[2016] UKFTT 725 (TC)

# TC05454

**Appeal number: TC/2015/02669**

***INCOME TAX – benefits in kind – family company paid care home fees for Mrs Baylis, wife of one employee and mother of another – whether contract with care home made in a personal capacity or as agent for employer – agency law considered and applied – held, contracted as agent – provision of the care therefore benefit in kind for family member – whether statute directs which of two possible employees liable to benefit in kind charge – whether a matter of employer's discretion – reliance on* Vestey *– other personal expenses paid by employer – whether taken into account when dividends calculated – whether benefits in kind – appeal allowed***

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

**SARAH BAYLIS** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE ANNE REDSTON**

**Sitting in public at the Royal Courts of Justice on 6 and 7 October 2016**

**Miss Diane Blagg CTA of Stiles & Co, Chartered Accountants, for the Appellant**

**Mr David Linneker of HM Revenue & Customs Appeals and Reviews Unit, for the Respondents**

DECISION

**Introduction and summary**

1. On 11 November 2013, HM Revenue & Customs ("HMRC") assessed Ms Baylis to tax on the basis that certain benefits in kind had been omitted from her 2009-10 and 2010-11 self-assessment ("SA") tax returns. In this decision, I have called those two tax years "the relevant period".

2. The extra tax was £9,649.95 for the first year and £27,533.22 for the second. Most of the tax related to the payment of care home fees for Ms Baylis's mother, Mrs Baylis.

3. During the relevant period, Ms Baylis was employed by Val Wyatt Marine Ltd ("VWML"). Her father, Mr Alec Baylis, was VWML's majority shareholder and managing director, and the spouse of Mrs Baylis.

4. It was not disputed that VWML had paid Mrs Baylis's care home fees. HMRC's primary case was that Ms Baylis had personally contracted with the care home, VWML had met her personal liability and the resulting benefit in kind was therefore taxable on her. Ms Baylis's case was that she had contracted with the care home as agent for VWML. Although the payment of the fees was a benefit in kind, it was taxable on her father, the spouse of Mrs Baylis.

5. HMRC's secondary case was that, if the contract was with VWML, the employer had the discretion to decide which of two possible employees should bear the resulting benefit in kind charge. Here, VWML had decided that Ms Baylis, not her father, was liable to tax on the care home fees.

6. I decided that:

(1) Ms Baylis had contracted with the care home as agent for VWML; and

(2) the resulting benefit in kind charge did not fall on Ms Baylis. This is because, where two employees are potentially liable to tax on an "employment-related benefit" provided "for a member of an employee's family or household", the legislation sets out a hierarchy, under which "spouse" takes priority over "parent". I also rejected HMRC's submission that employers can decide which of two employees are to suffer the tax charge.

7. It follows that Ms Baylis is not liable to tax on VWML's payment of her mother's care home fees.

8. The remaining part of the assessments under appeal related to the following sums said to have been paid by VWML to settle certain personal expenses incurred by Ms Baylis:

(1) credit card payments of £1,411 for 2009-10 and £6,475.10 for 2010-11; and

(2) other third party payments of £3,000 for 2010-11.

9. Ms Baylis's case was that any such personal expenses were covered by dividends already included in her tax return. I agreed with Ms Baylis.

10. I therefore allow her appeal against the assessments for both years in full.

11. There was no appeal before the Tribunal in relation to 2011-12. The parties are to discuss with each other in order to clarify the position for that year.

**The evidence**

12. The Tribunal had the benefit of a helpful bundle of documents prepared by HMRC, which included the following documents:

(1) correspondence between the parties, and between the parties and the Tribunal;

(2) correspondence between VWML and HMRC;

(3) correspondence between HMRC and two firms of accountants, Eacotts Ltd ("Eacotts") and Haines Watts Tax Compliance LLP ("Haines Watts");

(4) correspondence between Stiles & Co, representing Ms Baylis, and VWML, Eacotts and Haines Watts;

(5) Ms Baylis's SA tax returns for 2009-10 and 2010-11, and draft SA returns for Mr Baylis for the same tax years;

(6) P11D forms for Ms Baylis and Mr Baylis for both years, and amended versions of those forms;

(7) extracts from VWML's cash book;

(8) VWML's management accounts for June and December 2009;

(9) VWML's statutory accounts for 2010, and its Annual Return filed with Companies House on 6 March 2012;

(10) various bank statements for the joint bank account held by Mr and Mrs Baylis;

(11) invoices and other documents relating to payments made to Mrs Baylis by VWML;

(12) Minutes of an Extraordinary General Meeting held by VWML;

(13) two letters from Mrs Forsyth, matron of the care home in question;

(14) Mrs Baylis's death certificate;

(15) personal correspondence between Mr and Mrs Baylis, together with family photographs; and

(16) "to whom it may concern" letters from Ms Baylis's GP and from Mr Baylis's GP.

13. Miss Blagg also provided a copy of VWML's statutory accounts for the year ended 31 December 2015, which had been posted on the Companies House website a

few days earlier. Mr Linneker did not object to that document being admitted and I allowed it to be included in evidence.

14. Ms Baylis provided a witness statement dated 18 May 2016, and an earlier undated document headed "Background Notes" which set out her view of the facts. She also gave evidence in chief, led by Miss Blagg, was cross-examined by Mr Linneker and answered questions from the Tribunal. I found her to be an honest and credible witness. For example, although no copy of the contract with the care home was in evidence, she said she had signed it in her own name, despite being aware that this would make her position more difficult. She accepted without hesitation that she had arranged for VWML to transfer money to her between October and December 2011, although this was the subject of dispute between her and VWML, and she gave a straightforward account of certain payments made to her mother by the company, and her knowledge of that practice.

15. Mr Graham Maddrell had been Ms Baylis's partner between 1984 and 2004. He provided a witness statement, gave oral evidence, was cross-examined by Mr Linneker and answered questions from the Tribunal. I found his evidence to be reliable where it was based on his own first-hand knowledge. To the extent that he was setting out what he had been told by Ms Baylis, his evidence was hearsay. I have not relied on those parts of Mr Maddrell's evidence.

16. Dr Gary Thomas Bell is a consultant psychiatrist who attended Mrs Baylis in 2009 and 2010. He provided a witness statement, gave oral evidence, and was cross-examined by Mr Linnekar. He was an impressive witness who gave clear and honest evidence.

17. Ms Carol Sudbury is a former employee of VWML. She provided a witness statement but was unable to attend the hearing. Mr Linneker said that HMRC accepted her evidence, other than where she was simply reciting what she had heard from Ms Baylis.

18. HMRC did not call any witnesses.

**Mr Baylis**

19. As is clear from the preceding paragraphs, Ms Baylis's case was she was not taxable on her mother's care home fees, which should instead have been included on Mr Baylis's P11D.

20. Where a decision in one appeal may have consequences for a third party, the Tribunal may direct that the third party be joined as a respondent under Rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Tribunal Rules").

21. I therefore considered whether to adjourn this case, which had been listed for two days, and to direct that Mr Baylis be joined as a respondent.

22. However, I was provided with a "to whom it may concern" letter from Dr Philip Unwin, dated 2 June 2016. This had been sent to Miss Blagg after she made contact with VWML some six weeks before the hearing. In his letter, Dr Unwin states that Mr Baylis is suffering from dementia, finds it "difficult to remember the simplest of facts and…could not remember his late wife at all", and was therefore "unable to give any reliable evidence". Both parties accepted this was the position and I agreed.

23. It follows that if Mr Baylis were joined as a party, he would be unable to take part in the hearing, although an attorney appointed under a lasting power of attorney (LPA) or an enduring power of attorney (EPA) could participate on his behalf; an attorney could also instruct someone, such as an accountant or lawyer, to represent Mr Baylis's interests.

24. I also took into account the fact that the years in question are 2009-10 and 2010-11, so it is too late for HMRC to raise further assessments on Mr Baylis within the ordinary four year time limit in Taxes Management Act 1970 ("TMA") s 34. Although HMRC would be in time to raise an assessment in reliance on the six year time limit in TMA s 36, I thought it reasonable to assume that no such assessment would be made, given Mr Baylis's lack of mental capacity.

25. Having considered all the above factors in the light of the overriding objective at Rule 2 of the Tribunal Rules, including the need to avoid delay, so far as compatible with proper consideration of the issues, I decided that the hearing should continue. However, for the avoidance of any possible doubt, my jurisdiction is to make a decision about Ms Baylis's appeal; it is not to make a decision about Mr Baylis's tax liability.

**Discovery assessments**

26. The assessments under appeal were made under TMA s 29, and so were "discovery assessments". The name derives from TMA s 29(1), which requires that a HMRC Officer "discover" that an amount of tax has not been assessed. HMRC also has to meet one or other of the conditions in s 29(4) or s 29(5), which read:

> "(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."

27. Miss Blagg accepted that HMRC had made a discovery, and that it had met the test in TMA s 29(5), because no information about the care home fees or the expense payments had been included on Ms Baylis's SA returns for either year.

28. As a result, the parties moved on to consider whether Ms Baylis was liable to the extra tax which had been assessed on her.

## The facts

29. On the basis of the evidence provided, I found the following facts. These are not in dispute unless otherwise indicated. I make further findings of fact later in this decision.

*The family*

30. Mrs Judith Baylis was born on 20 October 1928 and married Mr Baylis in 1952. In the early years of the marriage she worked as a journalist, and was the higher earner. Their only child, Ms Baylis, was born in May 1965.

31. At some point before 1977, Mr Baylis began an extra-marital affair with his secretary, Ms Terlecki.

32. In 1977 Mr Baylis bought all the shares in VWML; Mrs Baylis provided financial support for that purchase. Around the same time, she stopped working as a journalist. After the purchase, Ms Terlecki moved with Mr Baylis to VWML; she remained his secretary, and the affair continued.

33. In 1981 Ms Terlecki became pregnant and subsequently gave birth to a daughter, Lisa ("Mrs Caddick"). Mr Baylis moved out of the marital home to be with Ms Terlecki. Around 1993 a second child, Anthony ("Mr Tony Baylis"), was born to Mr Baylis and Ms Terlecki. Mr Baylis did not inform Mrs Baylis or Ms Baylis that Ms Terlecki had had two children by him; they found out by chance some years after each child was born.

34. Mr Baylis did not obtain a divorce or a legal separation from Mrs Baylis. He visited Mrs and Ms Baylis at least twice a week, normally on Tuesdays and Fridays for dinner. On other days, he telephoned Mrs Baylis. He usually spent Christmas with Mrs Baylis and Ms Baylis, and they went on holiday together as a family every year, often to the South of France. They maintained a joint bank account. On their fortieth wedding anniversary, Mr Baylis paid for them to fly together in Concorde. It is clear from the personal correspondence provided to the Tribunal that Mr and Mrs Baylis retained a close and loving relationship, despite the existence of a second family, and that this continued up to Mrs Baylis's death.

35. In 2000, Ms Terlecki passed away. Mrs Caddick was then seventeen years old, and Mr Tony Baylis was seven. Mr Baylis cared for and supported these two children.

36. Ms Baylis continued to live with her mother. From around 2000 Mrs Baylis began to suffer from a number of physical and mental health conditions and become

increasingly frail. Ms Baylis provided physical care and support throughout this period until her mother was finally admitted to hospital in 2009.

*VWML*

37. VWML runs a marina business on the river Thames. It owns substantial moorings as well as four acres of land. Mr Baylis was its Managing Director from 1977 until December 2011. The company's shareholding was complex, involving trusts and seven classes of shares, labelled using the letters of the alphabet ("alphabet shares"). The use of alphabet shares allowed VWML to pay differential dividends to each class of shareholder.

38. The statutory accounts for the year ended 31 December 2010 state that Mr Baylis controlled the company by virtue of his majority shareholding; this is consistent with Ms Baylis's evidence and with the Annual Return filed in March 2012. I find that Mr Baylis was VWML's majority shareholder from 1977 until at least March 2012.

39. Ms Baylis described her father as having "a very controlling nature". In her oral evidence she said "I would never question him because he was in control". Mr Maddrell confirmed this, saying that Mr Baylis was "a control person" who "controlled everything" and told Ms Baylis what to do. Their evidence was unchallenged and I find as fact that Mr Baylis had a controlling nature and that Ms Baylis was, to put it colloquially, under his thumb.

40. Mr Linneker suggested to Ms Baylis that Mr Baylis had nevertheless handed over effective control of the company to her during the relevant period. He pointed out that Mr Baylis was by then over eighty, and relied in particular on two sentences in Ms Baylis's "Background Notes" document. The first was in a passage about caring for her mother (Mr Linneker's emphasis):

> "this [caring for my mother] was having a great impact on my health as <u>I was running the business too</u> and I suffered [from a medical condition] in late summer 2009. I went back to work almost straight away and cared for my mum too as my dad pressured me."

41. The second reference was similar: "I cared for my mother for 2 years and ran the business at the same time…".

42. Ms Baylis strongly disagreed with Mr Linneker, saying that her father remained in control of the business during the relevant period: he still came into the office at least once a week, without notice, and reviewed the cash book and checked other elements of the day-to-day running of the business. Ms Sudbury's evidence, which was accepted by Mr Linneker, was that Mr Baylis "frequently" came into the business during the relevant period, and would look through the books, and that he and Ms Baylis would together sit down with the cash book.

43. Ms Baylis's and Ms Sudbury's evidence is supported by the cash book itself, which shows that Mr Baylis was still actively making payments by cheque during the relevant period. Mr Linneker also did not challenge Ms Baylis's evidence that the

company's bank statements were sent to Mr Baylis's home address and he would bring them with him when he came to office.

44. I find, on the basis of the evidence, that in the relevant period Mr Baylis was no longer present at VWML every day, so Ms Baylis had day-to-day responsibility for running the business. But Mr Baylis nevertheless remained in overall control and retained hands-on involvement, and this remained the case at least until the end of 2011.

*Ms Baylis's role at VWML*

45. Ms Baylis started at VWML when she was still at school, working weekends and holidays. From the age of 24 she was employed full time, doing unskilled tasks such as working the diesel pumps and cleaning. Mr Baylis taught her how to enter sales and purchases in the day book, and how to keep the cash book.

46. Ms Baylis has no qualifications or training as an accountant, and it was evident from her responses to the Tribunal's questions that she has no understanding of double-entry book-keeping. She also has no tax knowledge.

47. At some point Ms Baylis was given the only category "G" share in VWML. From then on she was paid using a mixture of salary and dividends. Both Mr and Ms Baylis had company credit cards, as did a third director, Mr Guy Gerling, who was responsible for sales.

48. On 8 December 2000, Ms Baylis was made financial director of VWML, and had authority to make payments on the company's behalf. It is clear from the cash book that both she and her father wrote cheques and made payments. Ms Baylis carried out the monthly bank reconciliations based on the cash book and the bank statements provided by her father.

*Eacotts' role*

49. The accounting records of the company were written up from these primary records on a regular basis by Eacotts, a local firm of accountants, who had acted for the company for many years. Eacotts checked the receipts and payments, the bank reconciliations, the bank statements, the company credit card statements and the cash book. From these they produced monthly management accounts and the statutory accounts.

50. Eacotts also completed the VAT returns and P11Ds for VWML, and the SA tax returns for Mr and Ms Baylis. To carry out these tasks, Eacotts reviewed the cash book, bank statements, bank reconciliations, invoices and other vouchers, and the statements for the company credit cards. Eacotts also ran the payroll and organised the payment of staff wages, including Ms Baylis's salary. Ms Baylis did not have the knowledge or skills to check Eacott's work.

51. When Eacotts corresponded with Mr Baylis, they usually did so by writing to him at the marital home. This remained the position even after he had moved out to live with Ms Terlecki. Ms Baylis's unchallenged evidence was that the same was true

of a fair amount of business correspondence; she would show this to her father on his frequent visits, or take it into the office. Copies of some business correspondence were also kept at the marital home.

52. Ms Baylis also gave evidence, by reference to pages of the cash book, that cash dividends were paid to her and the other two directors, usually by way of cheques signed by Mr Baylis. This too was unchallenged and I accept it.

53. Mr Baylis had always charged a number of personal expenses to VWML, such as the costs of his gardener, domestic repairs and heating oil. Ms Baylis followed the same practice: for example, she used her company credit card to pay for clothes and hairdressing. The Tribunal was also taken to a credit card statement for Mr Gerling, which included purchases of Apple i-tunes, which Ms Baylis would have been personal and not business expenses. Miss Blagg submitted that it was normal company practice for VWML to pay a range of personal expenses on behalf of the directors. Mr Linneker did not contest this and I find it to be a fact.

54. Ms Baylis's evidence was that she filed receipts for personal expenditure and handed these over to Eacotts. When Eacotts prepared the management and statutory accounts, they totalled up the personal expenditure from the cash book and the credit cards, checked them to the receipts and added them to the cash payments made to the directors. They disclosed the total as dividends in VWML's statutory accounts and in Mr and Ms Baylis's SA tax returns. Mr Linneker did not challenge this description of Eacott's normal practice and I find it to be a fact. However, Mr Linneker did seek to argue that some of Ms Baylis's personal expenses were not treated in this way, and I return to this at §203ff below.

55. Two pages from VWML's 2009 management accounts were also in evidence. Both included a "directors loan account". The 2010 statutory accounts show that no amount was owed to VWML by the directors at either 31 December 2009 or 31 December; those accounts also set out the 2009 and 2010 dividends paid to the directors. I make further related findings at §214ff.

*Payments to Mrs Baylis*

56. From 1977, when Mr Baylis purchased VWML, Mrs Baylis was paid regular monthly amounts by the company. For example, in 1999 she was paid £1,500 pcm.

57. VWML received invoices from Mrs Baylis which match these payments. That for December 1993 reads:

> "to arranging advertising copy as required by 'Motorboat and Yachting' and 'Boats and Planes' and checking the feedback on sales enquiries in December."

58. The Tribunal was provided with two other invoices, one for January 1998 and one for February 1998. The wording on each invoice is identical to that set out above. VWML continued to make these regular payments to Mrs Baylis even after she went into hospital in 2009.

59. It was Ms Baylis's evidence that her mother did no work for VWML, and that these payments were housekeeping money paid by her father through the company. She said that Mr Baylis provided her mother with an annual list of payments which had been made. Four of these lists were provided to the Tribunal. Each includes the regular monthly payments and also other round sum amounts in December and October each year. Ms Baylis said that the December payments were Christmas presents to her mother, and the October payments were birthday presents. The invoices were, she said, typed by Mrs Baylis at her father's direction, and if they did not match the payments actually made, he required that they be changed. The Tribunal was provided with invoice on which Mr Baylis had written "*Judy please replace this invoice. The amount should be £1,885. Alec*". Both the signature on that annotation, and the annual lists, are in Mr Baylis's handwriting.

60. Mr Maddrell provided supporting evidence, stating that he was frequently in the Baylis family home during his twenty year relationship with Ms Baylis, and Mrs Baylis had never done any remunerative work.

61. Mr Linneker challenged both Ms Baylis and Mr Maddrell, and put it to them that the invoices were proof that Mrs Baylis was carrying on a self-employed business.

62. However, I accept their evidence, which is supported by the lists of payments and the annotated invoices, and also by the cashbook which shows that Mrs Baylis continued to be paid even after being admitted to hospital in 2009.

63. I find as facts that VWML regularly paid Mrs Baylis a monthly sum for housekeeping, plus further sums for Christmas and on her birthday; that these amounts began long before Ms Baylis joined VWML; that they were paid at Mr Baylis's direction and that no work was done by Mrs Baylis for VWML in exchange for the money she received.

64. The cash book also shows that the payments were coded to "marketing". Ms Baylis's evidence was that her mother's invoices had been coded to marketing before she took over responsibility for the cash book, and that she was instructed by her father to continue the practice. Mr Linneker did not challenge that evidence and I accept it.

65. It follows that from 1977 Mrs Baylis's housekeeping costs were paid by VWML at Mr Baylis's direction. Ms Baylis, who lived in the family home, paid her mother a contribution from her earnings to cover her share of food and utilities.

*Mrs Baylis's illness*

66. Mr Baylis had been a member of BUPA since at least 1989. The 2008 BUPA registration certificate shows that both Mr and Mrs Baylis were members of Bupacare, with Mr Baylis as the "main member". The subscription cost was originally paid by Mr Baylis himself; in later years it was paid by VWML.

67. In 2009 Mrs Baylis was admitted to the Cardinal Clinic ("the Clinic"). This is a private establishment and Mrs Baylis's costs were met by BUPA. Dr Bell, Ms Baylis and Ms Sudbury all gave unchallenged evidence that Mr Baylis regularly visited his wife in the clinic.

68. By the autumn of 2009 it was clear that Mrs Baylis was nearing the end of her life. Mr Baylis, Dr Bell and Ms Baylis had a meeting at the Clinic. Dr Bell said that it was no longer appropriate to keep Mrs Baylis at the Clinic because she no longer required the sort of care which it could provide. Mr Baylis said that the BUPA policy was reaching its financial limit, but that he had done some homework and knew that nursing homes were cheaper. Dr Bell recommended that Mrs Baylis be transferred to a nursing home because this was both clinically appropriate and cost-effective. He gave clear uncontested evidence that Mr Baylis took the lead during that conversation about costs and Ms Baylis said little or nothing.

69. Mrs Baylis was transferred to Harwood House ("Harwood"), described on its letterhead as "a care home with nursing". Ms Baylis accepted that she signed the contract with Harwood, although the capacity in which she did so is a key issue in dispute, see §122ff. Mrs Baylis did not signed the contract and would not have had the mental capacity to do so.

70. Ms Baylis and Ms Sudbury both gave evidence that Mr Baylis regularly visited his wife at Harwood until her death in January 2011. A letter from Mrs Forsyth, the matron, stated that Mr Baylis came at least twice a week to see his wife. Mr Linneker did not challenge any of that evidence and I find that Mr Baylis visited Mrs Baylis in Harwood at least twice a week.

71. The cost of Mrs Baylis's care at Harwood was £22,532 for the five months in 2009-10, and £52,550 for the nine months in 2010-11. The amount therefore varied between around £4,500 and £5,800 pcm, depending on the medication and other treatment provided.

72. VWML paid the care home fees on a monthly basis by company cheque; the payments were coded to "staff welfare". Other facts relating to the payment of the care home fees are in dispute, and I make further findings at §122ff.

73. Mrs Baylis died on 29 January 2011.

*The P11Ds*

74. On 2 July 2010, Eacotts prepared and subsequently submitted P11Ds for Mr Baylis and Ms Baylis for the tax year 2009-10. The P11D for Mr Baylis stated that he had the following benefits in kind: a company car, accountancy fees of £904 and "other" benefits of £734. Ms Baylis's P11D showed a single benefit in kind, being accountancy fees of £311.

75. On 28 January 2011, Eacotts filed Ms Baylis's 2009-10 SA return. This gave the same £311 figure for benefits in kind. It also declared a salary of £40,654 and

dividends of £29,444, so her gross income, including the benefit in kind, was £70,408. Her net income, after deducting the personal allowance and tax, was £48,121.45.

76. Although no copy of Mr Baylis's 2009-10 SA return was in evidence, it was not in dispute that the benefit in kind figures shown on that return were the same as those on the P11D.

77. On 27 June 2011, Eacotts submitted P11Ds for Mr Baylis and Ms Baylis for the tax year 2010-11. These reported the same type of benefits in kind as in 2009-10, although the figures were very slightly different.

78. In autumn 2011, Eacotts began to prepare VWML's statutory accounts for the year ended 31 December 2010. In the course of their work they identified that Mrs Baylis's care home fees had been paid by VWML. On 19 September 2011, Eacotts raised this issue with Ms Baylis, and told her it was a taxable benefit. Ms Baylis said that the benefit attached to her father.

79. Eacotts prepared amended P11Ds for Mr Baylis for 2009-10 and 2010-11, so as to include the care home fees. On 7 October 2011 Ms Baylis signed these amended P11Ds and they were submitted to HMRC.

80. On 27 October 2011, Eacotts sent an amended 2009-10 SA return for Mr Baylis to Ms Baylis's address. Consistent with the amended P11D, the return showed that the care home fees of £22,532 were a benefit in kind on Mr Baylis. Mr Baylis did not file that return.

81. Eacott's covering letter attached to the amended return states that Mr Baylis's original 2009-10 return and this amended return were the same, other than in relation to the care home fees. I therefore find that in 2009-10 his dividends were £40,200, his pension income £37,796 and his benefits in kind (ignoring the care home fees) £21,197, most of which related to his company car. His gross income as declared to HMRC was therefore £81,529.

82. Ms Baylis's evidence was that she gave the amended return to Mr Baylis and kept a copy with the business correspondence in what had been the marital home. Mr Linneker disputed this, and suggested she had not in fact given the return to her father. However, it is clear from the later letters between Miss Blagg and HMRC that Ms Baylis thought the amended return had been filed, and that could only have been the position if she had passed the return to her father. I find that she did give Mr Baylis the amended return, along with Eacott's covering letter.

83. On the same day, 27 October 2011, Eacotts also sent Mr Baylis a draft SA return for 2010-11. This too was posted to Ms Baylis's address. It included the care home fees of £52,550 as a benefit in kind, and stated that his income was £64,457, being dividends of £26,600 and pensions of £37,857. His benefits in kind (ignoring the care home fees) were £24,987. His total gross income (again, ignoring the care home fees) was therefore £89,444.

84. That draft 2010-11 return was also not submitted. Mr Linneker again disputed whether it had been given to Mr Baylis. I have found that Ms Baylis gave her father the amended return; this draft return was received on the same day, and it is highly unlikely that she would have given her father one document but not the other. I find that Ms Baylis passed this draft return to Mr Baylis.

*Mrs Caddick joins VWML and Ms Baylis leaves*

85. Mrs Caddick is a qualified chartered accountant who trained with one of the large accountancy firms. In the late summer of 2011 she began working at VWML as an unpaid administrative assistant. Ms Baylis was concerned that Mrs Caddick would want to take a financial role within VWML.

86. Around the end of September 2011, Ms Baylis was told by Mr Baylis that her role in the company would be given to Mrs Caddick. Sums of money totalling £70,600 were then transferred from VWML to Ms Baylis. I make further findings of fact about these payments at §224ff.

87. On 7 October 2011, Mr Baylis suffered a heart attack and was admitted to hospital. He was kept under observation for a few days and discharged without any medical interventions.

88. On 2 December 2011, Mr Baylis stepped down as managing director and resigned as Company Secretary. On the same day, Mrs Caddick was appointed company director, managing director and Company Secretary.

89. Shortly after Mrs Caddick's appointment, Ms Baylis became seriously ill and was unable to work. Since then her health has remained precarious. She has had no contact with her father since March 2012.

90. In May 2012 she was dismissed and on 20 June 2012 her directorship was terminated.

91. An acrimonious legal battle between Mrs Caddick and Ms Baylis began in December 2011, after Ms Baylis became ill. Issues in dispute included the transferred £70,600, which Mrs Caddick said were unauthorised, and VWML's failure to pay Ms Baylis's salary during her sick leave. Around June 2012, both parties' lawyers agreed that the dispute should be suspended because of Ms Baylis's ill-health. The current position is unclear but it is not relevant to this appeal.

92. Meanwhile, on 30 January 2012, Eacotts had filed Ms Baylis's 2010-11 SA return. This stated that her income was made up of salary of £38,216, dividends of £33,777, plus a benefit in kind of £330, being accountancy fees. Her gross income was therefore £65,848 and her net income, after the personal allowance and tax, was £49,655.30.

93. Mr Baylis's SA return was filed at or around the same time. As it did not include the care home fees, there was a difference between his return and the amended P11D which had been filed in October 2011. Although I accept that this

discrepancy may have caused HMRC to open an enquiry into his return, I make no findings on that point, as that too is not relevant to this appeal.

*The Disclosure Report*

94. A VWML Board Minute dated 1 August 2012 ("the Board Minute") signed by Mrs Caddick states that a meeting of VWML's directors was held on that day to "change the current classification of the private care home costs paid by the Company for Judith Baylis from a benefit in kind of Alec Baylis to a benefit in kind to Sarah Baylis". The Board Minute went on to set out the following, which it stated to be facts:

(1) the contract for care home services was signed and executed by Sarah Baylis and Judith Baylis;

(2) Alec Baylis was not party to the agreement; and

(3) Alec Baylis was refused any information on the contract from the care provider on the basis that he was not a party to the contract.

95. As to the first of these statements:

(1) I have found as a fact that Mrs Baylis did not sign the care home contract, see §69; and

(2) Ms Baylis accepted that she signed the contract, but whether this was on her own behalf or as agent for VWML is a key issue in dispute to which I return at §122ff.

96. The second statement is correct: neither party has suggested that Mr Baylis signed the contract. The third statement is considered at §167.

97. The Board Minute then records that the company passed formal resolutions that the care home fees should be classified as a benefit in kind on Ms Baylis, not on Mr Baylis.

98. On 4 December 2012, VWML's directors, namely Mrs Caddick, Mr Baylis and Mr Gerling, signed a disclosure report to HMRC ("the Disclosure Report"). So far as relevant to this appeal, the Disclosure Report stated that:

(1) the care home fees should have been included on Ms Baylis's P11Ds for 2009-10 and 2010-11;

(2) credit card payments of £1,411 for 2009-10 and £6,475.10 for 2010-11 relating to personal expenditure should also have been included on Ms Baylis's P11Ds for those tax years; these sums were previously expensed and deducted against corporation tax profits;

(3) third party payments of £3,000 should have been included on Ms Baylis's P11D for 2010-11; these too were previously expensed and deducted against corporation tax profits;

(4) a total of £70,600 had been transferred to Ms Baylis between October and December 2011 and those payments had not been approved by the company; and

(5) further credit card and third party payments should have been included on Ms Baylis's 2011-12 P11D (that year is not under appeal before the Tribunal).

99. The Disclosure Report also said:

(1) the care home fees had been included on Mr Baylis's amended P11D but this was "unbeknownst" to Mr Baylis. They had not been included on his SA return because "the benefit was known not to be his but rather that of Ms SJ Baylis". It added that "Class 1A NIC has been paid over accordingly by the company";

(2) corrected P11Ds had been filed for Ms Baylis for the years in question, to include the care home fees, credit card payments and third party payments;

(3) the company "has sought to correct its past tax returns and will make the appropriate payments in respect of those past liabilities…in order to make prompt restitution for the loss of tax"; and

(4) the disclosure "is being made to the best of the company's knowledge and belief…but may be subject to revision once the company has received a report from Haines Watts…which has been engaged for this purpose".

100. Mr Linneker confirmed that HMRC had not received the report from Haines Watts referred to in the Disclosure Report.

101. Also on the same day, 4 December 2012, Mrs Caddick signed amended P11Ds in respect of Mr Baylis and Ms Baylis. Those for Mr Baylis removed the care home fees, which were instead included on Ms Baylis's P11Ds under category B, namely as "payments made on behalf of employee". Category I, headed "private medical treatment or insurance", was left blank. The third party payments and credit card amounts were entered on her P11Ds under categories B and C respectively.

102. Mrs Caddick's husband, Mr Ben Caddick, was subsequently appointed a director of the company. Mr Gerling left VWML after a period of conflict between him and Mr and Mrs Caddick.

*The assessments*

103. On 11 November 2013 HMRC issued assessments on Ms Baylis for 2009-10 and 2010-11, seeking to recover tax on the care home fees, expenses and third party payments set out in the Disclosure Report.

104. At some point before 6 December 2013, Ms Baylis instructed Stiles & Co to act for her in relation to the assessments. Because of her continuing ill-health, that firm was engaged on the basis that Ms Baylis would have "only the minimum of involvement" in putting her case. On 6 December 2013, Miss Blagg appealed the assessments on behalf of Ms Baylis.

105. On the same day, Miss Blagg contacted Haines Watts, asking for details of the credit card and third party payments, as well as of all dividends paid. Haines Watts responded by saying that their engagement had ended and that contact would need to be made with VWML. On 13 December 2013, Miss Blagg wrote to Mrs Caddick.

106. On 24 January 2014, VWML's solicitors responded to Miss Blagg in general terms, saying that the credit card payments included utility bills, clothing, groceries and beauty services, and the third party payments included car costs and electrical works. No information was provided about dividends. As at the date of this hearing, no detailed analysis of the payments had been provided by VWML or its accountants, to either to HMRC or to Ms Baylis.

107. On 18 February 2014 Mr Donaldson, an HMRC Inspector of Taxes, replied to Ms Blagg's letter of appeal. He began by saying:

> "…there are no real grounds for appeal here, and this really is a matter between Ms Baylis and her former employer..."

108. He also informed Miss Blagg that he had seen no reason to challenge the Disclosure Report.

109. After some further correspondence, Ms Baylis asked for a statutory review. On 10 March 2015 the HMRC review officer issued the conclusions of his review. Having stated that "HMRC now appear to accept that there is a valid appeal in place" he went on to say:

> "this has been a challenging case to review in order to come up with a balance[d] conclusion…I am left with what facts and probabilities that have been presented to date in the case for me to arrive at a conclusion…on balance I concluded that HMRC's decision should be upheld."

110. On 8 April 2015, Ms Blagg notified Ms Baylis's appeals against both assessments to the Tribunal.

**The legislation**

111. The Income Tax (Earnings and Pensions) Act 2003 ("ITEPA") imposes income tax on employment income. In this decision, all reference to sections are to ITEPA unless otherwise specified. So far as relevant to Ms Baylis's appeal, the provisions which applied in 2009-10 and 2010-11 are set out below.

112. Section 7 is headed "Meaning of 'employment income', 'general earnings' and 'specific employment income'" and reads:

> "(1) This section gives the meaning for the purposes of the Tax Acts of 'employment income', 'general earnings' and 'specific employment income'.
>
> (2) 'Employment income' means
>
> (a) earnings within Chapter 1 of Part 3,
>
> (b) any amount treated as earnings (see subsection (5)), or…

(3) 'General earnings' means

(a) earnings within Chapter 1 of Part 3, or

(b) any amount treated as earnings (see subsection (5))…

(4) ...

(5) Subsection (2)(b) or (3)(b) refers to any amount treated as earnings under

(a) …

(b) Chapters 2 to 11 of Part 3 (the benefits code)…"

113. Section 13 is headed "person liable for tax" and provides:

"(1) The person liable for any tax on employment income under this Part is the taxable person mentioned in subsection (2) or (3)…

(2) If the tax is on general earnings, 'the taxable person' is the person to whose employment the earnings relate…"

114. Section 62 is headed "Earnings" and reads:

(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."

115. Section 63 is headed "the benefits code" and reads:

"(1) In the employment income Parts 'the benefits code' means

this Chapter,

Chapter 3 (expenses payments),

Chapter 4 (vouchers and credit-tokens),

Chapter 5 (living accommodation),

Chapter 6 (cars, vans and related benefits),

Chapter 7 (loans),

Chapter 10 (residual liability to charge); and

Chapter 11 (exclusion of lower-paid employments from parts of the benefits code)…"

116. ITEPA Part 3, Chapter 10, residual liability to charge, opens with s 201. This is headed "employment-related benefits" and reads:

"(1) This Chapter applies to employment-related benefits.

(2) In this Chapter

'benefit' means a benefit or facility of any kind;

'employment-related benefit' means a benefit, other than an excluded benefit, which is provided in a tax year

(a) for an employee, or

(b) for a member of an employee's family or household,

by reason of the employment.

For the definition of 'excluded benefit' see section 202.

(3) A benefit provided by an employer is to be regarded as provided by reason of the employment unless

(a) the employer is an individual, and

(b) the provision is made in the normal course of the employer's domestic, family or personal relationships…"

117. Section 721 is headed "other definitions" and includes the following subsections:

"(4) For the purposes of this Act the following are members of a person's family

(a) the person's spouse or civil partner,

(b) the person's children and their spouses or civil partners,

(c) the person's parents, and

(d) the person's dependants.

(5) For the purposes of this Act the following are members of a person's family or household

(a) members of the person's family,

(b) the person's domestic staff, and

(c) the person's guests."

**Preliminary observations and outline of submissions**

118. Mr Linneker opened his submissions by saying that "HMRC was caught in the middle of a family argument and had to make a difficult decision as to who, on the balance of probabilities, should be assessed". Miss Blagg described the amended P11Ds as the result of "a clear personal vendetta" on the part of Mrs Caddick. For the avoidance of any possible doubt, I emphasise that my task is to approach this case

dispassionately, find the facts which are in dispute, and come to my decision in accordance with the law.

119. The parties had two main submissions on the care home fees.

(1) HMRC's primary case was that Ms Baylis had personally contracted with the care home to pay the fees, so that when they were met by VWML, that company was meeting her personal liability. Ms Baylis's case was that she entered into the contract on behalf of VWML, so had no personal liability ("the Contract Issue").

(2) If Ms Baylis was right, so that the contract was between the care home and VWML, HMRC's secondary case was that the employer could decide which of two possible employees should be chargeable to the benefit. Miss Blagg submitted that s 721 provided for a hierarchical approach, and that as "spouse" comes before "parent" in that hierarchy, the liability fell on Mr Baylis and not on Ms Baylis ("the Liability Issue").

120. Although both Mr Linneker and Ms Blagg at times elided those two points, in particular when considering the application of the relevant legal provisions, it is clear that if HMRC succeeded on the first point, so that the care home fees were Ms Baylis's personal liability, VWML's meeting of that liability would be an "incidental benefit" of direct monetary value to her and so constitute "money's worth". It would therefore be "earnings" as defined in s 62 and Ms Baylis would be "the taxable person" because the earnings related to her employment, see s 13. Section 721 only becomes relevant if Ms Baylis signed the contract as agent for VWML.

121. In relation to the expenses, Ms Baylis accepted that various personal costs had been paid by VWML, but said that all such amounts had been taken into account as dividends. Eacotts carried out that exercise on an annual basis, and there was no reason to think it had not taken place in 2009-10 or 2010-11. Mr Linneker said that the burden of proof was on Ms Baylis, and she had not met that burden.

## CARE HOME FEES: THE CONTRACT ISSUE

122. The first issue was whether Ms Baylis signed the contract with Harwood in a personal capacity or as agent for VWML.

123. Whether a contract is made in a personal capacity or as agent is a mixed question of fact and law. The relevant legal principles are set out below, followed by the parties' submissions on further evidence, my consideration of that evidence, further findings of fact, and my conclusions.

### Agency law

*Whether there is an agency relationship*

124. An agent who acts on behalf of its principal binds the principal. In *Garnac Grain Co Inc v HMF Faure and Fairclough Ltd* [1968] AC 1130 ("*Garnac*"), Lord Pearson, giving the only judgment with which the other law lords agreed, described the relationship at page 1137:

> "The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it, as in *Ex parte Delhasse*. But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. Later words and conduct may have some bearing, though likely to be less important."

125. In *Yasuda Fire & Marine Insurance v Orion Marine Insurance Underwriting Agency Ltd* [1995] QB 174 ("*Yasuda*"), Colman J said at p 185:

> "Although in modern commercial transactions agencies are almost invariably founded upon a contract between principal and agent, there is no necessity for such a contract to exist. It is sufficient if there is consent by the principal to the exercise by the agent of authority and consent by the agent to his exercising such authority on behalf of the principal."

126. In *Targe Towing Ltd v Marine Blast* [2004] EWCA Civ 346 ("*Targe*"), Mance LJ (as he then was) giving the judgment of the Court, said at [21] that "the correct test" as to whether an agency can be implied is that stated in *Bowstead and Reynolds on Agency* (17th ed) article 8:

> "Implied Agreement
>
> Agreement between principal and agent may be implied in a case where one party has conducted himself towards another in such a way that it is reasonable for that other to infer from that conduct consent to the agency relationship."

127. Mance LJ went on to say that the *Bowstead and Reynolds* commentary on that passage was also correct:

> "**2-032 Consent of the principal**. This may be implied when he places another in such a situation that, according to ordinary usage, that person would understand himself to have the principal's authority to act on his behalf. or where the principal's words or conduct, coming to the knowledge of the agent, are such as to lead to the reasonable inference that he is authorising the agent to act for him But where one person purports to act on behalf of another, the assent of that other will not be presumed merely from his silence, unless there is further indication that he acquiesces in the agency. The substance of the matter is more important than the form: a contract describing the parties as principal and agent is not conclusive that they are such, and conversely there may be an agency relationship though the agreement creating it purports to exclude the possibility."

128. In *Monde Petroleum SA v Westernzagros Ltd* [2016] EWHC 1472 (Comm) ("*Monde*"), Salter J said at [200]:

> "The conferring of such authority does not have to be proved by direct evidence. It can be inferred from circumstantial evidence: and that circumstantial evidence can include things said by the agent to the other party."

*Disclosed and undisclosed agent*

129. If a third party is aware that a person signing a contract is acting as an agent, the latter is a "disclosed agent".

130. A contract signed by a disclosed agent is made between the third party and the principal, not between the third party and the agent. It is binding where the agent is acting within his authority. Contracts signed by an agent who acted, or is alleged to have acted, outside his authority, have given rise to an extensive body of case law. Because of my findings of fact at §§148-153, I have not set out that case law in this decision.

131. When the third party does not know the person signing the contract is acting as agent, that person is an "undisclosed agent". In *Teheran-Europe Co. Ltd. v. S. T. Belton (Tractors) Ltd* [1968] 2 All ER 886, Lord Denning MR said at p 989:

> "It is a well-established rule of English law that an undisclosed principal can sue and be sued on a contract, even though his name and even his existence is undisclosed, save in those cases when the terms of the contract expressly or impliedly confine it to the parties to it."

132. In the same case, Diplock LJ (as he then was) said at p 890:

> "Where an agent has … actual authority and enters into a contract with another party intending to do so on behalf of his principal, it matters not whether he discloses to the other party the identity of his principal, or even that he is contracting on behalf of a principal at all, if the other party is willing or leads the agent to believe that he is willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract. In the case of an ordinary commercial contract such willingness of the other party may be assumed by the agent unless either the other party manifests his unwillingness or there are other circumstances which should lead the agent to realise that the other party was not so willing."

**The relevant questions**

133. It follows from the case law set out above that the following questions are relevant when deciding whether Ms Baylis signed the contract as agent or in a personal capacity:

(1) whether Mr Baylis authorised VWML to pay the care home fees; and if so

(2) whether he authorised Ms Baylis to act as agent for VWML when signing the contract with Harwood; and, again if so

(3) whether Ms Baylis was acting in that capacity when she signed the contract.

134. In order to answer those questions, I make findings of fact on the basis of further evidence, most of which was in dispute.

**Whether Mr Baylis authorised the payment of the care home fees**

135. The starting point is the meeting which preceded Mrs Baylis's move to Harwood. That took place between Dr Bell, Mr Baylis and Ms Baylis; during that meeting Mr Baylis took the lead and Ms Baylis said little or nothing, see §68.

*Ms Baylis's case*

136. Miss Blagg relied on Dr Bell's and Ms Baylis's evidence. Dr Bell stated that "this conversation left me in no doubt that Mr Baylis was accepting ongoing responsibility for the funding of Mrs Baylis's care". Under cross-examination he accepted that he had no direct knowledge of this, but was giving his impression based on the approach taken by Mr and Ms Baylis during the meeting.

137. Ms Baylis's evidence was that, when she and her father visited Harwood on the Saturday after the meeting with Dr Bell:

> "The prospectus from the care home stated the care home fees. We went around the home with the prospectus for some 45 minutes. In the car on the way home I remember [my father] saying to me – I can't fund this out of private income and could I arrange it to be paid by the company which is the only method of payment he could afford. He was insistent that she went there."

138. Ms Baylis also said that her father instructed her to code the fees to "staff welfare" and that some of the company cheques to the care home were made out and signed by him.

*HMRC's case*

139. Mr Linneker challenged Ms Baylis on her evidence but did not go so far as to submit that Mr Baylis was unaware of the payments. He also referred to the Disclosure Report and a letter to HMRC from Mrs Caddick dated 4 June 2014, in which she said VWML has "no record of any Company documentation or correspondence agreeing to the company bearing the cost of the [care home] fees".

*Discussion*

140. I have already found as facts that Mr Baylis continued to be involved in the business throughout the relevant period; that he regularly checked the cash book, and that VWML's bank statements were sent to his home address. Given those findings, Mr Baylis was clearly aware that these payments were being made.

141. Did he also authorise the payments? Mr Linneker said not, and relied first on Mrs Caddick's letter of 4 June 2014. But it is entirely unsurprising that there is no formal documentation or correspondence recording VWML's approval, because that

company was a small family business, controlled by Mr Baylis. He did not need to document his own decisions.

142. The Disclosure Report, on which Mr Linneker also relied, only states that Mr Baylis was unaware that the care home fees had been included on the amended P11D submitted in October 2011. It does not say Mr Baylis was unaware that the fees were being paid by VWML, or that he had not authorised those payments. The Disclosure Report therefore does not assist HMRC.

143. Ms Baylis's evidence is entirely consistent with the facts already found. It seems to me inconceivable that she would have paid the care home without having been instructed to do so by her father. Not only would she have known that he would check the cashbook and bank account and see the money leaving the company, but the nature of their relationship was that he was in control and she followed his instructions. Moreover, Ms Baylis and Dr Bell were both credible witnesses. I therefore find as a fact that Mr Baylis instructed Ms Baylis to make the care home fee payments from VWML.

144. However, that is only the first step, because VWML could have made the payments either because:

(1) the contract had been made by Ms Baylis personally, so VWML was meeting her personal liability when it paid the care home fees; or

(2) Ms Baylis signed the contract as agent for VWML, so the contract was between the care home and VWML, not with Ms Baylis personally, see the authorities cited above.

145. I therefore next consider whether Ms Baylis was authorised to sign the contract for VWML, and if so, whether the contract was signed by her as agent.

**Whether Ms Baylis was authorised to sign the contract as agent for VWML**

*The parties' submissions*

146. Miss Blagg submitted that Ms Baylis had been authorised to act as agent for VWML in making the contract with Harwood. She relied on Ms Baylis's evidence, set out at §137 above, that Mr Baylis had asked her to arrange for the fees "to be paid by the company", because he could not pay them out of his own income. She said that Ms Baylis had therefore signed the contract on her father's express instructions. Since Mr Baylis was VWML's managing director, Ms Baylis had the company's authority to enter into the contract on its behalf. In the grounds of appeal Miss Blagg asked the following rhetorical question:

> "if Alec Baylis genuinely believed that his daughter was paying for this highly expensive care, how did he think she was funding it? Considering that her modest salary would not have even covered it!"

147. HMRC's case was that Ms Baylis had taken on the liability personally. In his cross-examination of Ms Baylis, Mr Linneker suggested that, as Mr Baylis could not afford to pay the fees because his BUPA cover was exhausted, he had decided to hand over to Ms Baylis the ongoing financial responsibility for her mother's care. Ms

Baylis entirely rejected this, saying that her father had taken financial responsibility for his wife since 1977, and continued to take responsibility when she was in the care home. Mr Baylis had asked her to make sure the company paid the fees; he had not asked her to pay them or take liability for them, and she would not have done so.

*Discussion and findings of fact*

148. A formal contract is not required before one party can act the agent of another, see *Garnac, Yasuda, Targe, Monde* and the cited extracts from *Bowstead and Reynolds*. It is instead enough for one party to have "conducted himself towards another in such a way that it is reasonable for that other to infer from that conduct consent to the agency relationship", see §126.

149. Ms Baylis was VWML's appointed Finance Director, and by 2009 was running the company on a day-to-day basis. She had authority to sign cheques on behalf of VWML and so acted as its agent on a regular basis.

150. In relation to this particular issue, I have already found as facts that Mr Baylis had taken financial responsibility for his wife since 1977, and that her medical care at the Clinic was paid for as a result of Mr Baylis's BUPA subscription. Although Mr Linneker suggested that Mr Baylis had handed over responsibility for Mrs Baylis's care to Ms Baylis, this was vehemently denied by Ms Baylis, and Mr Linneker did not put forward any evidence to support his submission. Ms Baylis consistently stated that her father asked her to arrange payment through VWML because *he* could not afford to pay the fees personally – not because he was asking her to take over responsibility for her mother's care.

151. I agree with Miss Blagg that Ms Baylis's net income is a relevant factor. For 2009-10 it was £48,121.45 and for 2010-11 it was £49,655.30. The care home fees were around £5,000 pcm, or £60,000 for a full year. This is more than Ms Baylis's net income. Although Mr Baylis's net income is not in evidence, his gross income for 2009-10 was £81,529 and that for 2010-11 was £89,444; the corresponding figures for Ms Baylis were £70,408 and £65,848 respectively. Those amounts would have been known to Mr Baylis, as Ms Baylis worked only for VWML. Against that background, it is not reasonable to infer that Mr Baylis, who was unable to contract with the care home because his own net income was insufficient, would have asked his daughter to take on that burden, despite her lower income.

152. I also give weight to Dr Bell's impression that Mr Baylis regarded himself as continuing to have financial responsibility for his wife's care.

153. Taking all the evidence into account, I find as a fact that Ms Baylis was not asked to take on the liability personally, but was instead authorised by her father to contract with Harwood as agent for VWML.

**Whether Ms Baylis signed the contract as an agent**

154. Applying the principles of agency law set out above:

(1) if Harwood knew that Ms Baylis was acting as agent for VWML, she was a "disclosed agent", so the contract was between Harwood and VWML;

(2) if Harwood did not know that Ms Baylis was acting as agent, the contract was nevertheless between Harwood and VWML unless:

(a) the terms of the contract prevented that (but as no copy of the contract was in evidence, neither party made submissions on that point); or

(b) Harwood manifested its unwillingness to sign with Ms Baylis other than as principal, or Ms Baylis should have realised that Harwood was unwilling for her to sign as agent.

*Mr Linneker's submissions on behalf of HMRC*

155. Mr Linneker submitted that Harwood was unwilling to sign the contract other than with Ms Baylis as an individual and would not have done so. He relied on a letter from Mrs Forsyth which reads:

> "The care home fees were always paid by [VWML]. I cannot confirm under whose instruction it was to pay via the family company, however Alec was very aware of the care and financial responsibility for his wife's care and visited Harwood on a regular basis. The contract was between Sarah Baylis and Harwood House, but I cannot confirm as this is from memory and we do not normally enter into contracts with companies only individuals."

156. He also relied on the following statement in the Board Minute: "Alec Baylis was refused any information on the contract from the care provider on the basis that he was not a party to the contract" (see §94). Although the basis of his reliance was not entirely clear, I understand his submission to be that, if the contract had been with VWML, a copy of the contract would have been provided to Mr Baylis on request, as he was a director of that company.

157. Finally, Mr Linneker relied on Ms Baylis's grounds of appeal to the Tribunal. The relevant paragraph reads (his emphasis):

> "HMRC's argument…states that, as contract between Sarah Baylis and [care] home, that Alec Baylis knew nothing about it, and this is a personal expense. This is refuted strongly – Sarah Baylis was finance director of the company and was representative of the company in signing the contract, ie it was in her role as FD. <u>The care home would not specifically contract with the limited company due to the limited liability status, ie if the company had gone bust, who would pay the fees</u>? If the company FD had been non-family, would they now be expected to pay the fees?"

*Miss Blagg's submissions on behalf of Ms Baylis*

158. In reliance on Ms Baylis's evidence, Miss Blagg said that Harwood knew Ms Baylis was signing as agent for VWML. Ms Baylis's witness statement says:

> " a couple of days after viewing the home with my dad, I went back to the home and signed on behalf of the company and my father."

159. Her evidence in chief was that "I had to sign the contract on behalf of the company, on behalf of my father" and she said under cross-examination that Harwood "wanted a signature from a director".

*Discussion*

160. I have to weigh and assess this conflicting evidence. On the one hand, I have Ms Baylis's statement that Harwood knew she was signing "as director", and I have found Ms Baylis to be a credible witness. I am, however, mindful of the Court of Appeal's warning in *Harb v Aziz* [2016] EWCA Civ 556 at [38] that it would be an impermissible "short cut" simply to prefer her evidence for that reason.

161. HMRC have asked me to base my findings on the appeal form, the Board Minute and Mrs Forsyth's letter. The appeal form is of course not evidence, but a submission drafted by Miss Blagg which ends with two rhetorical questions. Furthermore, the sentence on which HMRC relies is directly contradicted by that which precedes it, namely that "Sarah Baylis was finance director of the company and was representative of the company in signing the contract, ie it was in her role as FD". Moreover, because of Ms Baylis's ill health, Miss Blagg was instructed to act on the basis that she would ensure Ms Baylis would have "only the minimum of involvement" in putting her case, see §104. I place no reliance on the underlined sentence in the appeal form.

162. As to Mrs Forsyth's letter, HMRC was, in terms, relying on this as witness evidence. However, HMRC did not call Mrs Forsyth as a witness, although the capacity in which Ms Baylis signed the contract was a key factual matter in contention between the parties (contrast the position considered in *HMRC v Pacific Computers Ltd* [2016] UKUT 350 (TCC) (Mann J and Judges Berner) where HMRC's witnesses were not called because their evidence was unchallenged).

163. In *Kiely v Minister for Social Welfare* [1977] IR 267 81, a judgment of the Irish Supreme Court, Henchy J said at p 281:

> "Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. *Audi alteram partem* means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral examination and cross-examination."

164. In *R (oao Bonhoeffer) v GMC* [2011] EWHC 1585 (Admin), Stadlen J, with whose judgment Laws LJ concurred, cited *Kiely* and then said at [68]:

> "while [*Keily*] is of course not binding on this Court…it provides a classic statement of why it may be unfair to refuse an opportunity for cross-examination to a person whose own evidence is subject to cross-examination."

165. I respectfully agree. Although Rule 15(2)(a) of the Tribunal Rules gives this Tribunal a wide power to admit evidence, it is therefore right to take into account the

fact that, in contrast to Ms Baylis, Mrs Forsyth could not be cross-examined. The weight I can place on her letter is reduced in consequence.

166. Moreover, Mrs Forsyth had not found the contract before she wrote her letter, but was writing from memory. It is also not clear whether she or someone else signed on behalf of Harwood. Significantly, Mrs Forsyth also does not say that contracts were *never* signed with companies, but rather that they were not "normally" signed with companies. It is reasonable to infer from her use of the word "normally", that contracts were sometimes signed with companies, i.e through their directors or other agents. She also refers to her knowledge that the care home fees were always paid by VWML. On balance, I find that the letter supports Ms Baylis's case rather than that of HMRC, although it was Mr Linneker who relied on it.

167. Finally, the Board Minute. This says that Mr Baylis "was refused any information on the contract from the care provider". Mr Baylis did not give evidence at the hearing and so was not cross-examined, and that must be taken into account when I considering the weight to be given to this evidence.

168. Another relevant factor is that the Board Minute was not supported by any documentation, such as a letter from VWML to Harwood requesting a copy of the contract, or a reply from Harwood. It is therefore not possible to say how the question was phrased, or how it was answered; we also do not know who at Harwood provided the response or that person's state of knowledge. The Board Minute also stated that one of the parties to the contract was Mrs Baylis, and that is incorrect, see §69. The inclusion of that erroneous statement is relevant to the overall credibility of the Board Minute. Finally, it is of course true that Mr Baylis was not himself a party to the contract.

169. For all those reasons, I place no weight on the statement in the Board Minute.

**Conclusion on the contract issue**

170. It follows that the only reliable evidence is that provided by Ms Baylis, supported by Mrs Forsyth's letter. I therefore I find as facts that:

(1) Harwood knew and accepted that Ms Baylis was acting as agent for VWML;

(2) she therefore signed the contract on behalf of a disclosed principal; and

(3) the contract is therefore between Harwood and VWML.

171. That conclusion is consistent with VWML's own treatment of the care home fees for the purposes of National Insurance Contributions ("NIC"). The Disclosure Report, prepared following advice from Haines Watts, states that "Class 1A NIC has been paid over accordingly by the company", see §99. Had the contract had been with Ms Baylis personally, Class 1 NIC would have been due.

## CARE HOME FEES: THE LIABILITY ISSUE

172. VWML contracted to pay Mrs Baylis's fees, so the amounts paid were a "benefit or facility" provided "for a member of the employee's family or household" under s 201. Mrs Baylis was a member of both Mr Baylis's family and Ms Baylis's family. The question is: who bears the liability?

*The parties' submissions*

173. Miss Blagg submitted that, where the benefit or facility was provided for an individual (here, Mrs Baylis) who was related to two employees, s 721 sets out a hierarchical approach which directs the employer as to which should bear the tax charge. In that hierarchy, "the person's spouse" comes before "the person's parents". It was therefore Mr Baylis, and not Ms Baylis, who was liable to tax on the benefit in kind.

174. Mr Linneker disagreed, saying that it was for the employer to decide which of two employees should bear the tax, because the employer knew the background facts about both employees. The Disclosure Report stated that the care home fees had not been included on Mr Baylis's SA return because "the benefit was known not to be his but rather that of Ms SJ Baylis", and all three of the then incumbent directors had signed the Disclosure Report. VWML had therefore decided that liability for the tax on the benefit rested on Ms Baylis and not on Mr Baylis.

175. Mr Linneker also referred to Regs 85 and 86 of the Income Tax (PAYE) Regulations 2003 ("the PAYE Regs"). Reg 86(1) requires that the employer include on the P11D "any payments made on behalf of the employee by the employer…" Mr Linneker submitted that this was consistent with the employer having the power to identify the person liable to tax on a P11D benefit.

176. I asked Mr Linneker to consider the hypothetical example of an employee who had become temporarily homeless, so that his wife ("W") was accommodated as the guest of another employee, and during that time the employer paid W's private medical bills. I asked Mr Linneker whether the employer had a free hand to decide which of the two employees was liable to tax on the benefit in kind provided to W. Mr Linneker said yes, the employer had total discretion under the law; he described it as a question of "drawing straws".

177. I also drew the parties' attention to *Vestey v IRC* [1980] AC 1148. in which Lord Wilberforce gave the leading judgment (with which the other Law Lords agreed). Although *Vestey* concerned trusts and not employment tax, one of the points in issue was whether HMRC:

> "…have a discretion which enables them to assess one or more or all of the individuals in such sums as they think fit: the only limitation upon this discretion is, they say, that the total income…may not be assessed more than once."

178. Lord Wilberforce described this (at p 1171) as "a remarkable contention" with a number of practical consequences, one of which was that it was "open to the revenue to select one or more of the beneficiaries to tax and to pass over the others". Furthermore:

> "it is open to the revenue to apportion the tax between several beneficiaries according to any method they think fit - and this without any possibility of appeal, none being provided for".

179. He went on to say that these (together with other consequences specific to the provision in question) were "frightening", and that there were also more fundamental objections:

> "Taxes are imposed upon subjects by Parliament. A citizen cannot be taxed unless he is designated in clear terms by a taxing Act as a taxpayer and the amount of his liability is clearly defined
>
> A proposition that whether a subject is to be taxed or not, or, if he is, the amount of his liability, is to be decided (even though within a limit) by an administrative body represents a radical departure from constitutional principle. It may be that the revenue could persuade Parliament to enact such a proposition in such terms that the courts would have to give effect to it: but, unless it has done so, the courts, acting on constitutional principles, not only should not, but cannot, validate it.
>
> The revenue's contentions to the contrary, however moderate and persuasive their presentation by Mr. Nolan, fail to support the proposition.
>
> They say that the income tax legislation gives them a general administrative discretion as to the execution of the Acts, and they refer to particular instances of which one is section 115 (2) of the Act of 1970 (power to decide period of assessment). The judge described the comparison of such limited discretions with that now contended for as 'laughable'. Less genially, I agree. More generally, they say that section 412 imposes a liability upon each and every beneficiary for tax in respect of the whole income of the foreign transferees: that there is no duty upon the commissioners to collect the whole of this from any one beneficiary, that they are entitled, so long as they do not exceed the total, to collect from selected beneficiaries an amount decided upon by themselves.
>
> My Lords, I must reject this proposition. When Parliament imposes a tax, it is the duty of the commissioners to assess and levy it upon and from those who are liable by law. Of course they may, indeed should, act with administrative common sense."

180. Viscount Dilhorne, in a concurring judgment, said at p 1185:

> "Although an individual has the right to appeal against an assessment made on him, this right is worthless if the amount of his assessment depends solely on the discretion of the revenue."

181. Here, HMRC are not arguing that it has the discretion to decide which of two employees should bear the tax on a benefit in kind, but rather that the employer has that discretion. Mr Linneker said that, notwithstanding *Vestey,* HMRC maintained its position,.

182. Finally, I drew the parties' attention to the existence within ITEPA of:

(1) sections which specifically identify which of two employees is liable to tax. These include s 69, where a car is made available to one employee, and another employee is a member of his family/household; s 148, where a car is shared between employees, and s 681(D), where both parents are in work and child benefit is claimed; and

(2) sections which provide for a "just and reasonable apportionment" between two or more employees. For example, s 108 applies where "the same living accommodation is provided for more than one employee at the same time", and (in the relevant period) s 388 gave HMRC the discretion to apportion tax between employees who benefited from an employer's contribution to a non-approved retirement benefit scheme.

183. Here, however, there is neither a specific statutory mechanism nor any reference to a power to allocate on a just and reasonable basis. I informed the parties that I had been unable to identify any section of ITEPA which gives the employer or HMRC a general free-standing discretion as to who should be taxed on a benefit in kind. Mr Linneker said that he too was unaware of any such provision.

*Discussion*

184. For the reasons set out in *Vestey,* it is clear that HMRC do not have a discretion to subject one person to tax rather than another; that is a matter for Parliament. The same must be true of employers. If it were the case that an employer could, as Mr Linneker suggests, simply "pick straws" as to which of two employees should be subject to tax, the employer would have the power to impose a tax charge. As Lord Wilberforce said in *Vestey,* "taxes are imposed upon subjects by Parliament"; it follows that they cannot be imposed by employers.

185. As already identified, ITEPA does contain some provisions which allow a benefit to be allocated between employees on a "just and reasonable basis". In those specific cases, Parliament has given HMRC the power to decide each employee's liability "within a limit", see Lord Wilberforce in *Vestey* cited above. But there is no such power here.

186. Contrary to Mr Linneker's submission, Regs 85 and 86 of the PAYE Regs do not give employers the authority to impose a tax charge as a matter of discretion. Those regulations are not charging provisions; instead, they prescribe the mechanism by which benefits are reported.

187. There is also the issue of appeal rights. If Mr Linneker were correct, an employee selected to bear the tax charge would have no right of appeal, because his liability would be entirely a matter for his employer. Mr Donaldson, the HMRC Officer who replied to Ms Blagg's appeal letter, recognised this when he said:

> "there are no real grounds for appeal here, and this really is a matter between Ms Baylis and [VWML]."

188. In *Vestey* Lord Wilberforce and Viscount Dilhorne stated that if HMRC had the discretion to allocate the tax charge, there was no basis on which the taxpayer could appeal. The absence of an effective appeal right was one of the reasons the House of Lords decided HMRC's arguments were fundamentally flawed. There are, nevertheless, some provisions in the Taxes Acts which give the taxpayer no right of appeal – see for example the discussion of ITEPA s 392 in *HMRC v Dhanak* [2014] UKUT 0068 (TCC). Other provisions, such as TMA s 98A, provide only limited appeal rights, see *HMRC v Bosher* [2013] UKUT 0579. However, where there is no appeal right, or only a limited right, HMRC's decision can be challenged by judicial review, see *Dhanak* at [29] and *Bosher* at [39].

189. That avenue would not, however, be available to an employee seeking to challenge an employer's decision as to which employee should bear a tax charge. This is because, broadly speaking, only decisions of a public body exercising a public function are susceptible to judicial review. If Mr Linneker were correct, the affected employee(s) would therefore have neither an appeal right, nor the possibility of judicial review. For that further reason, I cannot accept his submissions.

190. Instead, I prefer Miss Blagg's suggestion that s 701 provides a hierarchy, with "spouse" at the top and "guest" at the bottom. That interpretation means that the employer knows, as a matter of law, which of two employees bears the tax charge.

191. In the hypothetical example I put to Mr Linneker (see §176), the employer would know that the benefit in kind was taxable on the employee who was W's spouse, not on the employee in whose home W was living a guest, because "spouse" comes before "guest" in the hierarchy. And, since "spouse" also comes before "parent", it follows that the benefit in kind arising from VWML's payment of care home fees is taxable on Mr Baylis, not on Ms Baylis.

192. I accept that this reading of the statute does not entirely resolve the question in all situations: there may, for example, be cases where a benefit is provided to a third party whose two children work as employees of the same employer. But that is a matter for another day. The fact that some cases will be difficult to resolve, despite the hierarchy, does not mean that my reading of the statute is incorrect.

193. If, however, I were to be wrong, so that the employer does have the discretion to decide which of two employers bear the benefit in kind charge, and assuming also that the employee had a right of appeal, perhaps on the basis that the employer had unfairly exercised its discretion, I would have found that the benefit should have been borne by Mr Baylis. He consistently accepted financial responsibility for his wife, and instructed Ms Baylis to arrange for the care home fees to be paid by VWML, she simply acted in accordance with those instructions.

**Conclusion on care homes fees**

194. For the reasons set out above, Ms Baylis is not liable to a benefit in kind charge on the care home fees paid by VWML.

## EXPENSES AND THIRD PARTY PAYMENTS

195. HMRC assessed Ms Baylis to further tax on the following benefits, in accordance with the Disclosure Report:

(1) credit card payments of £1,411 for 2009-10 and £6,475.10 for 2010-11 relating to personal expenditure; and

(2) other third party payments of £3,000 for 2010-11.

196. As noted earlier in this decision, no detailed analysis of those amounts has been provided either to HMRC or to Ms Baylis. The only further information is that in the letter 24 January 2014 from VWML's solicitors to Miss Blagg. This said that the credit card payments included clothing from ready-to-wear stores, groceries, beauty services, and utility bills, and that the third party payments included payments relating to her car, the installation of a TV aerial and other (unspecified) electrical works. That information related not only to the relevant period, but also to the following tax year. It is therefore not clear whether, for example, the "electrical works" related to 2010-11 or to 2011-12.

197. I have already found as facts (see §45, §46, §50, §55) that:

(1) although Ms Baylis was VWML's Finance Director, she had no accounting training and simply entered amounts in the ledgers. She knows nothing of double entry, and the management accounts were written up by Eacotts on a regular basis;

(2) receipts for personal expenditure were handed over to Eacotts, as were the credit card statements. When Eacotts prepared the management and statutory accounts, their practice was to total up the personal expenditure from the cash book and the credit cards, together with the cash payments made to the directors; they then disclosed the total as dividends in VWML's statutory accounts and in Mr and Ms Baylis's SA tax returns; and

(3) VWML's management accounts included a "directors loan account."

198. On 13 December 2013, Miss Blagg asked VWML for details of the director's loan account relating to Ms Baylis for the two years in question, but no information was provided. At some point in November 2015, Mr Ornoch, the HMRC Inspector dealing with Ms Baylis's case, telephoned Haines Watts and asked for more information.

199. On 23 November 2015, Haines Watts wrote to Mr Ornoch ("the HW letter") saying:

> "(1) there is no record of any Director's current account in the name of Ms S Baylis in 2010 or 2011; and
>
> (2) a summary of dividends declared and paid to Ms S Baylis is enclosed for your reference. Please note that in 2009 and 2010 Ms Baylis was responsible for the accounting of these transactions herself and no adjustments have been made since."

200. Despite point (2) above, no summary of dividends was in fact provided by Haines Watts. On 8 December 2015, Mr Ornoch wrote to Ms Baylis to inform her of this, and said "on the basis that these [dividends] would be those declared by you, I have not requested that the schedule be sent."

**The parties' submissions**

201. Miss Blagg said that the practice of clearing private expenditure by dividends was commonplace among small businesses. Eacotts carried out that sort of dividend exercise each year, and it was reasonable to assume they had also done so in relation to 2009-10 and 2010-11. Furthermore, the management accounts included a "directors loan account", which was entirely consistent with that practice.

202. Ms Baylis's own evidence was that she did not keep track of her expenditure and did not understand tax or P11Ds. Instead, she relied on Eacotts to carry out the exercise and calculate the dividends. As a result, she did not know how the dividends included in her SA returns for the relevant period were made up.

203. Mr Linneker said that it was for Ms Baylis to demonstrate that the amounts shown in the Disclosure Report had been included in the dividend figure reported on her SA tax returns. He said that "HMRC have seen no evidence that any such amounts have been cleared with dividends". He placed reliance on both the Disclosure Report and the HW letter.

204. He also submitted that payments of £70,600 made by VWML were relevant to this issue, even though they occurred between October to December 2011, so after the end of the relevant period. He pointed out that the Disclosure Report stated that these payments were unauthorised, and that Mr Baylis had signed that document. He submitted that the personal expenses and the £70,600 were both "part of a pattern of the company's bank account being used as a private bank account" by Ms Baylis.

205. In her Reply, Miss Blagg relied on Ms Baylis's evidence to reject Mr Linneker's submissions on the £70,600. Under cross-examination Ms Baylis had said that in September 2011, shortly after Mrs Caddick had joined VWML, she was told by her father that her position would soon become "untenable" because of Mrs Caddick joining the company, and that he "wanted to make sure I would be financially all right, and told me I could take some money out of the company". In her "Background Notes" document, she stated that Mr Baylis told her to take the money "to take care of my future as he was being bullied into getting rid of me by my sister who wanted total control of the business".

206. Miss Blagg submitted that the £70,600 payments were therefore exceptional, because Ms Baylis was on the verge of losing, not only her job, but also her role in the family business where she had worked almost all her adult life; that Mr Baylis had authorised the payments, and that there was no similarity with the expenses in issue; those had been dealt with by Eacotts as dividends, just as in all previous years.

207. In relation to Mr Baylis's signature on the Disclosure Report, Miss Blagg again relied on Ms Baylis's evidence, given under cross-examination, that :

(1) Mr Baylis was at that time under the influence of Mrs Caddick: and

(2) he "didn't like paying tax", as could be seen from VWML's payment of Mrs Baylis's housekeeping money, and the coding of those payments to "marketing".

208. Miss Blagg suggested, in the alternative, that as Mr Baylis was now suffering from severe dementia, it was possible that did not have his full mental capacity when he signed the Disclosure Report in December 2012.

**Discussion**

209. I have already found as facts that Eacotts had been VWML's accountants for many years, and that their practice was always to identify the directors' personal expenditure and disclose it as dividends. Ms Baylis's position is that nothing changed in 2009-10 and 2010-11.

210. Her evidence that she relied entirely on Eacotts to carry out the calculations is also consistent with my finding of fact that she had neither the knowledge nor the skills to check the P11Ds, dividend calculations, SA returns or other tasks carried out by that firm.

211. HMRC has, however, assessed Ms Baylis to further tax on the basis that Eacott's dividend exercise was either not completed, or not correctly completed, in those two years. Their case rests on a number of factors, each of which I consider below.

*The Disclosure Report*

212. The Disclosure Report states that the amounts in question were previously expensed and deducted against corporation tax profits, and should instead have been included on Ms Baylis's P11D. There is no indication that VWML considered the possibility that the personal expenses were taken into account in calculating Ms Baylis's dividends. There is also no reference to any exercise having been carried out by VWML to reconcile the dividends paid to Ms Baylis on the one hand, with the cash and personal expenses paid to her on the other. It is also relevant that Miss Blagg has been trying to obtain copies of such a reconciliation ever since she was first instructed to act for Ms Baylis in 2013, but those efforts have been entirely in vain.

213. The Disclosure Report does not provide any basis for a finding that Eacott's normal process was either faulty, or not carried out, in relation to the relevant period.

*The HW letter: director's loan account*

214. The HW letter says that "there is no record of any Director's current account in the name of Ms S Baylis in 2010 or 2011". Mr Linneker has placed reliance on that statement.

215. To put that letter in context, Miss Blagg asked Haines Watts for details of payments and dividends in December 2013, but that firm refused to provide the information because their engagement had terminated, see §105. The HW letter is

dated December 2015, two years later, and between five and six years after the dates of the transactions in question.

216. Mr Linneker did not contest Miss Blagg's submission that as a matter of general accountancy practice:

(1) a director's loan account (sometimes known as a "current account") is used to record in-year payments to the company by the director, and payments from the company to the director. The latter can include personal expenses paid by the company;

(2) after the end of the year many small companies classify a net debit balance on a director's loan account as a dividend, and report this in the company's statutory accounts;

(3) as a result, the directors' loan account balance is reduced to zero; and

(4) no sum is shown as owing to the company by the directors in the statutory accounts.

217. I have already found as facts (see §§54-55) that:

(1) Eacotts' practice was to classify personal expenses and cash payments as dividends at the end of the year;

(2) VWML's 2009 management accounts included a "directors loan account";

(3) dividends were paid to the directors in both years and disclosed in the statutory accounts; and

(4) no amount was owed by the directors to VWML at the end of 2009 or 2010.

218. It is true that the absence of any apostrophe in the phrase "directors loan account", means that it could refer to the loan account of one director, or of two or more directors. However, the facts set out in the previous paragraph are entirely consistent with Eacotts keeping track of in-year payments to each director via individual loan accounts, and then eliminating those balances by classifying the debit balances as dividends.

219. I therefore find on the balance of probabilities that the "directors loan account" figure included a director's loan account balance for Ms Baylis, and that she therefore had such an account.

220. In making those findings, I have relied on the management and statutory accounts. They were not only contemporaneous with the periods in question but were also prepared by Eacotts, the firm with responsibility for VWML's books and records. I reject as unreliable the statement to the contrary in the HW letter.

*The HW letter: other*

221. Although the HW letter went on to state that a schedule of dividends was attached, no list was provided. Mr Ornoch, who was in telephone contact with Haines Watts, understood that the summary simply listed dividends paid and was not an

reconciliation between dividends on the one hand, and cash and other personal expenditure on the other. Haines Watts were therefore either unwilling or unable to supply a reconciliation to support the expenses on the Disclosure Report.

222. The HW letter ends with the highly prejudicial sentence "Please note that in 2009 and 2010 Ms Baylis was responsible for the accounting of these transactions herself and no adjustments have been made since". However, Ms Baylis simply entered transactions in the ledgers. It was Eacotts who were responsible for producing VWML's management and statutory accounts. The statement in the HW letter is simply wrong.

223. For all the above reasons, I find that the HW letter provides no reliable evidence.

*The £70,600 payments*

224. I have already found as a fact that around the end of September 2015, Ms Baylis was told by her father that Mrs Caddick would be given her role in the company. Payments totalling £70,600 were then transferred to her by VWML.

225. I reject Mr Linneker's submission that those amounts were "part of a pattern of the company's bank account being used as a private bank account". On the contrary, they related specifically to the imminent termination of Ms Baylis's employment.

226. As to whether Mr Baylis authorised the payments, I have found as facts that Ms Baylis was very much under the control of her father, who regularly checked the cash book and bank statements. Furthermore, she had been loyally working for VWML for many years, and it is reasonable to infer that Mr Baylis would have been anxious about the financial consequences Ms Baylis would face once Mrs Caddick took over her role in the company.

227. It is true that Mr Baylis signed the Disclosure Report, which included the statement that he did not authorise the payments. However, as he did not attend the hearing, he could not be cross-examined. Ms Baylis was a credible witness, who was extensively cross-examined. I therefore give more weight to her evidence compared to that in the Disclosure Report.

228. I also agree with Miss Blagg that there are other possible explanations for Mr Baylis's signature on the Disclosure Report. First, as Ms Baylis says, her father "didn't like paying tax". Second, given that Mr Baylis's mental capacity was so limited by June 2016 that he found it "very difficult to remember the simplest facts…and could not remember his late wife at all" (see §22), it is very possible that he had suffered some impairment to his mental faculties by 4 December 2012, when he signed the Disclosure Report. Third, he may have acted under the influence of Mrs Caddick, as Ms Baylis suggested.

229. Having assessed the evidence I find as a fact, on the balance of probabilities, that Mr Baylis authorised Ms Baylis to make payments to herself as compensation for the loss of her role in the company.

230. I make no findings on whether, or to what extent, the £70,600 is properly to be treated as a dividend, a payment for loss of office, redundancy, or compensation for constructive or unfair dismissal. None of those matters is relevant to this appeal.

*Eacott's processes*

231. Finally, I consider one further point, which is raised by the facts. When Eacotts carried out their accounting processes:

(1) they did not identify the housekeeping payments to Mrs Baylis, so they were not treated as Mr Baylis's dividends or included on his P11Ds; and

(2) did not realise, until September 2011, that Mrs Baylis's care home fees had been paid by VWML during 2009-10 and 2010-11.

232. Given those oversights, I asked myself whether Eacotts might also have failed to identify some or all of Ms Baylis's personal expenses when they carried out their dividend exercise. However, I decided there was a significant difference between (a) the housekeeping payments and care home fees on the one hand, and (b) the expenses added to Ms Baylis's P11Ds on the other.

233. The housekeeping payments were deliberately misclassified as marketing, at Mr Baylis's direction, and were supported by invoices. Similarly, the care home fees were misclassified as "staff welfare", again at Mr Baylis's direction. The expenses in issue in this appeal were not hidden. The majority were set out in credit card statements supported by invoices and other vouchers. They were clearly identifiable as personal expenditure, such as clothing from ready-to-wear stores, groceries, beauty services and home utilities; the third party payments included costs relating to Ms Baylis's car and the installation of a home TV aerial. The only possible exception is the "electrical works" about which no further information has been provided.

234. Taking a fair view on the basis of the evidence, Ms Baylis's personal expenses would have been easily identifiable by Eacotts. That firm would therefore have been able to carry out their year-end dividend calculations in both years to the professional standards it is reasonable to expect of chartered accountants.

**Conclusion on expenses**

235. For the reasons set out above, I find that neither the Disclosure Report nor the HW letter support HMRC's position. I also reject the inference Mr Linneker invited me to draw in relation to the £70,600.

236. It is true that the burden of proof here is on Ms Baylis, and she has not provided evidence demonstrating that each expense payment was included in her dividends. But that is not her case. Instead, it rests on Eacotts' regular practice.

237. I find as a fact, on the balance of probabilities, that:

(1) in 2009-10 and 2010-11 Eacotts continued to carry out their normal procedure of identifying personal expenditure and treating it as on account of dividends, just as in previous years.

(2) the credit card payments of £1,411.83 for 2009-10 and £6,475.10 for 2010-11, together with the third party payments of £3,000 in that second year, were included in Ms Baylis's dividends.

238. As a result, neither the expenses nor the third party payments are benefits in kind and no further tax is due.

**Overall decision and appeal rights**

239. Ms Baylis's appeal succeeds and the assessments made on 11 November 2011 in respect of 2009-10 and 2010-11 are both set aside.

240. My thanks to Miss Blagg and Mr Linneker for their careful preparation and helpful submissions.

241. This document contains full findings of fact and reasons for the decision. If HMRC is dissatisfied with this decision, it has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Rules. The application must be received by this Tribunal not later than 56 days after this decision is sent to HMRC. 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.

**ANNE REDSTON**
**TRIBUNAL JUDGE**

**RELEASE DATE: 26 OCTOBER 2016**