeable on the United Kingdom income of the Trust in accordance with Section 16, Finance Act 1973".

22 Section 16-18 of the FA 1973 were re-enacted in materially identical terms in ss. 686-7 and s. 809 of the Income and Corporation Taxes Act 1988 ("ICTA 1988").

23 The first iteration of ESC B18 extended look-through relief to non-resident beneficiaries. It did not, however, address the situation of UK resident beneficiaries such as the Claimants. That situation was addressed in the second iteration in 1994, which also inserted headings dividing the text dealing with UK resident trusts from that dealing with non-UK resident trusts. It was in these terms (with numbering and sub-headings in square brackets inserted by me):

> "B18: PAYMENTS OUT OF DISCRETIONARY TRUSTS
>
> [1.] UK Resident Trusts
>
> A beneficiary may receive from trustees a payment to which section 687(2), Income and Corporation Taxes Act (ICTA) 1988 applies. Where that payment is made out of the income of the trustees in respect of which, had he received it directly, the beneficiary would
>
> - have been entitled to relief under sections 47, 48 or 123 ICTA 1988;* or
> - have been entitled to relief under the terms of a double taxation agreement; or
> - not have been chargeable to UK tax
>
> the beneficiary may claim those reliefs or, where he would not have been chargeable, repayment of the tax treated as deducted from the payment (or an appropriate proportion of it).
>
> Relief will be granted to the extent that the payment is out of income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made, provided that the trustees have made trust returns for each year which are supported by the relevant income tax certificates and which give details of all sources of trust income and payments made to beneficiaries.

[2.] Non-UK resident trusts

A similar concession will operate where a beneficiary receives a payment from discretionary trustees which is not within section 687(2), ICTA 1988 but is income arising from a foreign possession (e.g. where non-resident trustees exercise their discretion outside the UK).

[a. Non-UK resident beneficiaries]

Where a non-resident beneficiary receives such a payment out of income of the trustees in respect of which, had he received it directly, the beneficiary would have been liable to UK tax then he

- may claim relief under Section 278 ICTA 1988* (if entitled); and
- may be treated as if he received that payment from a UK resident trust but claim credit only for UK tax actually paid by the trustees on income out of which the payment is made.

[b. UK resident beneficiaries]

A UK beneficiary of a non-resident trust may claim credit for UK tax actually paid by the trustees on the income out of which the payment is made as if the payment were from a UK resident trust.

This treatment will only be available where the trustees:

- make trust returns, supported by the relevant income tax certificates, giving details of all sources of trust income and payments made to beneficiaries; and

- pay tax at the rate applicable to trusts chargeable on the UK income of the trust under section 686, ICTA 1988.

No credit is given for tax treated as paid on income received by the trustees (for example foreign income dividends) which would not be available for set off under Section 687(2) if that section applied, and that tax is not repayable.

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* The relevant reliefs are

- exemption from tax on certain UK Government securities held by persons not ordinarily resident in the UK (Section 47 ICTA 1988);

- exemption from UK tax on income from overseas securities held by persons not resident in the UK (Sections 48 and 123 ICTA 1988);

- personal reliefs for certain non-residents (Section 278, ICTA 1988)."

24 A third iteration of ESC B18 was issued in 1999 as follows (again with numbering and subheadings inserted by me):

"**B18: Payments out of discretionary trusts**

[1.] UK Resident Trusts A beneficiary may receive from trustees a payment to which Section 687(2) ICTA 1988 applies.

Where that payment is made out of the income of the trustees in respect of which, had it been received directly, the beneficiary would

- have been entitled to exemption in respect of FOTRA Securities issued in accordance with Section 154 FA 1996; or

- have been entitled to relief under the terms of a double taxation agreement; or

- not have been chargeable to UK tax because of their not resident and/or not ordinarily resident status the beneficiary may claim that exemption or relief or, where the beneficiary would not have been chargeable, repayment of the tax treated as deducted from the payment (or an appropriate proportion of it). For this purpose, the payment will be treated as having been made rateably out of all sources of income arising to the trustees on a last in first out basis.

Relief or exemption, as appropriate, will be granted to the extent that the payment is out of income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made, provided the trustees:

- have made trust returns giving details of all sources of trust income and payments made to beneficiaries for each and every year for which they are required, and

- have paid all tax due, and any interest, surcharges and penalties arising, and

- keep available for inspection any relevant tax certificates.

Relief or exemption, as appropriate, will be granted to the beneficiary on a claim made within five years and ten months of the end of the year of assessment in which the beneficiary received the payment from the trustees.

[2.] Non-resident trusts

A similar concession will operate where a beneficiary receives a payment from discretionary trustees which is not within section 687(2) ICTA 1988 (i.e. where non-resident trustees exercise their discretion outside the UK).

[a. Non-UK resident beneficiaries]

Where a non-resident beneficiary receives such a payment out of income of the trustees in respect of which, had it been received directly, it would have been chargeable to UK tax, then the beneficiary

> - may claim relief under Section 278 ICTA 1988 (personal reliefs for certain non-residents); and
>
> - may be treated as receiving that payment from a UK resident trust but claim credit only for UK tax actually paid by the trustees on income out of which the payment is made. The beneficiary may also claim exemption from tax in respect of FOTRA Securities issued in accordance with Section 154 FA 1996 to the extent that the payment is regarded as including interest from such securities.
>
> [b. UK resident beneficiaries]
>
> A UK beneficiary of a non-resident trust may claim appropriate credit for tax actually paid by the trustees on the income out of which the payment is made as if the payments out of UK income were from a UK resident trust and within Section 687(1) ICTA 1988. This treatment will only be available where the trustees:
>
> - have made trust returns giving details of all sources of trust income and payments made to beneficiaries for each and every year for which they are required, and
>
> - have paid all tax due and any interest, surcharges and penalties arising, and
>
> - keep available for inspection any relevant tax certificates.
>
> Relief or exemption, as appropriate, will be granted to the beneficiary on a claim made within five years and ten months of the end of the year of assessment in which the beneficiary received the payment from the trustees.
>
> No credit will be given for UK tax treated as paid on income received by the trustees which would not be available for set off under Section 687(2) ICTA 1988 if that section applied, and that tax is not repayable (for example on dividends). However, such tax is not taken into account in calculating the gross income treated as taxable on the beneficiary under this concession."

25 Section 686-7 and 809 ICTA 1988 were replaced by ss. 493-498 of the Income Tax Act 2007 ("ITA 2007"). These effect a change which it is agreed is not material for present purposes. The Explanatory Notes provided:

> "This change does not affect the operation of ESC B18, which enables UK resident beneficiaries who receive discretionary payments to have a credit for the tax paid by non-UK resident trustees on United Kingdom source income."

The law on extra-statutory concessions

26 In *R v Inland Revenue Commissioners ex p. MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545, a taxpayer sought to enforce an assurance given by the Revenue. Bingham LJ said this at 1569:

> "Every ordinarily sophisticated taxpayer knows that the revenue is a tax-collecting agency, not a tax-imposing authority. The taxpayers' only legitimate expectation is, prima facie, that he will be taxed according to statute, not concession or a wrong view of the law… Such taxpayers would appreciate, if they could not so pithily express, the truth of the aphorism of 'One should be taxed by law, and not be untaxed by concession:' *Vestey v. Inland Revenue Commissioners* [1979] Ch. 177, 197 per Walton J. No doubt a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling clearly within them. But where the approach to the revenue is of a less formal nature a more detailed inquiry is in my view necessary."

27 In *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718, Lord Hoffmann noted that s. 1 of the Taxes Management Act 1970 conferred a discretion which "enables the commissioners to formulate policy in the interstices of tax legislation, dealing pragmatically with minor or transitory anomalies, cases of hardship at the margins or cases in which a statutory rule is difficult to formulate or its enactment would take up a disproportionate amount of parliamentary time". But the discretion was not so wide as to enable the commissioners "to concede, by extra-statutory concession, an allowance which Parliament could have granted but did not grant…".

28 It is common ground in this case that ESC B18 is *intra vires* (though it would not be in either party's interests to suggest otherwise). There are, in any event, additional powers not considered in *Wilkinson* under which extra-statutory concessions may be issued: ss. 5 and 9 of the Commissioners for Revenue and Customs Act 2005. I assume for the purposes of this claim that ESC B18 is *intra vires* those provisions.

29 The status of extra-statutory concessions was considered in *R (Accenture) v Revenue and Customs Commissioners* [2009] EWHC 857 (Admin), [2009] STC 1503, where at [6] Sales J said:

> "It is important to observe that an extra-statutory concession represents a policy of HMRC and operates according to its own terms, as devised by the HMRC, as an instrument distinct from the underlying legal provisions set out in the statutory tax regime. The purpose of an extra-statutory concession is, in effect, to disapply the underlying statutory tax regime in respect of cases falling within the concession."

30 At [7], he cited Collins J's dictum in *R (Greenwich Property Ltd) v Customs and Excise Commissioners* [2001] EWHC 230, [2001] STC 618, at [13], that concessions should not be construed as if they were statutes. At [8], he relied on *MFK Underwriting* as authority for the proposition that:

> "Where a taxpayer claims to be entitled to take advantage of an extra-statutory concession promulgated by the tax authorities, its claim is in the nature of a claim to benefit from an enforceable substantive legitimate expectation. After the passage quoted by Collins J, Bingham LJ emphasised that any statement relied upon would have to be 'clear, unambiguous and devoid of relevant qualification' (see [1989] STC 873 at 892, [1990] 1 WLR 1545 at 1569)."

31 At [33], Sales J noted that "the proper interpretation of the concession is a matter for the court", citing *Sainsbury's Supermarkets Ltd v First Secretary of State* [2005] EWCA Civ 520, at [16]. That is consistent with subsequent authority in other areas of administrative law, which confirm that the interpretation of a published policy is a hard-edged question for the court and that no margin of interpretive discretion is accorded to the maker of the policy: see the case law which I summarised in *R (Ellis) v Secretary of State for the Home Department* [2020] UKUT 82 (IAC), [34]-[36].

32 In *Argyll House Developments* [2009] CSOH 131, [2009] SLT 959, Lord Woolman, sitting in the Outer House of the Court of Session, noted at [24] that extra-statutory concessions "facilitate the workings of the taxation system". He too cited Collins J's statement at [23] of his judgment in the *Greenwich Property* case that "since the Commissioners are relieving a taxable person of a liability imposed by the law... the taxable person must demonstrate that he has acted strictly in accordance with what the concession permits and has complied with all the conditions necessary to obtain the relief. At [27], he said that it was "appropriate to look to the purpose of the extra statutory concession".

33 In *R (Davies) v Revenue and Customs Commissioners* [2011] UKSC 47, [2011] 1 WLR 2625, the Supreme Court had to consider the proper interpretation of the Inland Revenue Booklet IR20. At [45], Lord Wilson asked how the booklet would be read by the "ordinarily sophisticated taxpayer", which provides further confirmation that an objective approach to interpretation is required.

Submissions for the Claimants

34 For the Claimants, William Massey QC submits that ESC B18 (1999) grants concessionary treatment of two different kinds.

35 The first is an extension of the "look-through" relief granted by s. 18 FA 1973. §1 extends this relief to cover other types of underlying trust income than taxed overseas income. The 6-year income limit is retained. §2a extends "look-through" relief to cover other types of underlying trust income of non-UK resident trusts where the beneficiary is a non-UK resident.

36 The second type of concessionary treatment is the extension in §2b of the credit mechanism in s. 17 FA 1973 to UK resident beneficiaries of non-UK resident trusts. The effect of this is different. It does not confer look-through relief. Rather, it allows a UK beneficiary of a non-UK resident trust to take advantage of the credit mechanism for UK income tax actually paid by the trustees on the income out of which the payment is made "as if the payments out of UK income were from a UK-resident trust and within Section 687(1) ICTA 1988".

37 It is not surprising that no 6-year income limit is expressed to apply to this latter type of relief, because its effect is to extend a mechanism which itself is not subject to any such limit.

38 In their Reply to HMRC's Detailed Grounds of Defence, the Claimants plead in addition that HMRC's construction should be rejected because, if correct, ESC B18 would be contrary to EU law because there would be a difference in treatment between the tax credits available to the beneficiaries of a UK resident trust and those available to the beneficiaries

of a non-UK resident trust. This would constitute unjustified discrimination contrary to Articles 49 and/or 63 TFEU.

39 This argument is not to be found in the Claimants' skeleton argument for the hearing. The Defendants accordingly noted in their skeleton argument that they assumed the point was no longer pursued. I understand that the Claimants subsequently made clear that it was and, at the hearing, Mr Elliott made brief submissions on it. He made clear that he was *not* saying that the Claimants' EU law rights were infringed. Rather, his argument was that the concession had to be interpreted so as not to infringe the EU law rights of taxpayers generally.

40 If, as Messrs Massey and Elliott argue, HMRC's interpretation of ESC B18 is wrong, they invite me to quash the decision to reject the Claimants' claim insofar as it related to income received by the Trust more than 6 years before the end of the relevant tax year. The basis for quashing is that the decision involved either an error of law or a breach of legitimate expectation. The fact that HMRC advised Magma that the 6-year income limit applied cannot affect the entitlement to a quashing order if the advice was wrong. Otherwise, the interpretation of extra-statutory concessions would become a subjective rather than an objective matter.

Submissions for the Defendant

41 For the Defendant, Aparna Nathan QC started by noting that §1 of ESC B18 has only one "foreign element": it applies to UK resident trusts, UK source income, but non-UK beneficiaries. This contains express wording imposing a 6-year income limit. §2 has at least two foreign elements: it applies to (i) a non-UK resident beneficiary with UK source income and (ii) a UK resident beneficiary with UK source income or foreign source income.

42 Ms Nathan relied on the explanation of the development of the policy provided in a witness statement by Mark Rimmer, who has worked for HMRC for 20 years and has been technical advisor to the Personal Tax International Team since 6 December 2010. That statement includes reference to internal discussions within HMRC (or its predecessor) at the time when the first iteration of ESC B18 was issued (1978). These discussions are said to show that the decision to include the 6-year income limit was taken to alleviate the administrative burden on HMRC and on trustees. Because not all the income arising to trustees would be UK source income or income attracting the trusts tax rate, applying the credit would involve complex calculations, which would have to be based on returns or other information provided by the trustees. Applying the limitation would relieve the trustees of the burden of having to produce substantial records or keep records longer than 6 years; and it would relieve the HMRC of having to review a substantial quantity of such records.

43 The rationale for the extension of ESC B18 in 1994 can be seen from a press release issued at the time in these terms:

> "The Inland Revenue have today published a revised version of extra-statutory concession B18 which applies where a beneficiary receives income from a discretionary trust. The concession enables the beneficiary to claim certain reliefs or credits to set against his tax liability on that income.

> The concession allows some beneficiaries of trusts with income taxable in the UK to claim reliefs to which they would not otherwise be entitled, by treating them as if they had received the income directly. The amendment now being made to the concession ensures that it also applies to allow UK resident beneficiaries of non-resident trusts to claim credit for UK tax paid by the trustees. The Inland Revenue have always viewed the concession as enabling credit for this tax to be claimed, and the amendment is made to correct a possible defect of the previous wording. The text has also been re-ordered and amended to take into account changes to the taxation of trusts introduced by Finance Act 1993."

44 Mr Rimmer's original evidence, and Ms Nathan's original submission, was that §2b is best seen as an extension of the look-through relief in s. 18, rather than an extension of the credit mechanism in s. 17. Three reasons are given.

45 First, s. 17 FA 1973 does not apply where there is any foreign element – whether the residence of the trust or beneficiary or the source of the income. Section 18 does have a foreign element: the overseas source of the income.

46 Second, ESC B18 was introduced in order to provide further circumstances in which the "look through" to the underlying income would be available, i.e. it was an extension of the look-through relief in s. 18 to (i) the income of UK resident trusts with non-resident beneficiaries (§1) and (ii) the income of non-resident trusts with UK resident and non-resident beneficiaries (§2). It follows that all these extensions should be subject to the same conditions. These include the need for a claim to be made, for the trustees to provide information to support the claim and the 6-year income limit. There is no reason to think that one extension of the "look through" treatment should be more limited in scope than any other. That similar conditions were intended to apply to all the extensions set out in ESC B18 is put beyond doubt by the words at the start of §2: "A similar concession will apply…" The word "similar" was appropriate, rather than "the same", because whereas §1 applies to trusts which have paid tax on all income at the trusts rate, §2 applies to trusts which may or may not have paid UK tax on UK source income at the basic or trusts rate and will not have borne UK tax on foreign source income.

47 Third, both §§1 and 2 deal with payments that are not within s. 17. HMRC's interpretation treats all income with a foreign element requiring the individual to make a claim for relief or credit (whether that be foreign income, a non-UK beneficiary or non-UK trustees) in the same way. They are all subject to a 6-year income limit.

48 Mr Rimmer said that his "research and understanding" are supported by the fact that there has never been a judicial review challenge to the 6-year income limit. No one has sought to apply the interpretation the Claimants now advance. HMRC's records include an enquiry made by a Guernsey-based tax professional in 2004 about whether the 6-year income limit applied to the section headed "Non-UK resident trusts". The answer was "Yes". The tax professional confirmed that this was in accordance with his understanding. Ms Nathan submitted that the lack of challenge was relevant to the proper interpretation of ESC B18, because it undermines the Claimants' assertion that their interpretation is the one that would be adopted by the ordinarily sophisticated taxpayer.

49 Mr Rimmer's evidence was corrected by an email on the day before the hearing and a corrected witness statement, which was handed up at the hearing. Whilst he had originally analysed s. 17 FA 1973 as applying to situations with "no foreign element", he now accepted that it *did* apply to situations with a foreign element. Ms Nathan submitted that this correction did not affect the argument. §2b of ESC B18 was still properly to be regarded as distinct from s. 17 FA 1973. It provided a *relief*, rather than an automatic credit mechanism; and it was therefore to be interpreted in accordance with other reliefs (in s. 18 and in §§1 and 2a of ESC B18).

50 Ms Nathan submitted that, for the same reasons that there was no error of law, there was also no breach of legitimate expectation. ESC B18 contains no unambiguous statement, devoid of relevant qualification, that the credit at issue here would be applied.

51 Finally, Ms Nathan submitted that, even if I accept the Claimants' interpretation of ESC B18, I should refuse relief in the exercise of my discretion because the grant of a quashing order would be contrary to principles of good public administration and would potentially expose HMRC to multiple claims. She relied on *R v Monopolies and Mergers Commission ex p. Argyll Group* [1986] 1 WLR 763 and *R v Secretary of State for Social Services ex p. Association of Metropolitan Authorities* [1986] 1 WLR 1.

Discussion

What is admissible when interpreting an extra-statutory concession?

52 Applying the principles derived from the case law set out above, an extra-statutory concession, like any other government policy, is to be interpreted objectively by the court. It means what the "ordinarily sophisticated taxpayer" would understand it to mean. Such a taxpayer would read the text of the concession in context, not in a vacuum. The context would include the statutory provisions or scheme whose rigour the concession tempers. It would also include previous iterations of the concession, read against the statutory provisions in force when they were issued, any other relevant statements by HMRC made at or before that time, provided that the notional taxpayer could be expected to be aware of them.

53 This last proviso is important. The notional taxpayer could not be expected to be aware of memoranda or discussions internal to HMRC. These may show the subjective intention of those who drafted the concession, but they are categorically irrelevant in identifying its objective meaning. Such internal views and understandings are no more pertinent when construing an extra-statutory concession than the instructions of a department sponsoring a Bill to Parliamentary Counsel (when construing a statute) or the instructions of one party to his solicitor (when construing a contract made with another party). They are inadmissible. The same is true of evidence in a witness statement produced for the purposes of litigation by officials and purporting to explain, *ex post facto*, the thinking behind the concession.

54 That does not mean that there is no place for a witness statement from a knowledgeable officer of HMRC. A statement may be helpful in explaining the chronology of the development of the policy relating to the concession and exhibiting any public documents. The chronology and public documents may assist in understanding the purpose of the concession, which is important to its proper interpretation: see e.g. *Argyll House Developments*, [27]. But care must be taken if the statement also contains inadmissible

material. In this case, I have read Mr Rimmer's statement, but left out of account those parts which (i) are based on research on internal documents and (ii) purport to explain the subjective reasons of HMRC in issuing and amending ESC B18.

Principles of construction

55 Extra-statutory concessions are not statutes and should not be interpreted as such: *Accenture*, [13]. It cannot therefore be assumed that every principle that applies when construing a statute applies to them. But some principles of statutory construction are just formalised expressions of linguistic interpretive techniques that are used when interpreting any formal text: see *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed, 2020), §20.1; *Effort Shipping Co. Ltd v Linden Management SA* [1998] AC 605, 627 (Lord Cooke).

56 One such is the principle *expressio unius est exclusio alterius:* to express one thing is to exclude another. To take a very simple example, if there are four recognised kinds of a particular product and a contract refers to three of them, that may indicate that it excludes the fourth. But, "[l]ike all linguistic canons of construction, the *expressio unius* principle… is a useful starting point rather than an absolute rule and it may be displaced in cases where some other reason can be found for why some things were mentioned but not others": *Bennion, Norbury and Bailey,* §23.13.

The approach to ambiguity

57 The authorities make clear that, because an extra-statutory concession relieves taxpayers of a liability imposed by the law, any ambiguity should in general be resolved against the taxpayer. Bingham LJ noted that "a statement formally published by the Inland Revenue to the world might safely be regarded as binding, subject to its terms, in any case falling *clearly* within them": *MFK*, at 1569 (emphasis added). Sales J noted that, because its binding nature was properly characterised as a form of substantive legitimate expectation, an extra-statutory concession would have to be "clear, unambiguous and devoid of relevant qualification" before it could be relied upon: *Accenture,* [8].

Is HMRC's long-standing practice relevant?

58 There is some support in the authorities for a principle of construction from "settled practice", which may be available in cases of ambiguity: see the judgment of Lord Carnwath in *R (N) v Lewisham London Borough Council* [2014] UKSC 62, [2015] AC 1259, [89]-[98]. Some of the case law referred to there suggests that a long-established practice or "customary meaning" may be relevant to interpretation, but the principle Lord Carnwath ultimately identified and applied was narrower than that. At [95], he said this:

> "Where the statute is ambiguous, *but it has been the subject of authoritative interpretation in the lower courts,* and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts." (Emphasis added.)

59 This was the principle that Lord Hodge (with whom Lord Wilson, Lord Clarke and Lord Toulson agreed) endorsed at [53]. Even this narrow version of the principle was controversial: see the reservations of Lord Neuberger at [146] and Lady Hale at [167]-[168].

In any event, it does not apply here, because the construction favoured by HMRC does not rest on any authoritative interpretation by a court.

60 More generally, a principle of "customary meaning" would only be consistent with an objective approach to interpretation if the custom in question was widely known and understood. In those circumstances, it might be said that, as Lord Carnwath put it, "those interested should be able to continue to order their affairs on that basis without the risk of being upset by a novel approach": see [90] and [93], citing a judgment of his own in *Isle of Anglesey County Council v Welsh Ministers* [2010] QB 163, [43]. But it is difficult to see how such an approach could apply to the interpretation of extra-statutory concessions.

61 HMRC's dealings with individual taxpayers are private. Its evidence in these proceedings is that it has consistently applied the 6-year income limit to UK resident beneficiaries of non-UK resident trusts; and that other than the Claimants' there has only been one query about this practice. But an ordinarily sophisticated taxpayer would not necessarily have any means of knowing this. The Claimants did not, and nor did their accountants, at least until HMRC responded to their query in 2018. In my judgment it would be incompatible with the objective approach to interpretation of policy to attach weight to the existence of a long-standing practice if the practice is visible only to HMRC.

62 I therefore attach no weight to the fact that, according to their evidence, HMRC has always interpreted ESC B18 in the manner for which they now contend.

ESC B18

63 Looking simply at the language of ESC B18 (in its current form), a comparison between the language used in §1 and that used in §2b provides some support for the Claimants' interpretation.

64 The relevant part of §1 is as follows:

> "Relief or exemption, as appropriate, will be granted to the extent that the payment is out of income which arose to the trustees not earlier than six years before the end of the year of assessment in which the payment was made, provided the trustees
>
> - have made trust returns giving details of all sources of trust income and payments made to beneficiaries for each and every year for which they are required, and
>
> - have paid all tax due, and any interest, surcharges and penalties arising, and
>
> - keep available for inspection any relevant tax certificates."

65 The first part of this passage grants the relief, subject to the 6-year income limit. The second part contains the proviso. §2b, by contrast, contains no express 6-year income limit but *does* still include a proviso in precisely the same terms. Application of the *expressio unius* principle might therefore suggest that the omission of any reference to the 6-year income limit in §2b signals that it does not apply in that part of the concession.

66 To my mind, however, that is not the only possible reading of the language of the concession. Another way of reading it is that the first part of §1 defines the *extent* of the relief granted (see in particular the words "to the extent that…"), whereas the second sets the conditions under which it will be granted. If §1 is read in that way, the opening words of §2 ("A similar concession will operate…") might be read as indicating that the relief granted by §2 is similar *in its extent* to that granted by §1 (i.e. it only applies to income arising to the trustees not more than 6 years before the year of assessment in which payment was made).

67 To decide between these two interpretations, it is necessary to go beyond the language of ESC B18 in its current form and consider both the statutory scheme and the 1978 and 1994 versions of the concession. This is the context against which the ordinarily sophisticated taxpayer would read the current version. Both parties relied on this context, but they drew different things from it.

68 The Claimants placed great reliance on the fact that the relief granted by §2b in the 1994 and 1999 versions is an extension of the credit mechanism in s. 17 (which is not subject to the 6-year income limit) rather than the look-through relief in s. 18 (which is). But to understand what was meant by the opening words of §2 ("A similar concession will operate…") it is necessary to consider the 1978 version, when those words first appeared.

69 §2 of the 1978 version corresponds to §2a of the current version. As the Claimants agree, that is properly understood as an extension of the look-through relief in s. 18 FA 1973 to non-UK resident beneficiaries of non-UK resident trusts. If the opening words do not incorporate the 6-year income limit, the consequence would be that: (i) the statutory look-through relief in s. 18 is subject to the 6-year income limit; (ii) the extension of that look-through relief in §1 to cover other income of UK resident trusts is subject to the 6-year income limit; but (iii) the extension of the same look-through relief in §2 to cover non-UK resident trusts is *not* subject to the 6-year income limit.

70 In my judgment, a reading with that consequence would be incoherent. It is difficult to conceive of a logical reason why HMRC would wish to extend look-through relief to non-resident trusts on a basis that is more beneficial to non-resident trusts than to resident ones. Nothing in Mr Massey's careful analysis of the statutory scheme suggested such a reason. Indeed, that analysis depended on reading those parts of the concession properly characterised as extensions of the look-through provision in s. 18 as subject to the 6-year income limit. The application of that analysis to the 1978 version of the concession provides strong support for interpreting the words "A similar concession will operate…" as importing into §2 (which at that stage did nothing other than extend look-through relief) the same limits on the extent of the concession as are found in §1.

71 Another way of putting the point is that, if the relief in §2 were not subject to the same limit to that in §1, the former would not be "similar" to the latter. It would be very much more generous in circumstances where there is no logical reason for the generosity. Mr Massey emphasised, after receiving a draft of the judgment, that he had not submitted that the opening words of §2 did not import the 6-year income limit. His argument was that what became §2b imported a fundamentally different (and unlimited) relief.

72 If – as this analysis suggests – the words "A similar concession will operate…" import the 6-year income limit into §2 of the 1978 version, what changed in 1994? The answer is that the concession in §2 was extended to cover UK resident beneficiaries. But the structure of

the 1994 version makes clear that §2b (which appears under the same heading "Non-resident trusts") was regarded as part of the same concession as §2a. That being so, §§2a and 2b are best understood as two limbs of the concession granted in §2. Read in that way, the introductory paragraph governs both §§2a and 2b. There is no reason why the words "A similar concession will operate…" should in 1994 mean anything different from what they meant in 1978. In both cases, the intention was to define the *extent* of the concession by reference back to §1 – i.e. to import into both §§2a and 2b the 6-year income limit.

73 Mr Massey may well be correct to characterise §2b as extending the credit mechanism in s. 17 (which is not subject to the 6-year income limit), rather than the look-through relief in s. 18 (which is). But it does not follow that the extension must be unrestricted in its extent. As Ms Nathan pointed out, s. 17 is applicable to UK resident trusts only. §2b of ESC B18 applies to non-UK resident trusts. That, together with the fact that the draftsman regarded it as simply a second limb of the concession in §2a, suggests that it would be anomalous if it provided relief to a greater extent (i.e. not subject to the 6-year income limit) than either s. 18 or §§1 and 2a of ESC B18.

74 Moreover, §2b grants a relief which must be claimed. In this respect it is similar to s. 18 and to §§1 and 2a, and dissimilar from s. 17. It is understandable that HMRC would wish to limit the number of years of records it has to check when deciding whether to grant such a relief. There is no similar need to limit the number of years to which the automatic treatment conferred by s. 17 applies, particularly in circumstances where that treatment applies only to UK resident trusts.

75 For these reasons, I consider that the better interpretation of §2b of ESC B18 is HMRC's: relief is granted to the same extent as s. 18 FA 1973 and §§1 and 2a of ESC B18, i.e. to the extent that the payment is out of income which arose to the trustees not earlier than 6 years before the end of the year of assessment in which the payment was made.

76 Thus, even without applying the principle in [57] above, I would have rejected the Claimants' case on the proper interpretation of ESC B18. But if, contrary to my view, ESC B18 is ambiguous between HMRC's and the Claimants' interpretations, that principle would resolve this claim in HMRC's favour: on no view can it be said that the Claimants' case *clearly* falls within ESC B18. The concession was not "clear, unambiguous and devoid of relevant qualification" on this point. That being so, the precondition for the invocation of a substantive legitimate expectation is not satisfied.

EU law

77 When the challenged decisions were made, the United Kingdom was a member of the European Union. The European Communities Act 1972 ("the 1972 Act") applied. After the conclusion of the Withdrawal Agreement, it continued to apply until the end of the "implementation period" at 11pm on 31 December 2020. At that point, EU law continued to have effect to the extent provided for in the European Union (Withdrawal) Act 2018 ("the 2018 Act").

78 By s. 4(1) of the 2018 Act, treaty provisions which applied immediately before that time continue to be recognised and available in domestic law, subject to certain exceptions. They are one of the species of "retained EU law". By s. 5(2), the principle of the supremacy of

EU law continues to apply so far as relevant to the interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day.

79 As I have indicated, Mr Elliott began his submissions by making clear that he was *not* submitting that the decision under challenge infringed the Claimants' own rights under EU law (or retained EU law). He later cited the decision of the Supreme Court in *Routier v Revenue and Customs Commissions (No. 2)* [2019] UKSC 43, [2021] AC 327 as authority for the proposition that the provisions on free movement of capital applied to transfers between the UK and Jersey. Guernsey is in the same position as Jersey for these purposes. At one stage, I wondered whether *Routier* was being relied upon to show that the Claimants' own EU law rights would be infringed if ESC B18 were read as HMRC say it should be read. However, in his reply submissions, Mr Elliott expressly disavowed any such submission. The point being advanced was rather that, on HMRC's construction, ESC B18 would conflict with the rights of *some* taxpayers under Articles 49 and/or 63 TFEU, and should therefore be given an interpretation which avoids that conflict in every case.

80 There is a short answer to this point, which does not require any examination of the compatibility of the concession with EU law. Given that the Claimants have expressly disavowed the argument that their own EU rights are infringed by the challenged decision, there is no reason to "read down" ESC B18 in this case:

(a) Prior to 11pm on 31 December 2020, Articles 49 and 63 TFEU were "directly applicable as law in the United Kingdom" and had to be "given effect in priority to inconsistent national law". This meant that national law had to be "read down" or disapplied *in situations falling within the scope of the relevant treaty provisions*: see by analogy *Routier*, [52]. The same is true of national policy.

(b) By virtue of ss. 4(1) and 5(2) of the 2018 Act, the position remains the same today, at least in a case such as the present, where the relevant enactments, policy and challenged decision all pre-date 11pm on 31 December 2020.

(c) However, Mr Elliott did not identify any principle of interpretation which permits the court to "read down" domestic law or policy in a claim brought by one person because that law or policy would or might conflict with the EU law rights of other persons. There is no need for any such principle, since those whose EU law rights would be infringed by the law or policy, read in accordance with domestic principles of construction, can rely on the EU law right directly.

81 This makes it unnecessary to consider whether, by allowing UK resident trusts to benefit from unlimited credit under s. 17 FA 1973 and its successors, but making non-UK resident trusts subject to the 6-year income limit, the HMRC is acting contrary to retained EU law. If so, the statutory provisions themselves might potentially have to be read down. To decide whether such a reading down is required, it would be necessary to consider a number of issues, including: (i) whether the issue is properly analysed as engaging the provisions governing the free movement of workers (because what is being taxed is, at root, income) or services (because of the impact on those providing trust services) or capital (as in *Routier*); (ii) depending on the answer to (i), whether the application of the 6-year limit to a trust resident in Guernsey falls within the material scope of EU law; (iii) if so, whether any discrimination or restriction on the free movement of capital is justified, bearing in mind that ESC B18 provides considerable (though not unlimited) relief to non-UK resident trusts.

If the matter fell to be analysed under the provisions dealing with the free movement of capital, it would be necessary to consider the import of Article 65 TFEU, which provides that Article 63 is "without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested".

82 It would be inappropriate to embark on the task of deciding questions such as these in a case where:

(a) the EU point was only pleaded in a Reply to HMRC's Detailed Grounds of Defence and then only in the most skeletal form and without alleging that the Claimants' own EU law rights were engaged;

(b) the argument did not appear in the Claimants' skeleton argument at all – and so was not addressed by HMRC in its skeleton argument;

(c) even orally, it was advanced only briefly and was described as "far from a central argument";

(d) in the course of oral argument, the Claimants' counsel expressly disavowed any argument that the Claimants' own EU law rights would be infringed by HMRC's reading of ESC B18.

Conclusion

83 For these reasons, I conclude that HMRC interpreted ESC B18 correctly. Its decision was lawful. In those circumstances, I do not need to address HMRC's ambitious argument that, even if it had not been, it would be appropriate to refuse relief.

Postscript

84 After a draft of this judgment was circulated, it was pointed out by Mr Massey in a written application for permission to appeal that my recitation of the arguments contained some errors. I have corrected these in the text of the judgment by inserting what is now [41] and [49] and by modifying the text in what is now [71]-[74], but it is right that I should say what they were.

85 The first error was my failure to make clear that Mr Massey had accepted that the opening words of §2 of ESC B18 imported the 6-year income limit. I have now made that clear. His argument was that these opening words did not apply to §2b when that was introduced in 1994. I have explained why I consider they did in [72]-[74].

86 The second error was that, in my draft at [72]-[73], I had recorded Ms Nathan's submission as being that s. 17 FA 1973 applied to "situations with no foreign element at all". This was her original submission, but it was corrected on the day before the hearing. The correct position was set out at [17] above: s. 17 FA 1973 is limited to UK resident trusts. I have corrected the error. In my judgment, the analysis remains sound in the light of the correction.

87 The third error was to suggest that Mr Massey had not relied on the change of wording and format in 1999 as material. He did rely on these changes. In my judgment, however, they do not affect the analysis contained in this judgment.