Neutral Citation: [2023] UKFTT 00368 (TC)

Case Number: TC08790

FIRST-TIER TRIBUNAL
TAX CHAMBER

In public by remote video hearing

Appeal reference: TC/2018/01628

INCOME TAX – loan contractor scheme- were sums paid to offshore trusts and then lent to the appellant taxable on him as employment income? – yes on the basis of Rangers – validity of discovery assessments – awareness of the insufficiency by the s 29(5) TMA hypothetical officer – impact of DOTAS disclosure – held inadequate awareness and assessments valid – appeal dismissed

Heard on: 4 and 5 October 2022 and 7 March 2023
Judgment date: 13 April 2023

Before

TRIBUNAL JUDGE NIGEL POPPLEWELL
MR JULIAN SIMS

Between

DR PRADIP KUMAR SHETH

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

The Appellant in person

For the Respondents: Marika Lemos and Thomas Westwell of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The appellant (or "**Dr Sheth")** appeals against two discovery assessments both dated 10 February 2014 ("**the assessments**"). The assessments are for the amounts set out in the table below:

Tax Year Ended	Description	Amount
5 April 2010	Discovery assessment	£27,120.90
5 April 2011	Discovery assessment	£3,334.60

2. It is HMRC's case that Dr Sheth used two tax avoidance schemes known colloquially as "contractor loan schemes" during these two tax years. These schemes ostensibly worked by converting what would otherwise be employment income into loans from an offshore trust. These schemes appear to have been promoted by Sanzar Solutions Ltd ("**Sanzar**") and Darwinpay ("**Darwinpay**"). The theory was that such loans would not be taxable as employment income. In 2009/2010 Dr Sheth received £72,577 from an offshore trust relating to Sanzar, and in 2010/2011, he received £45,869 from the same Sanzar offshore trust, and £16,673 from either Darwinpay or a trust relating to Darwinpay. We shall refer to these trusts as the "**EBTs**" and the loans as "**the Loans**".

3. The assessment for 2010/2011 is based only on the loan from the Darwinpay EBT. The loan from the Sanzar EBT was not known to HMRC at the time that that assessment was raised. In light of that additional loan, HMRC invite us to consider our duty under section 50(7)of the Taxes Management Act 1970 ("**TMA**") to increase the assessment for that tax year. We have agreed that we will make a decision in principle on this point and if we decide in favour of HMRC, leave it to the parties to work out the precise amount of additional tax which is due (even though it is HMRC's view that the tax for 2010/2011 should increase to £18,315.60).

4. The basis of the assessments is that it is HMRC's view that the loans from the EBTs are earnings as defined in section 62 of the Income Tax (Earnings and Pensions) Act 2003 ("**ITEPA**") and thus liable to income tax as earnings. In their view Dr Sheth is a taxable person, and HMRC have exercised their discretion to impose the tax on him rather than his employer.

5. Dr Sheth opposes the assessments on the basis that firstly they are invalid and were not served on him properly, and secondly the Loans are not taxable employment income. He also raises a number of procedural and other arguments.

6. For the reasons given below, it is our decision that the assessments were valid in time assessments which were served on Dr Sheth, and the Loans or amounts equivalent to them do comprise taxable employment income for which Dr Sheth is liable to income tax.

THE LEGISLATION

7. The relevant legislation is set out in the appendix to this decision.

THE EVIDENCE AND THE FACTS

8. As can be seen from the first page of this decision, the hearing took place in two stages. The hearing was scheduled to take place over three days, but unfortunately the appellant was unable to attend the third day and so we went part heard. We were provided with a substantial bundle of documents for the hearing, and the appellant, at our request, then provided a further bundle of documents in preparation for the third day of the hearing. The appellant participated in the video hearing from his location in India and was thus unable to provide oral evidence given that the appropriate diplomatic consents had not been obtained from the Indian government. However, there was little dispute over the facts of his involvement with the tax planning schemes which we set out below. The assessments had been raised by Officer Lesley Stopp who did not give evidence, but her witness statement of 11 October 2017 in another case (that of *Hoey v HMRC* [UKFTT] 0489 which also related to a contractor loan scheme) was in the bundle. A statement from Officer Andrew Finch dated 5 April 2018, given for the purposes of that case, was also in the bundle. Oral evidence on behalf of HMRC was given by Officer Brian Forbes. From this evidence we find as follows:

The schemes

(1) HMRC have been investigating and challenging contractor loan schemes since the early to mid-2000's. These schemes involve the taxpayer providing services to a UK employer, but via the medium of a contract of employment with an offshore entity. The employee is employed by that offshore entity who pays the taxpayer a modest salary under deduction of tax and National Insurance, whilst the balance (and far greater proportion) of the income attributable to the taxpayer's services is then provided to the taxpayer either by the offshore employer or by an offshore trust, by way of a loan. Taxpayers may have reported the loan as giving rise to a taxable benefit in their returns, but generally did not self-assess the loan as taxable income. This is the case of Dr Sheth.

(2) Officer Stopp's witness statement states that she started working on the contractor loan scheme project in October 2012, and that shortly after being told how the scheme worked, she came to the conclusion that the loans received by scheme users were taxable as income and there would accordingly be a loss of tax from scheme users. It is also clear from her statement that there were thousands of users of these contractor loan schemes, and that HMRC were up against enquiry windows. They therefore prioritised opening enquiries where those windows were still open before raising discovery assessments.

(3) The extent of the use of these schemes was confirmed by Officer Finch who went on to state that whilst he had become aware of these schemes only in November 2011, HMRC were aware of them since 2006/2007. He also states that those working on contractor loan schemes were aware of the cases of Dextra Accessories [2005] UKHL 47 ("***Dextra***") and Sempra Metals [2007] UKHL 34 (in our view this is the incorrect reference and Officer Finch meant to refer to the Special Commissioners Decision in *Sempra Metals v HMRC* [2008] 7 WLUK 193 ("***Sempra***"). It was his evidence that the implication of these cases was that unless the loans were challenged as a sham, then even though they were not intended to be repaid, they should be treated as being genuine. He also indicated that the initial basis of challenge to the schemes was under the transfer of assets abroad legislation.

(4) The promoters of the Sanzar and Darwinpay schemes disclosed the schemes under DOTAS in 2008. Following correspondence between HMRC and the promoters, it was HMRC's view that both schemes were identical for DOTAS purposes and given the scheme reference number 9026 9264 on 22 April 2010.

(5) The AAG1 disclosure form describes the scheme as follows:

> "Summary: Members of the scheme become employees of an Isle of Man partnership and are granted a life interest in a UK resident discretionary trust. They elect to sell this life interest. The monies arising from the sale and not subject to CGT, NIC or IT".
>
> "Explanation: Members of the scheme become employees of the partnership (The Sanzar Solutions Isle of Man Partnership) which is resident in, and carries on business in, the Isle of Man and are paid a salary that is subject to IT, EE NI and ERNI. IT and NICs are returned on a monthly basis. Receive loans from an offshore trust. These loans are at a discounted interest rate and the scheme members pay IT on this benefit in kind via their Self-Assessment Return. Are granted an interest in a UK resident trust (the trust property being excluded property for inheritance tax purposes). May elect to sell their interest in the UK trust, receiving monies in respect of this sale intended to reflect the market value of the interest. These monies are not subject to CGT, IT and NICs".
>
> "Statutory provisions: Taxation of Chargeable Gains Act 1992 part III. Individuals, Partnerships, Trusts And Collective Investment Schemes Chapter II. Settlements General Provisions (s. 76)".

(6) A letter dated 15 August 2011 from Sanzar to the appellant states that "during the year 2010/2011 tax year you were an employee of the Sanzar Solutions Isle of Man Partnership in our company therefore you are eligible to be considered for discretionary loans made to you by the Trustees of the Sanzar Solution Trust… In this respect we Sanzar Solution would like to inform you that your remaining loan of £48,434.17 had been adjusted (credited) in our Sanzar Solution Trust Account…." ("**the Sanzar letter**").

Dr Sheth's Tax Returns

Tax return 2009/2010

(7) Dr Sheth's tax return for the tax year 2009/2010 was submitted electronically on 30 October 2010. Insofar as relates to his use of the Sanzar scheme, the information shown in Dr Sheth's self-assessment tax return and several attachments thereto included only the following:

(a) The tax return included a completed Employment page showing at Box 5, employers name Sanzar Solution, at Box 1, Pay from this employment £9,833 and at Box 2, tax taken off pay £1,256.00;

(b) The tax return section headed 'Tax Avoidance schemes' which was completed and advised HMRC of the scheme reference number – 90269264 at Box 17 and the year in which the expected advantage was to arise – 2009-10 at Box 18;

(c) The attachments to that return which included:

(i) A copy of Dr Sheth's form P11D from Sanzar for year ended 5 April 2010 (This document was also submitted directly by Sanzar when submitting their employer returns). This form has entries at Section H showing an outstanding loan amount at 5 April 2010 of £72,577.61. Beneath this at Box 15 there is an entry for the cash equivalent of the loan, which is the value of the taxable benefit resulting from the loan (£1,381.00). The 'cash equivalent' of the 'loan' was not reported at Box 15 on the Employment page of the return.

(ii) Two copies of the 'Notification of Disclosure Avoidance Scheme and Notification of scheme reference number' forms that Sanzar were obliged to supply to scheme users following their disclosure of the scheme. One of the forms was completed by Dr Sheth and included his signed declaration ("**the AAG4**")

(iii) A copy of Dr Sheth's End of Year form P60 from Sanzar showing the same pay and tax deducted (details as noted above), plus details of earnings for and contributions due in respect of NICs.

Tax return 2010/2011

(8) Dr Sheth's tax return for the tax year 2010/2011 was submitted electronically on 6 February 2012. Insofar as relates to the Sanzar and Darwinpay schemes, the information shown in Dr Sheth's self-assessment tax return for this tax year (which did not include attachments) included the following:

(a) A completed Employment page showing at Box 5, employers name Sanzar, at Box 1, Pay from this employment £5,912 and at Box 2, tax taken off pay £707.

(b) Another completed Employment showing at Box 5, employers name Darwin Pay, at Box 1, Pay from this employment £2,991 and at Box 2, tax taken off pay £667.

(c) The tax return Section headed Tax Avoidance schemes completed advising of the scheme reference number – 90269264 at Box 18 and the year in which expected advantage arises – 2010-11 at Box 19.

P11D's

(9) Although copies were not submitted with Dr Sheth 2011 return (and they are not required to be submitted with the return) forms P11D for year ended 5 April 2011 were submitted by Sanzar and Darwinpay for the 2010/11 tax year as part of their employer annual returns. They included the following information:

(a) Form P11D from Sanzar:

(i) Has entries showing the outstanding loan at 5 April 2010: £72,577.61 and amount outstanding at 5 April 2011: £48,434.17. There is also an entry the loan was discharged on 4 April 2011. Whilst these entries might suggest there was only a loan of £72,577.61 made in year ended 5 April 2010 and which was partially released or repaid in year ended 5 April 2011 subsequent information received following an information request to Isle of Man authority established that in fact Dr Sheth received loans totalling £72,577 in year ended 5 April 2010 and further loans totalling £45,869.50 in year ended 5 April 2011.

(ii) It also has an entry at Box 15 showing cash equivalent of the loan in this year of £2,218. This detail was not reported on the tax return by Dr Sheth at Box 15 of the relevant Employment page of the return.

(b) The form P11D from Darwinpay:

(i) Has entries at Section H showing the outstanding loan at 5 April 2010: £7,025.17 and an amount outstanding at 5 April 2011: £16,672.69.

(ii) There is also an entry at Box 15 below this showing the cash equivalent of this loan £315.00. This detail was not reported on the tax return by Dr Sheth at Box 15 of the relevant Employment page of the return.

The assessments

(10) The design of HMRC's internal procedure and the means by which it led to a 'discovery' being made of an insufficiency in Dr Sheth's tax returns for 2009/2010 and 2010/2011 was:

(a) HMRC Officer Finch considered which principles, when applied to the circumstances of this scheme would potentially amount to avoidance, thereby giving rise to an insufficiency;

(b) Officer Finch then appraised Officer Stopp of those principles and entrusted her with the task of devising a system of checks of individual tax returns which would ascertain whether those tax returns had adequately disclosed the tax position relating to the identified principal;

(c) Officer Stopp devised and issued Standard Working Instructions ("**SWIs**") for her team to follow and which for example required the officer looking at the particular tax return to ascertain whether the position in respect of the transfer of assets abroad provisions had been disclosed by the taxpayer;

(d) There were three steps involved in the making of discovery assessments. These were: Establishing the loan figure; calculating the amount of lost tax; making the assessment.

(e) The SWIs were then applied by more junior officers in Officer Stopp's team in relation to taxpayers returns. The system required them to record in 'control spreadsheets' when they had completed each stage of the SWI;

(f) A lower graded member of her team, namely Alf Hitchcock, looked at Dr Sheth's tax return for the year ended 5 April 2010 on 6 August 2013 and following SWI 2 became aware of the loss of tax in Dr Sheth's tax return for this year and completed the control spreadsheet;

(g) A different lower graded member of Officer Stopp's team, namely Rani Thiva, looked at Dr Sheth's tax return for the year ended 5 April 2011 on 2 January 2014 and following SWI 2 became aware of the loss of tax in Dr Sheth's tax returns for this year and completed the control spreadsheet.

(11) HMRC have internal guidelines which only permit officers of a certain grade to issue discovery assessments. Accordingly, Officer Cunliffe, having closely followed SWI 3 devised by Officer Stopp issued the assessments on her behalf on 10 February 2014.

(12) In her letter dated 10 February 2014 addressed to Dr Sheth at an address in London which accompanied the assessments, Officer Stopp explained that the reasons for raising the assessments was that "Although described as loans, I believe that the sums related to your professional work in the UK and are taxable income, either as such, or under long-standing anti-avoidance rules". The assessments themselves explain that the recipient has a 30 day period to appeal against the assessments, and that the appeal right was also set out by Officer

Stopp in her covering letter.

(13) Following communications with Dr Sheth in March and October 2014, in which Dr Sheth indicated that he knew nothing of any debt owed to HMRC arising from the assessments, Dr Sheth confirmed receipt of the assessments in his letter to HMRC dated 17 December 2014. In that letter he states "thank you very much for sending me the copy of re-assessment of my tax returns of year 2009-2010 and 2010-2011. I have received end of November 2014".

(14) In a letter dated 2 April 2015 HMRC explained that the amount due under the assessments which had been suspended to allow Dr Sheth the period of time to pay, had now been released for collection and was with debt management.

(15) On 31 May 2016 HMRC wrote to Dr Sheth to explain that the debt had been passed to the Indian Tax Authority for enforcement.

(16) On 5 February 2018 Dr Sheth notified the tribunal of his appeal. It was HMRC's view that Dr Sheth's appeal was out of time. His application to appeal out of time was determined initially by the First-tier Tribunal, and subsequently, on appeal, by the Upper Tribunal which remitted the appeal back to the First-tier Tribunal for a full hearing.

FINDINGS OF FACT

9. From the foregoing evidence we make the following additional findings of fact:

(1) For both of the tax years under appeal, the appellant participated in tax avoidance schemes involving Sanzar and Darwinpay, which involved salary to which he was entitled by dint of being an employee of those two entities, and which would otherwise have been paid to him directly, being paid in the form of the Loans from the EBTs. This finding is based on the contents of the appellant's tax returns which included the schemes' SRN, the DOTAS disclosure on form AAG1, the AAG4, the Sanzar letter and the evidence of Officer Forbes.

(2) The amount of this salary is equivalent to the amount of the Loans as the Loans effectively replaced that salary, and provided the appellant with the same gross amount, but in a form which did not attract PAYE income tax or NICs.

(3) The section 29(6) TMA information for 2009/10 comprised the appellant's tax return, his Sanzar P11D and P60, and the AAG4. The section 29(6) TMA information for 2010/2011 comprise the appellant's tax return for that year.

(4) The appellant's P11D for 2009/2010 shows a loan to him of £72,577.61 none of which was repaid during that tax year.

(5) The appellant's P11D for 2010/2011 shows an opening loan balance of £72,577.61, and a loan balance of £48,434.17 "…at 5 April or at date loan was discharged if earlier". It also states that the loan was discharged on 4 April 2011. So, part of the outstanding loan had been repaid during that tax year and the balance shortly before the end of the tax year.

(6) The cash equivalent of the Loans which are reported at box 15 of the P11D forms were not included in box 15 of the appellants tax returns for either year.

(7) By the end of November 2014 he had received copies of the assessments which included his appeal rights.

DISCUSSION

Submissions

10. In her written and oral submissions Ms Lemos made the following points:

On Discovery

(1) HMRC discovered an insufficiency in the appellant's 2009-2010 tax return on 6 August 2013, and in his tax return for 2010/2011, on 2 January 2014. These were within the 4-year time period permitted by section 34 TMA.

(2) HMRC rely on the condition set out in section 29 (5) TMA ("**the hypothetical officer condition**"). This condition is only satisfied if the hypothetical officer could have been reasonably expected to be aware of the actual insufficiency on the basis of the information made available to him by the taxpayer (or on his behalf) before the closure of the enquiry window. (See *Langham v Veltema* [2004] EWCA Civ 193).

(3) The validity of the assessments must be judged solely from information listed in section 29 (6) TMA. The issue is whether the material could or should have alerted an officer to the actual insufficiency. The hypothetical officer is not to have attributed to him knowledge of any further information that he might have obtained if he had made further enquiries.

(4) The focus on section 29(5) TMA is on the quality of the taxpayer's disclosure and whether it clearly alerts the hypothetical officer to the insufficiency. Adequate disclosure, therefore, depends on the complexity of the situation and the extent and quality of the disclosure.

(5) That hypothetical officer could not reasonably have known of the insufficiency in the appellant's tax returns since: no mention was made in either of them of the fact that he would not realistically be required to repay the Loans; the section 29 (6) TMA information available to the hypothetical officer was the appellant's tax return, P11D, and AAG4, as regards the 2009/2010 tax year, and his tax return for the 2010/2011 tax year; this information did not disclose that there was a loss of tax nor how the scheme worked in sufficient detail; it did not disclose that the appellant was in receipt of taxable amounts from either Sanzar or Darwinpay; it did not disclose, nor could the hypothetical officer have been aware of, the fact that these Loans were redirected earnings and thus taxable as income; the crucial omission from the disclosure was the fact that the Loans were not repayable and the hypothetical officer could not have known that they were not repayable.

(6) It is clear that Dr Sheth was aware of the assessments at the end of November 2014 as evidenced by his letter dated 17 December 2014.

(7) There is no concept of staleness as regards discovery assessments. The fact that the discoveries were made in August 2013 and January 2014, yet not notified to the appellant until, at the latest, November 2014 does not affect the validity of the assessments.

Employment income

(8) Once HMRC have established that the assessments were valid, the burden shifts to Dr Sheth to displace them and show that they overcharge him. He has not done this.

(9) The effect of the decision in *RFC 2012 plc (formerly the Rangers Football Club plc) v*

Advocate General for Scotland [2017] UKSC 45 ("***Rangers***") is that the payments made by the employers to the EBTs were Dr Sheth's redirected earnings and thus taxable as employment income at the point of that redirection irrespective of whether the Loans were intended to be repaid or not. The amount of those redirected earnings is the amount of the Loans the evidence for which is in the P11D forms submitted by Sanzar and Darwinpay.

(10) There was never, in any event, any intention that Dr Sheth should repay the Loans.

(11) On the authority of *Hoey v HMRC* [2022] EWCA Civ 656 ("***Hoey***") we have no jurisdiction to consider the exercise of Officer Forbes' discretion under section 684(7A)(b) TMA to disapply the PAYE regulations in the case of Dr Sheth such that the liability to pay tax on the employment income is his and not that of his employer.

(12) We are under a duty under section 50(7)(c) TMA to increase the assessment for 2010/2011 if the evidence shows this to be appropriate (see *Glaxo Group Ltd v IRC* [1996] STC 191 at 199J and *CM Utilities Ltd v HMRC* [2017] UKUT 0305 at paragraphs [44-46]). It is appropriate for us to increase the assessment for 2010/2011 by £14,981 to take into account the tax due in respect of the appellant's use of the Sanzar scheme during that tax year.

(13) So, Dr Sheth's liability to income tax for the tax year 2009/2010 is £27,120.90, and for the tax year 2010/2011, the liability is £18,315.60 (in both cases excluding interest).

11. In his written and oral submissions Dr Sheth made the following points:

(1) The Loans were not earnings or emoluments. They were loans which brought with them a liability to be repaid. The employer could have asked for these to be repaid. There was no benefit to him since each loan was matched by a corresponding liability.

(2) In any case he denies that the Loans were professional income and it is for HMRC to prove that they are.

(3) It is clear from his P11Ds for 2010/2011 that the Loans were repayable since in that tax year he repaid some of the outstanding Loans.

(4) It is clear from the Sanzar letter that the outstanding loan amount set out in his P11D for 2010/2011 of £48,434.17 had also been repaid.

(5) HMRC have no jurisdiction to visit an assessment on an individual where that individual is outside the territorial scope of UK tax. Nor can HMRC assess the appellant since the lenders are outside the territorial scope of UK tax. HMRC appear to have accepted this in correspondence.

(6) HMRC had sent the assessments to the wrong address. There is no evidence that he received the assessments when they were originally sent to him, either at his London address or at his Indian address.

(7) The delay between making the assessments and sending them to the appellant at his correct address on 4 November 2014 is a serious and significant delay for which HMRC should be impugned.

(8) The assessments did not include the required statutory information concerning his appeal rights.

(9) HMRC have dropped their transfer of assets abroad case, and he cannot understand why they have done so and wants them to explain this.

(10) In the first week of January 2015, he received a statement from HMRC relating to his self-assessment position stating that he had "nothing to pay". He received a further assurance from HMRC in an email dated 3 July 2015 that his assessment was up to date and that he had nothing to pay.

(11) He is a British citizen who has no source of income in the UK nor any property here. He suffers from serious medical conditions.

(12) He cannot afford to pay the tax and it should be written off under the provisions of Extra Statutory Concession A 19.

(13) HMRC have not followed nor considered the rule of law which is in their charter which says that they will be sensitive to any financial difficulties which a taxpayer faces.

(14) HMRC did not reply or acknowledge his appeal of 1 August 2015.

(15) HMRC have no power or right to increase the assessments. Nor do they have any jurisdiction to recover tax from him.

(16) In the decision ("**the PTA decision**") which rejected his application for permission to bring his appeal out of time (which decision was subsequently overturned on appeal) Judge McNall encouraged HMRC to consider exercising their care and management powers in respect of recovering any tax due from him. He urges us to do the same.

Burden of proof

12. The burden of proving that the assessments are valid in time assessments which were properly served on the appellant lies with HMRC. The standard of such proof is the civil standard, namely the balance of probabilities. HMRC accept this.

13. If we find that the assessments are valid, then the onus shifts on the appellant to show that he has been overcharged. Again, the standard of establishing that is the balance of probabilities.

14. HMRC have pleaded that we have a statutory duty under section 50 (7) TMA to increase the assessment for 2010-2011 if we find, again on the balance of probabilities, that the appellant has been undercharged for that tax year.

Employment income?

15. We turn first to the question of whether the Loans, or amounts equivalent to them, should be taxed, as alleged by HMRC, as employment income under the provisions of ITEPA. We do so because the burden of establishing that the assessments are valid is predicated on the basis that the appellant's self-assessment in his tax returns is insufficient in that it does not assess the Loans or amounts equivalent to them to income tax. The assessments have therefore been issued to make good that insufficiency. The assessments can only therefore be valid if the Loans

or amounts equivalent, are employment income.

16. HMRC say that the Loans reflect earnings which were redirected to the EBTs by the appellant's employer (Sanzar and Darwinpay) and which would, in the absence of such redirection, have been paid to him under deduction of PAYE income tax and NICs. And that *Rangers* is authority that the charge to income tax on that employment income arises at the point at which that "salary" is redirected from the appellant to the EBTs.

17. We agree. The relevant extracts from *Rangers* are set out below:

> "[41] As a general rule, therefore, the charge to tax on employment income extends to money that the employee is entitled to have paid as his or her remuneration whether it is paid to the employee or a third party. The legislation does not require that the employee receive the money; a third party, including a trustee, may receive it…
>
> [58] In summary, (i) income tax on emoluments or earnings is due on money paid as a reward or remuneration for the exertions of the employee; (ii) focusing on the statutory wording, neither s 131 of ICTA nor s 62(2)(a) or (c) of ITEPA, nor the other provisions of ITEPA which I have quoted (except s 62(2)(b)), provide that the employee himself or herself must receive the remuneration; (iii) in this context the references to making a relevant payment 'to an employee' or 'other payee' in the PAYE Regulations fall to be construed as payment either to the employee or to the person to whom the payment is made with the agreement or acquiescence of the employee or as arranged by the employee, for example by assignation or assignment; (iv) the specific statutory rule governing gratuities, profits and incidental benefits in s 62(2)(b) of ITEPA applies only to such benefits; (v) the cases, to which I have referred above, other than *Hadlee*, do not address the question of the taxability of remuneration paid to a third party; (vi) *Hadlee* supports the view which I have reached; and (vii) the special commissioners in *Sempra Metals* (and in *Dextra*) were presented with arguments that misapplied the gloss in *Garforth* and erred in adopting the gloss as a principle so as to exclude the payment of emoluments to a third party.
>
> [59] Parliament in enacting legislation for the taxation of emoluments or earnings from employment has sought to tax remuneration paid in money or money's worth. No persuasive rationale has been advanced for excluding from the scope of this tax charge remuneration in the form of money which the employee agrees should be paid to a third party, or where he arranges or acquiesces in a transaction to that effect".

18. We have found as a fact that the appellant participated in the Sanzar and Darwinpay schemes and the way in which those schemes operated was set out, most clearly, in the AAG1 DOTAS disclosure form, and in the Sanzar letter both of which make it clear that as an employee of Sanzar, the appellant was to be paid loans from the EBTs. We also found that these loans (or amounts equivalent thereto) in effect replaced the salary to which the appellant was entitled as a reward for his employment services provided to Sanzar and Darwinpay in his capacity as an employee.

19. In light of this, it is our view that the appellant was liable to a charge to income tax under the provisions of ITEPA at the time at which that salary was redirected from his employers to the EBTs, irrespective of whether the Loans were intended to be repaid (and indeed whether they were actually paid) or not. The tax point had already arisen before the Loans were made and/or repaid. We therefore reject Dr Sheth's submissions in this regard.

20. In light of this conclusion, it is our view that there was an insufficiency of tax reported in the appellant's tax returns for 2009/2010 and 2010/2011. So the basic prerequisite for the making of a valid discovery assessment is established. We now need to consider in more detail whether the assessments were, as a matter of fact, valid in time assessments which were properly notified to the appellant.

The assessments

21. As regards notification, and whilst we understand the appellant's frustration that the assessments were not sent, initially, to the correct address, we have no hesitation in finding that, as submitted by HMRC, Dr Sheth was aware of the assessments at the end of November 2014 as evidenced by his letter dated 17 December 2014. And furthermore, that the assessments include his appeal rights. We note that in the PTA application, Dr Sheth had made the same "complaint", and Judge McNall had reached the same conclusion as us. We therefore reject Dr Sheth's submissions in relation to lack of, or late service of the assessments, and that they did not contain any statutory information.

22. It is true, however, that some considerable time had elapsed between the making of the discovery (6 August 2013 for the 2009/2010 tax return and 2 January 2014 for the 2010/2011 tax return) and the effective notification at the end of November 2014. But, as submitted by HMRC, there is no concept of staleness on which the appellant can rely, and so we find that the assessments were validly notified to the appellant.

23. In this appeal the ordinary time limit set out in section 34 TMA applies, namely that a discovery must be made within 4 years from the end of the year of assessment to which it relates. The 4-year period for the tax year 2009/2010 ended on 5 April 2014. And for the tax year 2010/2011, that 4-year period ended on 5 April 2015. The discovery for both tax years was made within those 4-year time limits.

24. The more fundamental question regarding the validity of the assessments, however, concerns the hypothetical officer condition. Having established that there is insufficiency of tax in an assessment, HMRC have to go on to establish that one of two conditions is then satisfied. The first condition is in section 29 (4) TMA and concerns fraud or negligence on the part of the taxpayer or someone acting on his behalf. HMRC do not rely on this first condition in this appeal. They rely on the hypothetical officer condition which is set out in section 29(5) TMA and states, relevantly:

> "The second condition is that at the time when an officer of the Board—
>
> > (a) ceased to be entitled to give notice of his intention to enquire into the taxpayer's return under section 8 or 8A of this Act in respect of the relevant year of assessment; or
> >
> > (b) …
> >
> > the officer could not have been reasonably expected, on the basis of the information made available to him before that time, to be aware of the situation mentioned in subsection (1) above".

25. We were referred by Ms Lemos to the principles in *Sanderson v HMRC [2016] EWCA Civ 19.* A useful synopsis of these and other relevant principles are set out in the following extracts from the Upper Tribunal decisions in *Clive Beagles v HMRC* [2018] UKUT 380

("***Beagles***") and *HMRC v John Hicks* [2020] UKUT 0012 ("***Hicks***") which we have found to be of considerable assistance. In *Beagles* the Upper Tribunal said this:

> "99. The leading cases on the application of s29(5) are now *Hankinson*, *Lansdowne and Sanderson*. We were referred to these cases by the parties. We will refer predominantly to the decision of the Court of Appeal in *Sanderson* and the leading judgment of Patten LJ as in it he set out a summary of the relevant principles which incorporates relevant extracts from the decisions in the other cases. The relevant passage is at [17] to [23] of his judgment. We will not set it out in this decision.
>
> 100. We endeavour to summarise the principles that we derive from Patten LJ's judgment as follows:
>
>> (1) The test in s29(5) is applied by reference to a hypothetical HMRC officer not the actual officer in the case. The officer has the characteristics of an officer of general competence, knowledge or skill which include a reasonable knowledge and understanding of the law.
>>
>> (2) The test requires the court or tribunal to identify the information that is treated by s29(6) as available to the hypothetical officer at the relevant time and determine whether on the basis of that information the hypothetical officer applying that level of knowledge and skill could not have been reasonably expected to be aware of the insufficiency.
>>
>> (3) The hypothetical officer is expected to apply his knowledge of the law to the facts disclosed to form a view as to whether or not an insufficiency exists (Moses LJ, Lansdowne [69]; Patten LJ, Sanderson [23]).
>>
>> We agree therefore with Mr Firth that the test does assume that the hypothetical officer will apply the appropriate level of knowledge and skill to the information that is treated as being available before the level of awareness is tested. The test does not require that the actual insufficiency is identified on the face of the return.
>>
>> (4) But the question of the knowledge of the hypothetical officer cuts both ways. He or she is not expected to resolve every question of law particularly in complex cases (Patten LJ, Sanderson [23], Lansdowne [69]). In some cases, it may be that the law is so complex that the inspector could not reasonably have been expected to be aware of the insufficiency (Moses LJ, Lansdowne [69]; Patten LJ, Sanderson [17(3)]).
>>
>> (5) The hypothetical officer must be aware of the actual insufficiency from the information that is treated as available by s29(6) (Auld LJ, Langham v Veltema [33] [34]; Patten LJ, Sanderson [22]). The information need not be sufficient to enable HMRC to prove its case (Moses LJ, Lansdowne [69])." but it must be more than would prompt the hypothetical officer to raise an enquiry (Auld LJ, Langham v Veltema [33]; Patten LJ, Sanderson [35]).
>>
>> (6) As can be seen from the discussion in Sanderson (see [23]), the level of awareness is a question of judgment not a particular standard of proof (see also Moses LJ in Lansdowne [70]). The information made available must "justify" raising the additional assessment (Moses LJ, Lansdowne [69]) or be sufficient to enable HMRC to make a decision whether to raise an additional assessment (Lewison J in the High Court in Lansdowne [2011] STC 372 at [48]).

101. Applying those principles to the facts of the present case, the question is whether from the information in and accompanying the return, a hypothetical officer could not reasonably have been expected to be aware of the insufficiency".

26. In *Hicks* the Upper Tribunal said this:

"194. In our judgment, section 29(5) requires that a taxpayer should make sufficient disclosure in order to enable an officer to make an informed decision whether an insufficiency existed sufficient to justify, in the words of Moses LJ [in *Lansdowne* at [69]], the exercise of the power to make an amendment to the return. We respectfully agree with Moses LJ that the possibility should remain open that mere *factual* disclosure may not, in some cases involving complex issues of law, be sufficient.

195. The purpose of section 29(5) is to strike a balance between the protection of the revenue, on the one hand, and the taxpayer on the other. The taxpayer is protected against a discovery assessment provided adequate disclosure has been made. The disclosure must be from the sources referred to in section 29(6) (as amplified by section 29(7)). HMRC are protected because they can raise a discovery assessment if adequate disclosure has not been made.

196. It seems to us that section 29(5) focuses primarily on the adequacy of the disclosure by the taxpayer. What constitutes adequate disclosure for the purposes of section 29(5) will vary from case to case. It depends on the nature and tax implications of the arrangements concerned and not on the assumed knowledge (or lack of knowledge) of the hypothetical officer. The obligation is on the taxpayer to make the appropriate level of disclosure as befits a self-assessment system.

197. In a relatively simple case, where the legal principles are clear, it would be sufficient for a taxpayer simply to give a full disclosure of the factual position. The return must also make clear what position the taxpayer is adopting in relation to the factual position (e.g. whether a receipt was not taxable or whether a claim for relief was being made).

198. But there may be other cases where the law and the facts (and/or the relationship between the law and the facts) are so complex that adequate disclosure may require more than pure factual disclosure: namely some adequate explanation of the main tax law issues raised by the facts and the position taken in respect of those issues.

199. Plainly, the greater the level of disclosure, the greater the officer's awareness can reasonably be expected to be. If a disclosure on a tax return includes all material facts and, in complex cases, an adequate explanation of the technical issues raised by those facts and the position taken in relation to those issues, it would be reasonable to expect an officer to be aware of an insufficiency. What constitutes reasonable awareness is linked to the fullness and adequacy of the disclosure – the expertise of the hypothetical officer remains that of general competence, knowledge or skill which includes a reasonable knowledge and understanding of the law.

200. In argument before us Mr Nawbatt came close to suggesting, as we understood it, that a hypothetical officer could not be expected to understand complex or specialist areas of tax law. We disagree. If the disclosure (factual and technical) is adequate in the circumstances of the case, a hypothetical officer can reasonably be expected to be aware of an insufficiency even in a complex case or one involving specialist technical knowledge. If the disclosure is inadequate then it is fair that a hypothetical officer could not reasonably be expected to be aware of an insufficiency in such a case. That is the

balance that section 29(5) strikes".

27. Dr Sheth did not challenge HMRC's assertion that it had made the discovery of the insufficiency in his 2009/2010 tax return on 6 August 2013, and the discovery of the insufficiency in his 2010/2011 tax return on 2 January 2014. The bar for making a discovery is very low. It simply means that the relevant officer must come to a conclusion or find out from the evidence before him or her that there is an insufficiency in the return. This must be a new conclusion. From the evidence before us, we have found as a fact that there was a discovery within the foregoing meaning on the dates set out above.

28. The main issue, therefore, is whether section 29(6) TMA information was adequate to make the hypothetical HMRC officer aware of the actual insufficiency in those returns at the date on which the enquiry window into those returns closed. For the 2009/2010 tax return, the enquiry window closed on 31 January 2012. For the 2010/2011 tax return, it closed on 31 January 2013.

29. It is clear from *Hicks* that irrespective of the complexity of the case, the competence of the hypothetical officer is a constant, namely general competence, knowledge or skill which includes a reasonable knowledge and understanding of the law.

30. In this case we would imbue that hypothetical officer with two specific competencies. Firstly, the same knowledge and analysis of that of Officer Stopp, who within a very short period of time of becoming involved in the contractor loan scheme project, was able to conclude that the loans were subject to tax as employment income. It strikes us that Officer Stopp, albeit the assessing (and thus a real) officer in this case, is the quintessential hypothetical officer for the purposes of section 29(5) TMA. She came from a general HMRC background but was then seconded to the contractor loan scheme project. That general background enabled her to come to a conclusion that the loans were taxable employment income. We think that the hypothetical officer would have been able to come to the same conclusion once they knew of the facts of the contractor loan scheme.

31. Secondly the hypothetical officer would have been aware of the cases of *Dextra* and *Sempra*, in a general way, even if that officer did not know of the specific technical issues in those decisions. In both of those cases the appellant was arguing that sums paid by a company to an EBT which were then intended to be paid to employees, were not taxable as employment income on those employees. Whilst there were other issues (most significantly, whether those payments to the EBTs were tax-deductible in the hands of the company), it is clear that in the early 2000's schemes had developed to reward employees via loans from EBTs in, what was asserted, was a form which was not subject to employment taxes. In our view the hypothetical officer would have been aware of these schemes and that the principle behind them was to "convert" what would otherwise have been employment income and taxed as such, into loans which were taxed only as a benefit in kind.

32. It is also clear from *Hicks* that the adequacy or otherwise of the disclosure depends on the complexity of the arrangements under consideration. And this complexity can be complexity of fact and/or law. Whilst the adequacy of the disclosure will determine whether the hypothetical officer was made aware of the actual insufficiency, it is likely that in less complex cases, the disclosure needed to generate that awareness will be less detailed than in more complex cases. This seems largely common sense to us.

33. To our mind, the contractor loan scheme arrangements are simply a species of the more general arrangements whereby income otherwise payable to an employee and taxable as

employment income is diverted through a third party (an EBT) and the employees rewarded by way of a loan which is not subject to employment income tax and NICs. This is very much down the shallow end of the pool of tax avoidance schemes, and in our view this was the case at the time of the closure of the enquiry windows into Dr Sheth's tax returns in January 2012 and January 2013.

34. So we now turn to the statutory information in respect of the two tax returns. And it is worth pointing out that the information which is relevant to the 2009/2010 tax year is more extensive than that for the 2010/2011 tax year.

35. The 2009/2010 tax year, information not only includes the appellant's tax return but also his P11D from Sanzar, his P60 from Sanzar, and the AAG4. Importantly, for these purposes, the tax return included the scheme reference number for the Sanzar scheme.

36. The hypothetical officer would have seen from the tax return that the appellant had been paid £9,833 in that tax year from which tax had been deducted. He would also have been able to see from the P11D (and the P60) that the appellant had been lent £72,577.6, with a taxable benefit of £1,381.

37. Whilst this might have put the hypothetical officer on notice that something strange might have been going on (it would have appeared to him unusual, we suspect, that a taxpayer would have been lent almost eight times his taxable salary by his employer), this is not sufficient to comprise adequate disclosure. It would not have made the hypothetical officer aware of the actual insufficiency.

38. However, these details must be seen in the context of the DOTAS disclosure. We set this out again here:

> "Summary: Members of the scheme become employees of an Isle of Man partnership and are granted a life interest in a UK resident discretionary trust. They elect to sell this life interest. The monies arising from the sale and not subject to CGT, NIC or IT".
>
> "Explanation: Members of the scheme become employees of the partnership (The Sanzar Solutions Isle of Man Partnership) which is resident in, and carries on business in, the Isle of Man and are paid a salary that is subject to IT, EE NI and ERNI. IT and NICs are returned on a monthly basis. Receive loans from an offshore trust. These loans are at a discounted interest rate and the scheme members pay IT on this benefit in kind via their Self-Assessment Return. Are granted an interest in a UK resident trust (the trust property being excluded property for inheritance tax purposes). May elect to sell their interest in the UK trust, receiving monies in respect of this sale intended to reflect the market value of the interest. These monies are not subject to CGT, IT and NICs".
>
> "Statutory provisions: Taxation of Chargeable Gains Act 1992 part III. Individuals, Partnerships, Trusts And Collective Investment Schemes Chapter II. Settlements General Provisions (s. 76)".

39. In our view this is a typically disingenuous disclosure designed to provide (in the promoter's view) adequate disclosure to prevent the raising of a discovery assessment if HMRC miss the enquiry closure window, whilst at the same time providing insufficient information which would make clear to HMRC (if they read it during the enquiry window) that they should immediately open an enquiry.

40. As far as the contractor loan scheme is concerned, and in particular the rearrangement of taxable employment income into non-taxable loans, it is both confusing and deficient.

41. Firstly, it starts off by providing a summary dealing with the grant of a life interest in the UK resident discretionary trust which the employee might elect to sell and that the monies arising from the sale are not subject to tax. This is, at best, only of peripheral relevance to the redesignation of employment income to loans. No mention is made of loans under the heading "Summary".

42. The Explanation section is then extremely confusing. Firstly, it states that members of the scheme become employees of the partnership and are paid a salary which is subject to employment taxes. This is borne out by the appellants tax return. But it makes no mention of the fact that this salary is dwarfed by the loans, which the disclosure goes on to say are received from an offshore trust. There is no mention that these loans are payable or otherwise, and the disclosure is simply that the scheme members pay income tax on the benefit in kind of the discounted interest rate. The disclosure then goes on to talk about interest in trusts which could be sold, and the phrase "these monies are not subject to CGT, IT and NICs" do not, to our mind, relates to the loans referred to earlier, but to the sale proceeds from the sale of the trust interest.

43. Finally, under the relevant statutory provisions, no mention is made of ITEPA and the possible tax on the loans as employment income under that statute. The statutory provisions mentioned in this section appear to deal more with capital taxes than with employment income tax.

44. So, what would the hypothetical officer, who knew that doing the rounds were schemes under which employers were seeking to recategorise remuneration as non-taxable loans and that such loans might be subject to employment income tax notwithstanding, have taken from the tax returns, the P11D, the P60 and the DOTAS disclosure?

45. That officer would have seen that the appellant had received employment income, which is consistent with the explanation in the DOTAS disclosure. He/she would also have seen that the appellant had received the Loans at a discounted rate to which a benefit in kind charge had arisen (something which is also consistent with the disclosure). He/she would also have seen that the Loans were considerably greater than the employment income.

46. What would not have been apparent from these documents was that the Loans were designed to compensate the appellant for the salary that he had foregone by accepting the lower salary set out in his tax return. It would not have been apparent that the statutory provisions which were relevant to this re-categorisation were set out in ITEPA. Nor, given at the time at which this disclosure was made, the repayability or otherwise of the Loans was an important feature relating to their taxability, was any mention made of whether they were repayable, and if they were, why this meant that they were not subject to employment income tax or NICs.

47. Furthermore, the hypothetical officer would have been confused by the references to life interest trusts and the possibility of those being sold in a tax-free way. This disclosure is misleading, therefore, in relation to the contractor loan scheme, since it includes information which is largely irrelevant to the application of that scheme.

48. It is our view that the combination of tax return, P11D, P60, and DOTAS disclosure does not comprise adequate disclosure to make the hypothetical officer aware of an actual insufficiency in the appellant's self-assessment in his tax return for 2009/2010. This is

notwithstanding that the hypothetical officer is obliged to apply his knowledge of the law to the facts disclosed, and there is no requirement that the actual insufficiency is identified on the face of the return.

49. In this case the scheme was a relatively straightforward strategy of converting taxable employment income into non-taxable loan receipts. It was well known to HMRC at the time at which the enquiry windows into the appellant's tax returns closed. It was a scheme of which the hypothetical officer would have been aware and have had a view that any such loans would have been taxable as employment income.

50. But notwithstanding that, all of which suggest that the level of disclosure required to alert the hypothetical officer to the actual insufficiency is a modest one, the appellant has not met it. The DOTAS disclosure is confusing, misleading, and as far as that contractor loan scheme is concerned, deficient of relevant factual and statutory information. Whilst it might have alerted the hypothetical officer to undertake further enquiries into the nature of the Loans, that is insufficient to provide adequate disclosure. The disclosure must put the hypothetical officer on notice of an actual insufficiency. It is very far from the disclosure made in *Hicks* which was deemed to be adequate to make the hypothetical officer aware of the insufficiency. That disclosure set out brief but comprehensive details of the individual to whom it applied (a self-employed trader carrying on a business on a commercial basis with a view to profit); the tax magic (the trader acquires at a discount the right to receive dividends declared but not yet paid); the statutory provision which is relevant (the income is not taxable due to section 730 TA 1988); the result (a net loss for tax purposes to the trader); and the tax benefit for the trader (a trader who works more than 10 hours a week can obtain sideways loss relief). When one compares that disclosure with the disclosure made on behalf of the appellant in this case, one can see that his disclosure deals with few, if any, of those points in any, or any adequate detail.

51. It is our conclusion, therefore, that the hypothetical officer was not made aware of the actual insufficiency in the appellant's tax return for 2009/2010 by virtue of the section 29(6) TMA information on or before the closure of the enquiry window into that return. And so the hypothetical officer condition for making a valid discovery assessment has been satisfied by HMRC.

52. We have come to the same conclusion in respect of the appellant's tax return for 2010/2011, for the same reasons that we have given above. The information under section 29(6) TMA for that year did not include the appellant's P11D, P60, or AAG4. So the hypothetical officer would have had less information to go on than for the year 2009/2010. For what it is worth, even if the hypothetical officer was in possession of that additional information, we would have reached the same conclusion as we have reached for the 2009/2010 tax year, for the same reasons.

Dr Sheth's other submissions

53. We now turn to Dr Sheth's submissions which, regrettably for him, we do not consider have merit. We have no jurisdiction to consider whether HMRC have acted outside the scope of ESC A19, nor whether they have acted in accordance with their charter. As regards the former, Dr Sheth's remedy is judicial review. As regards the latter, it is a complaint to HMRC. We cannot explain why Dr Sheth was under the impression that HMRC were no longer pursuing him for the tax at issue in this case, but in any event, even if such assurances were given, HMRC did not elevate those assurances to a binding agreement, and in these circumstances we cannot estop HMRC from asserting their right to tax. The tribunal does have

power to increase the assessment for 2010/2011 and, on the authority of *Hoey*, has no power to interfere with the discretion exercised by Officer Forbes to visit the tax on the appellant.

S50(7)(c) TMA

54. We have reviewed the law and authorities set out at [10 (12)] above and have reached the conclusion that Ms Lemos' submission on the application of this subsection is correct. We have found that the appellant received loans totalling £45,869.50 in the tax year 2010/2011. Even though the Sanzar loans were only recognised by HMRC after the date of the assessment for that year, we are obliged under this subsection to increase the assessment for that year to take into account the full amount of this loan income. It is HMRC's view that this increases the tax to which the appellant is liable for that tax year to £18,350.60. The appellant did not mount any challenge to this increased amount other than saying that it was incorrect, as a matter of principle, that the amount could be increased. We have therefore taken the view that, having come to the decision in principle that the assessment for 2010/2011 should be increased to take into account the full amount of the loans made to him in that tax year, we will issue directions separately regarding how the parties should deal with agreeing or otherwise resolving the additional tax on that additional amount.

HMRC discretion

55. We have also reviewed the law and authority (*Hoey*) in relation to the exercise of Officer Forbes' discretion under section 684 (7A) (b) set out by Ms Lemnos at [10 (11)]. We agree with that submission that we have no jurisdiction to consider the exercise of that discretion, and therefore the decision to impose the tax assessed on the Loans on the appellant rather than his employers is one which we cannot impugn.

Conclusion

56. Drawing the threads of this decision together. We have found that the Loans or amounts equivalent to them, are taxable employment income, and were taxable at the point at which they were transferred from the appellant's employer (Sanzar or Darwinpay) to the relevant EBT. This analysis is not influenced by the repayability, or actual repayment, of those Loans. The assessments are valid in time assessments and were properly notified to Dr Sheth. The hypothetical HMRC officer could not reasonably have known of the insufficiency in his tax returns on the basis of the information in those tax returns, the DOTAS disclosure, and, for the tax year 2009/2010, the AAG4, and the appellant's P11D and P60 from Sanzar. We have no jurisdiction to consider whether the exercise of Officer Forbes' discretion to impose the tax liability on Dr Sheth rather than on his employers has been properly exercised. We are under a statutory duty to increase the assessment for 2010/2011 to take into account the loans from Sanzar which became apparent to HMRC only after the assessment for that tax year had been raised.

DECISION

57. We dismiss the appeal.

CARE AND MANAGEMENT

58. We have mentioned at [11(16)] that in the PTA decision, Judge McNall indicated that if the appellant was still in the United Kingdom and if HMRC were itself seeking to recover the tax due as a debt in this jurisdiction (they are seeking to recover by way of a notice of demand

under the (Indian) Income Tax Act 1961), he would encourage HMRC to consider using its so-called care and management powers. He accepted he had no power to direct HMRC to do so. Similarly, whilst accepting that we have no power to so direct HMRC, we would also encourage them to consider using them to mitigate the appellant's liability to additional income tax under the assessments. Dr Sheth may have not benefited from the scheme in 2010/2011 since there is evidence that the loan outstanding at the start of that year had been repaid by the end of it. Yet he is still taxable on it for the reasons given in this decision. It seems to us that Dr Sheth is as much sinned against than sinning, and the weasel worded DOTAS disclosure has failed to give him the protection against a discovery assessment which, we suspect, he was assured would be the case.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

59. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

NIGEL POPPLEWELL
TRIBUNAL JUDGE

Release date: 13th APRIL 2023

APPENDIX

THE LEGISLATION

TMA

1. Section 29 TMA provided:

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

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

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

(c) at any relief which has been given is or has become excessive, the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

(2) …

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

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

(b) in the same capacity as that in which he made and delivered the return, unless one of the two conditions mentioned below is fulfilled.

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

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

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

(b) informed the taxpayer that he had completed his enquiries into that return,

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

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

(a) it is contained in the taxpayer's return under section 8 or 8A of this Act in

respect of the relevant year of assessment (the return), or in any accounts, statements or documents accompanying the return;

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

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

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

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

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

(7) In subsection (6) above—

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

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

(ia) …; and

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

2. Section 34 TMA provided:

34. Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax, capital gains tax or to tax chargeable under section 394(2) of the Income Tax (Earnings and Pensions) Act 2003 may be made at any time not more than 4 years after the end of the year of assessment to which it relates.

(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

3. Section 50 TMA provided:

(1)–(5) . . .

(6) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that, . . ., the appellant is overcharged by a self-assessment;

(b) that, . . ., any amounts contained in a partnership statement are excessive; or

(c) that the appellant is overcharged by an assessment other than a self-assessment, the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.

(7) If, on an appeal notified to the tribunal, the tribunal decides—

(a) that the appellant is undercharged to tax by a self-assessment . . .;

(b) that any amounts contained in a partnership statement . . . are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment, the assessment or amounts shall be increased accordingly.

ITEPA

4. Section 1 ITEPA imposes an income tax charge on "employment income". Section 6(1) ITEPA provides that the charge to tax on employment income is a charge to tax on, inter alia, general earnings.

5. Section 7(1) ITEPA states that "employment income" means (a) earnings within Chapter 1 of Part 3 (s.62); (b) any amount treated as earnings; and (c) any amount that counts as employment income. Section 7(3) ITEPA provides that "General earnings" means, inter alia, earnings within Chapter 1 of Part 3 (s.62 ITEPA).

6. Section 9(1) and (2) ITEPA provide that the amount of general earnings charged to tax is the net taxable earnings for the year. Section 13(1) identifies that the person liable to tax on employment income is the taxable person identified in Section 13(2). Section 13(2) identifies the taxable person, in relation to general earnings as the person to whose employment the earnings relate.

7. Section 15(1) and (2) ITEPA provide, in relation to UK resident employees, that the full amount of any general earnings which are received in a tax year is an amount of "taxable earnings" from the employment in that year.

8. Section 18 ITEPA defines the time when an amount of general earnings is received for the purposes of ITEPA. So far as relevant general earnings are received at the earliest of the time when payment is made of or on account of the earnings and the time when a person becomes entitled to payment of or on account of the earnings.

9. Section 62 ITEPA defines "earnings" as:

(1) This section explains what is meant by "earnings" in the employment income Parts.

(2) In those Parts "earnings", in relation to an employment, means—

(a) any salary, wages or fee,

(b) any gratuity or other profit or incidental benefit of any kind obtained by the employee if it is money or money's worth, or

(c) anything else that constitutes an emolument of the employment.

(3) For the purposes of subsection (2) “money's worth” means something that is—

(a) of direct monetary value to the employee, or

(b) capable of being converted into money or something of direct monetary value to the employee.

(4) Subsection (1) does not affect the operation of statutory provisions that provide for amounts to be treated as earnings (and see section 721(7)).

10. Section 684(7A) ITEPA provides that nothing in the PAYE regulations may be read… as requiring the player to comply with the regulations in circumstances in which an officer of Revenue and Customs is satisfied that it is unnecessary or not appropriate for the payer to do so.