[2020] UKFTT 0086 (TC)

TC07580

BANKERS PAYROLL TAX – whether HMRC gave notice of their intention to enquire into appellants' return under paragraph 23 Schedule 1 Finance Act 2010 – no – whether remuneration provided pursuant to "arrangements" under paragraph 12 Schedule 1 Finance Act 2010 – yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/06394, 06395, 06396 & 06397

BETWEEN

CREDIT SUISSE SECURITIES (EUROPE) LIMITED
CREDIT SUISSE (UK) LIMITED
CREDIT SUISSE AG – LONDON BRANCH
CREDIT SUISSE INTERNATIONAL **Appellants**

-and-

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

TRIBUNAL: JUDGE GUY BRANNAN

Sitting in public at Taylor House, London on 30 September – 4 October 2019

Kevin Prosser QC and David Yates QC, instructed by Slaughter and May, for the Appellant

Akash Nawbatt QC and Kate Balmer, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The appellants (collectively "CS") are all companies within the Credit Suisse Group. CS appeals against closure notices dated 19 January 2017. These closure notices, issued by the Respondents ("HMRC"), amended CS's consolidated bank payroll tax ("BPT") return, increasing the tax payable by £83,144,379. CS paid this amount on 31 August 2010.

2. By way of background BPT was a one-off tax imposed by Schedule 1 to the Finance Act 2010 ("FA 2010"). BPT was charged at the rate of 50% on "relevant remuneration" in excess of £25,000 awarded to or in respect of "relevant banking employees" of "taxable companies" during the "chargeable period". The tax was announced by the Chancellor of the Exchequer on 9 December 2009.

3. The present appeals are concerned with the application of BPT to the provision by CS to its senior employees of a deferred variable award called the Adjustable Performance Plan Award ("APPA"), awarded for 2009, and granted under the Credit Suisse AG Master Share Plan.

4. Both parties accept that CS is a "taxable company" and that the remuneration which CS awarded to employees pursuant to the APPA is "relevant remuneration" awarded to "relevant banking employees", within the meaning of the relevant provisions of Schedule 1 to FA 2010. It is also common ground that there was no tax avoidance purpose behind the introduction of the APPA – in fact it was formulated before the announcement of BPT.

5. There are two issues in dispute in these appeals: a procedural issue and a substantive issue.

6. The first issue ("the procedural issue") is whether HMRC gave notice of their intention to enquire into CS's BPT return on or before 31 August 2011. If HMRC did not give such a notice then HMRC had no statutory power to amend CS's BPT return by giving closure notices. If CS is successful on the procedural issue then it was common ground that the appeals must be allowed, regardless of the outcome on second issue relating to the substantive liability to BPT.

7. The second issue ("the substantive issue") is whether the remuneration awarded pursuant to the APPA was "awarded during the chargeable period" either under paragraph 6 or under arrangements within paragraph 12 of Schedule 1 to FA 2010. The expression "the chargeable period" is defined by paragraph 8 of Schedule 1 to FA 2010 to mean the period beginning at 12:30 p.m. on 9 December 2009 and ending on 5 April 2010. On 31 August 2010, CS filed a consolidated BPT return and paid £238,799,581.00 of BPT to HMRC in respect of relevant remuneration awarded during the chargeable period.

8. On 19 January 2017, HMRC issued CS with four closure notices in respect of the liability to BPT of an employee incentive and retention scheme, i.e. the APPA).

9. On 17 February 2017, notices of appeal were sent to HMRC by CS, in which a request for an independent review was made. HMRC's independent reviewer provided review conclusion letters on 3 July 2017, which upheld HMRC's decision to issue the four closure notices. CS filed notices of appeal with the First-tier Tribunal (Tax Chamber) on 26 July 2017.

THE RELEVANT STATUTORY PROVISIONS

10. References to paragraphs of statutory provisions are references to paragraphs of Schedule 1 to FA 2010, unless otherwise expressly stated.

The procedural issue

11. In relation to the procedural issue, the main relevant statutory provisions are to found in paragraph 23 which relevantly provides:

> "(1) HMRC may enquire into a bank payroll tax return if they give notice to the taxable company of their intention to do so within the time allowed.
>
> (2) If the return was delivered on or before 31 August 2010, notice of enquiry may be given at any time on or before 31 August 2011.
>
> (3) If the return was delivered after 31 August 2010, notice of enquiry may be given at any time up to and including whichever of 31 January, 30 April, 31 July or 31 October next follows the first anniversary of the day on which the return was delivered.
>
> (4) An enquiry extends to anything contained in the return or required to be contained in the return.
>
> (5) The following provisions of Schedule 18 to FA 1998 apply to an enquiry into a bank payroll tax return under this Schedule as they apply to an enquiry into a company tax return under that Schedule—
>
> (a) paragraph 24(4) to (5) (notice of enquiry)
>
> (b) paragraph 25(2) (enquiry following amendment by company) (but as if the reference there to paragraph 24(2) or (3) were to sub-paragraph (2) or (3) of this paragraph),
>
> (c) paragraph 31 (amendment of return by company during enquiry),
>
> (d) paragraphs 31A to 31D (referral of questions to the tribunal during enquiry),
>
> (e) paragraph 32(1) (completion of enquiry),
>
> (f) paragraph 33 (direction to complete enquiry), and
>
> (g) paragraph 34 (amendment of return after enquiry)."

12. As to the question whether a notice of enquiry has to be in writing, the parties relied on paragraph 28 which relevantly provides:

> "(1) If a discovery assessment is made with respect to a taxable company, the company may appeal against it.
>
> (2) Notice of appeal must be given—
>
> (a) in writing,
>
> (b) within the period of 30 days beginning with the date on which notice of the assessment was given, and
>
> (c) to the officer of Revenue and Customs by whom notice of the assessment was given.

(3) Any objection to a discovery assessment on the ground that paragraph 25, 26 or 27 was not complied with can only be made on an appeal against the assessment under this paragraph."

13. Paragraph 40 applies certain provisions of the Taxes Management Act 1970, as follows:

"(1) The following provisions of TMA 1970 apply for the purposes of bank payroll tax and this Schedule as they apply for the purposes of corporation tax and the Taxes Acts—

(a) section 108 (responsibility of company officers),

(b) section 112 (loss, destruction or damage to assessments, returns etc.),

(c) section 114 (want of form), and

(d) section 115 (delivery and service of documents).

(2) The application of section 115 of TMA 1970 in relation to the delivery of bank payroll tax returns is subject to any requirements published under paragraph 19(1) of this Schedule."

14. Paragraph 23(5) applies certain of the collection mechanisms relating to corporation tax contained in Schedule 18 Finance Act 1998. These are not particularly relevant, in my view, but I include them for completeness:

"(4) If the company amends its return, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the amendment was made.

(5) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) by the company of its return."

15. At the hearing I drew the parties' attention to the provisions of section 115 Taxes Management Act 1970 ("TMA") which relevantly provides:

"115 Delivery and service of documents

(1) A notice or form which is to be served under the Taxes Acts on a person may be either delivered to him or left at his usual or last known place of residence.

(2) Any notice or other document to be given, sent, served or delivered under the Taxes Acts may be served by post, and, if to be given, sent, served or delivered to or on any person [by HMRC] may be so served addressed to that person—

(a) at his usual or last known place of residence, or his place of business or employment, or

(b) in the case of a company, at any other prescribed place and, in the case of a liquidator of a company, at his address for the purposes of the liquidation or any other prescribed place."

The substantive issue

16. In relation to the substantive issue, the relevant provisions of Schedule 1 to FA 2010 were as follows.

17. BPT was charged by paragraph 1 and the rate of tax was set out in paragraph 2:

> "1. (1) This Schedule makes provision for taxable companies to be charged to a tax to be known as "bank payroll tax".
>
> (2) Bank payroll tax is chargeable on the aggregate of the amounts of chargeable relevant remuneration awarded during the chargeable period to or in respect of relevant banking employees of a taxable company by reason of their employment as relevant banking employees.
>
> (3) Relevant remuneration awarded during the chargeable period to or in respect of a relevant banking employee of a taxable company by reason of the employee's employment as a relevant banking employee is "chargeable" relevant remuneration only if and to the extent that its amount exceeds £25,000.
>
> 2. Bank payroll tax is charged at the rate of 50%."

18. Paragraph 5 deals with "Excluded remuneration", as follows:

> "(1) "Excluded remuneration" means—
>
> (a) anything which is regular salary or wages or a regular benefit,
>
> (b) anything in the case of which a contractual obligation to pay or provide it to or in respect of the employee concerned arose before the beginning of the chargeable period,
>
> (c) any shares awarded under an approved share incentive plan (within the meaning of section 488 of ITEPA 2003), or
>
> (d) any share option granted under an approved SAYE option scheme (within the meaning of section 516 of that Act).
>
> (2) In sub-paragraph (1)(a) "regular", in relation to salary or wages or a benefit, means so much of the amount of the salary or wages or benefit as cannot vary according to—
>
> (a) the performance of, or of any part of—
>
> (i) any business of the taxable company concerned, or
>
> (ii) any business of a person connected with the taxable company,
>
> (b) the contribution made by the employee concerned to the performance of, or of any part of, any business within paragraph (a)(i) or (ii),
>
> (c) the performance by the employee of any of the duties of the employment, or
>
> (d) any similar considerations.
>
> (3) For the purposes of sub-paragraph (1)(b) a contractual obligation to pay or provide something to or in respect of the employee does not arise until—
>
> (a) the amount to be paid or provided is fixed or is capable of becoming fixed without the exercise of discretion by any person, or
>
> (b) the total amount of things to be paid or provided to or in respect of a number of employees including the employee is fixed or is capable of becoming fixed without the exercise of discretion by any person.

(4) A contractual obligation to pay or provide something is taken to arise for those purposes even if payment or provision of it is dependent on compliance by the employee with any conditions."

19. Paragraph 6 deals with the question whether relevant remuneration has been awarded:

"(1) Relevant remuneration is "awarded" during the chargeable period if—

(a) a contractual obligation to pay or provide it arises during the chargeable period, or

(b) the relevant remuneration is paid or provided during the chargeable period without any such obligation having arisen during the chargeable period,

but subject to sub-paragraph (3).

(2) Sub-paragraph (3)(a) of paragraph 5 applies for the purposes of sub-paragraph (1) as for the purposes of sub-paragraph (1)(b) of that paragraph.

(3) Relevant remuneration is not to be taken to be awarded during the chargeable period by virtue of sub-paragraph (1)(a) if—

(a) it is required to be paid or provided at intervals,

(b) it is to be paid or provided in respect of contribution, performance or similar considerations only for times after the end of the chargeable period, and

(c) the reduction or elimination of a liability to bank payroll tax is not the main purpose or one of the main purposes of any person in assuming the obligation to pay or provide it.

(4) Sub-paragraph (4) of paragraph 5 applies for the purposes of this paragraph as for the purposes of sub-paragraph (1)(b) of that paragraph."

20. Paragraph 7(2) adds a gloss to paragraph 6(1)(a), in the following terms:

"(2) Where relevant remuneration is awarded to or in respect of an employee by virtue of paragraph 6(1)(a) and its amount is not fixed when it is awarded, its amount is such as it is reasonable at that time to assume would be its amount (in accordance with sub-paragraph (1)) if and when paid or provided."

21. Paragraph 12 deals with payments made under "arrangements":

"(1) This paragraph applies where—

(a) arrangements are made during the chargeable period by reason of an employee's employment as a relevant banking employee of a taxable company,

(b) the arrangements make provision under which money may be paid, or any money's worth or other benefit provided, to or in respect of the employee in accordance with the arrangements, and

(c) were the money so paid, or the money's worth or other benefit so provided, during the chargeable period, it would be relevant remuneration awarded to or in respect of the employee during the chargeable period.

(2) The making of the arrangements is to be regarded as the awarding of relevant remuneration to or in respect of the relevant banking employee by reason of the employment; and the amount of the relevant remuneration is to regarded as the amount of any money which it is reasonable to assume will be

> paid, and any money's worth or other benefit which it is reasonable to assume will be provided, as mentioned in sub-paragraph (1)."

22. Paragraph 49(1) provides a non-exhaustive definition of "arrangement":

> ""arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable);
>
> …."

EVIDENCE

23. The following witnesses gave evidence and were cross-examined.

24. For CS, Steven Driscoll (Director in the Tax Department of CS) and Philip Halliday (Head of Executive Compensation for CS) gave evidence. For HMRC, Richard Taylor-Gooby (formerly Customer Relationship Manager, Large Business Office Banking Sector of HMRC) gave evidence.

25. I found all the witnesses to be honest and credible witnesses. Mr Nawbatt QC, appearing with Ms Balmer, for HMRC argued that Mr Driscoll was not a straightforward witness and accused him of being evasive during cross-examination. I do not agree. It is true that Mr Driscoll was cautious in giving evidence, often taking pauses before answering questions and sometimes engaging in semantics, but this seemed to me no more than the reticence of a witness under skilled and persistent cross-examination. In particular, Mr Driscoll often paused before answering a question about a document because he wished to read the whole document rather than the particular paragraph to which he had been taken.

26. In addition, Mr Nawbatt attacked Mr Driscoll's evidence, in particular his recollection of what was said at meetings several years ago, as unreliable citing *Gestmin SGPS SA v. Credit Suisse (UK) Limited* [2013] EWHC 3560 per Leggatt J (as he then was) at [15] - [22]. This was, in my view, a submission that went to the reliability of certain aspects of Mr Driscoll's evidence rather than his credibility and I shall deal with it later in this decision.

27. Harriet Fiddick, head of the employment law team within the General Counsel Division of CS, submitted a witness statement but did not give oral evidence. Her evidence was unchallenged.

FACTS RELATING TO THE PROCEDURAL ISSUE

The announcement of BPT and HMRC meetings with the BBA

28. On 9 December 2009 the Chancellor of the Exchequer announced the introduction of BPT with immediate effect from 12.30pm on that date. The legislation imposing BPT was first promulgated as part of the Finance Bill on 1 April 2010, but HMRC had already published draft legislation (as part of a Technical Note) on 9 December 2009.

29. On 21 December 2009 HMRC published on its website high level guidance on BPT in the form of a short set of BPT Frequently Asked Questions and a Q&A document entitled "BPT Responses to some Questions". Mr Steven Driscoll commented that this guidance raised more questions for CS than it answered.

30. CS's senior management team (headed by chief executive Mr Brady Dougan) agreed that it made sense to liaise with HMRC as soon as possible to understand the implications of BPT for CS.

31. On 18 January 2010, a British Bankers' Association ("BBA**")** Tax Advisory Panel met representatives of HMRC including Richard Taylor-Gooby, a Tax Specialist, Large Business Service, London Financial Banking Sector, to discuss the Q&A document. The BBA subsequently provided CS with minutes of the meeting.

32. On 8 April 2010 the Finance Act 2010 was enacted and BPT became law.

33. On 26 April 2010 there was a further meeting between the BBA and HMRC (represented by Chris Davidson, the Deputy Director, Financial Sector Leader, Large Business Service and Mr David Laing) to discuss how operational issues in relation to BPT (HMRC could not discuss policy issues because there was an election campaign in progress). The meeting was attended by a representative from CS who emailed her note of the main points discussed at the meeting to other members of the CS tax team.

34. The note stated that: "HMRC are looking to implement BPT as they would any other tax in line with the LBS strategic propositions." I shall refer shortly to those "strategic propositions". The note recorded that HMRC encouraged BBA members to be in discussions with their Customer Relationship Managers ("CRMs"):

> "…as regards open issues/difficulties so that (as far as possible)
>
> – Areas of agreement are identified in advance;
>
> – Areas of fundamental disagreement to be noted and ring-fenced for further discussion."

35. It was noted that HMRC expected to publish "guidance" around 19 May 2010. HMRC said that it wished to "get to the point where at 31 August [2010] there are no surprises and that CRMs know what they expect to receive from the banks." 31 August 2010 was the latest date on which the banks had to file their BPT returns. The banks noted that "given the timing, expecting that discussions with CRMs would be completed in advance of 31 August was unrealistic."

36. The last paragraph of the note under the heading: "Future enquiries/queries" stated:

> "– Queries to be raised by CRMs but would be managed centrally to make sure that queries raised were consistent across all entities.
>
> – Known areas of disagreement could be addressed as soon as possible after filing, but more detailed reviews could take longer."

37. Mr Nawbatt in his cross-examination of Mr Driscoll drew attention to the distinction in the heading between "enquiries" and "queries" in the final paragraph of the note. He suggested that the first bullet point related to queries and the second related to "enquiries". Mr Driscoll did not agree. I have to say that I do not think that this note was intended to be subject to the rigorous textual analysis to which Mr Nawbatt subjected it. In any event, I do not think that, in the context of the note as a whole, the use of the word "enquiries" in the heading of the final paragraph of the note necessarily refers to a formal enquiry opened pursuant to paragraph 23 of Schedule 1. Earlier in the note "areas of fundamental disagreement" were to be left "for further discussion."

38. At the hearing, Mr Prosser QC (appearing with Mr Yates QC for CS) produced two further documents. The first was entitled "HMRC: Large businesses – Overview". The earliest copy which Mr Prosser was able to retrieve was dated 1 March 2012, but I did not understand it to be in dispute that the earlier versions of this document contained the same "LBS strategic

propositions" to which Mr Davidson referred in the note of the 26 April 2010 meeting. The document stated:

> "…
>
> 4. HMRC will always seek to work through issues in real-time with all customers no matter what their tax strategy. This provides earlier certainty for the customer but also allows HMRC to detect avoidance more quickly.
>
> 5. HMRC customers should have or buy in skills to fulfil their ordinary day-to-day tax compliance requirements. HMRC will provide assistance to resolve uncertainty around complex or significant issues and commercial transactions.
>
> …"

39. The document emphasised that the normal channel of communication would be with the taxpayer's CRM.

40. The second document produced by Mr Prosser was a note of a meeting of the Association for Financial Markets in Europe ("AFME") which took place on 3 March 2010. The meeting was attended by representatives of a number of banks, including Mr Watson on behalf of CS and Mr Davidson on behalf of HMRC. In relation to BPT Mr Davidson explained:

> "A Large Business strategy has been set to encapsulates the arrangements to ensure a tailor-made service for large business that works in real-time, wherever possible, and give certainty about the outcome. The aim is to have a real-time dialogue before the filing date so that as many issues as possible can be resolved by that date."

41. On 1 September 2010, Mr Norris sent an email to a colleague within HMRC (Mr Laing) in which he commented:

> "CS has engaged positively with us on the BPT process although there remain some issues to tidy up. This may necessitate opening an enquiry anyway but I would concur with the view that it would be difficult to prove arrangements were made to circumvent BPT."

HMRC's BPT Manual: notice of enquiry "must be in writing"

42. Also in May 2010, HMRC issued the first draft of their BPT Manual. The draft manual was sent to Mr Watson by Mr Davidson on 26 May 2010 and Mr Watson shared it with others in CS's tax department.

Paragraph 4115 stated:

> "HMRC may enquire into a BPT Return: anything contained in the Return or required to be contained in the Return. A notice of enquiry must be in writing to the taxable company and within the time allowed:
>
> • If the BPT Return was delivered on or before 31 August 2010: any time on or before 31 August 2011…."

43. This paragraph was unchanged in the final version of the BPT Manual issued on 7 June 2010.

44. Mr Driscoll's evidence was that CS's tax team had looked at the BPT Manual as part of the preparations for the BPT return itself. He specifically said that CS had looked at the part of the Manual which stated that a notice of enquiry would be in writing.

Interaction between HMRC and CS prior to submission of BPT return

45. CS held two meetings with HMRC regarding BPT prior to the submission by CS of its BPT return. The meetings concerning a number of matters affecting their BPT liability (of which the BPT treatment of the APPA was one).

46. At the first meeting, held on 29 July 2010, HMRC's representatives were Craig Norris (CS's CRM) and Nick Goodwin, a Tax Specialist at HMRC's Large Business Service. CS's representatives included Mr Driscoll and Mr Andrew Watson (Managing Director, EMEA Head of Tax). Mr Goodwin took notes of the meeting, although these notes were not shared with CS at the time. CS gave a presentation to HMRC on the processes which had been put in place for calculating its liability to BPT. In the course of the meeting CS referred to a remuneration plan (although not specifically refer to as such, this was accepted to be a reference to the APPA) where the compensation was deferred "and therefore is not considered as awarded." CS said that it believed that: "the deferred compensation [again, a reference to the APPA] is not within BPT. Is this correct?" It was noted as an "Action Point" that Mr Norris was to consider this further. Both parties agreed that a further meeting would be required and that CS would suggest dates in the week commencing 9 August 2010.

47. Mr Driscoll accepted that there was no reference in the notes of the meeting of 29 July 2010 to what would happen after the filing of the BPT return by CS.

48. The second meeting was held on 11 August 2010, at which HMRC agreed, after a discussion, that CS could submit a consolidated BPT return as well as giving technical feedback on certain substantive issues raised by CS concerning BPT's application in relation to information provided by CS. It was noted that Mr Norris had still to come back on the issue of the market value of the deferred share awards.

49. Notes of the meeting were taken by Mr Goodwin. Mr Driscoll again accepted that the notes of this meeting did not refer to any discussion of how areas of disagreement would be resolved post-filing.

50. On 17 August 2010 (approximately two weeks before CS's BPT return was due to be filed) Mr Norris emailed Mr Driscoll. As regards the quantification of the BPT liability, whilst recognising that deferred share awards represented "a difficult area ", Mr Norris suggested the use of a current valuation of future stock awards and indicated that this methodology was likely to be acceptable and "viewed as low risk". As regards the incidence of liability, Mr Norris suggested that the APPA "may be" within the scope of paragraph 12 of Schedule 1, and that, if CS disagreed, further information and detailed reasons should be provided. At the end of the email, in relation to research activities, Mr Norris suggested that if the methodology adopted in relation to such activities was as set out in Mr Driscoll's email of 10 August, "I would not regard this as a high-risk issue."

51. Mr Driscoll acknowledged that as a result of the email of 17 August 2010, he understood that the chargeability of the APPA was something that HMRC intended to look into further.

52. CS submitted its consolidated BPT return on 31 August 2010.

Interaction between HMRC and CS after submission of BPT return

53. On 23 September 2010 Mr Driscoll replied to Mr Norris' email and provided the requested information and analysis i.e. that in CS's view the APPA was outside the scope of BPT. I note that in the course of his email Mr Driscoll referred to the BPT Manual. Mr Driscoll's email concluded by suggesting a further meeting with HMRC to go into greater

detail on the BPT returns and to provide any supporting analysis that Mr Norris may require. In his evidence, Mr Driscoll referred to this as an example of "real-time" working.

54. On 2 November 2010 Mr Driscoll and Mr Watson met Mr Norris and Mr Goodwin to discuss the possible application of BPT to the APPA. HMRC's note of the meeting, taken by Mr Goodwin, recorded that HMRC opened discussion about the APPA as follows:

> "[Mr Norris] referred to [Mr Driscoll's] email of 23 September and Mr Dougan's (CEO CS) statement in the CS press release 20 October 2009. [Mr Norris] said that we [i.e. HMRC] wanted to just clarify the position so that we had understood CS's position".

55. The note recorded discussions between HMRC's and CS's representatives regarding the APPA and whether it was subject to BPT. In particular, there was a discussion about the applicability of paragraph 6(3). Although Mr Norris offered to set out HMRC's view in a clear email, it was agreed that CS would go back to their advisers and provide information on the advice they had received and the reasoning which led them to the conclusion that the exemption under paragraph 6(3)(b) of Schedule 1 would apply (HMRC having indicated that they thought that paragraph 6(3) did not apply).

56. The "Action Point[s]" arising from the meeting were recorded as "CS to provide details of the advice they received surrounding para 6(3)(b)", and "CS to provide an overall analysis as previously agreed at the meeting on 11 August 2010".

57. Mr Driscoll accepted, in relation to paragraph 6(3)(b), that CS and HMRC were not in agreement at this stage but added that HMRC had suggested an alternative way of dealing with the issue which involved CS giving further details of their reasoning.

58. The note records that Mr Norris:

> "…concluded that only the issue of the APPAs needs to be resolved and provision of the analysis of decisions made, which ties up the whole process and is useful as an audit trail."

59. Mr Driscoll's evidence was that at no stage during the course of this meeting was he given the impression that HMRC was giving notice of enquiry or that HMRC was intending to enquire into CS's BPT return.

60. On 3 November 2010, Mr Driscoll sent an email to Mr Watson and other colleagues as follows:

> "Here is a note of the action points from yesterday's meeting with HMRC on the above ["BPT/special APPA/EBTs"]
>
> 1 re original APPA – CS to provide a note to HMRC of why even though award was made during the chargeable period para 6(3) largely exempts that award from BPT (SD reply for circulation and discussion with Slaughters). My suggestion is that we call HMRC before sending the reply, including walking through the HMRC's BPT manual which supports our position.
>
> 2 CS to finalise and send to HMRC overall BPT reconciliation (RC to draft summary reconciliation using HR's previously provided schedules).
>
> 3 Re-Special APPA awarded September 2010 – term sheet to be provided to HMRC (TC to finalise term sheet).
>
> 4 …

> 5 Further meeting to be held with HMRC once IBP 2010 arrangements are finalised."

61. On 19 November 2010, in response to HMRC's request at the meeting, Mr Watson emailed a letter to Mr Norris with an analysis as to why the APPA was not subject to BPT. The emailed letter explained the background to the APPA, the APPA's detailed terms and discussed the application of paragraph 6(2) and (3) of Schedule 1 to FA 2010. The letter concluded: The letter concluded:

> "We trust that this is helpful. Please let us know how you would like to proceed. If you would find a further meeting helpful, we would be happy to discuss."

62. Mr Driscoll said that CS's tax team remained confident that they would be able to explain the reason for the APPA's exclusion from the scope of BPT to the satisfaction of HMRC.

63. On 10 December 2010 Mr Watson emailed Mr Norris and Mr Goodwin a reconciliation of CS's Bank Payroll Tax which was formatted in the same way as the initial presentation that CS gave to HMRC.

64. On 13 December 2010 Chris Davidson emailed the BBA (who forwarded the email to CS on the same day) to say:

> "You'll recall that HMRC wished to gain assurance of banks' payroll tax compliance and that we indicated we would want to undertake some post-filing assurance activity. We said this would be proportionate and appropriate. The extensive pre-filing engagement means that relatively little post-filing enquiry work will be necessary.
>
> Our approach is based on the following categories:
>
> 1. Banks with CRMs that did not take the opportunity to engage with HMRC in pre-filing discussion. We're likely to open enquiries.
>
> 2. Issues identified through pre-filing discussions that have still not been resolved. We'll need to complete these discussions.
>
> 3. Project work to identify other areas of risk.
>
> 4. Banks without CRMs…
>
> When we met, we discussed the project work we might do under 3 above. We put to you six possible areas; the discussion helped us to narrow these to two…
>
> We've now completed both these projects and have identified a small number of banks we are approaching for further information. Reaching this stage means CRMs can now start to confirm to the rest of their customers that they do not intend to open a payroll tax enquiry under para 23 sch 1. Most of your members with CRMs (whether in LBS [Large Business Service] or LC [Large and Complex]) should receive such a message over the next couple of weeks. For those without a CRM, it will take us slightly longer to finish our risk assessing, but we should be able to send messages to customers sometime in the new year."

65. On 2 February 2011 Mr Taylor-Gooby (who had recently taken over the handling of CS's BPT issues from Mr Norris due to the latter's illness[1]) emailed Mr Watson in relation to BPT:

[1] Sadly, Mr Norris died in January 2018.

> "As per my voicemail I am standing in for my colleague Craig Norris in relation to BPT issues. I note there is an open issue regarding payments under the APPA agreement. I thought it might be helpful if we had a quick discussion about where we are we [sic] a view to considering how this matter might be resolved."

66. Mr Driscoll's evidence was that CS's tax team thought it took a while for Mr Taylor-Gooby to get up to speed on discussions that had already taken place with HMRC and they had to cover items that had already been discussed with Mr Norris.

67. On 15 February 2011, Mr Taylor-Gooby replied to AW's email of 19 November 2010:

> "First of all let me say that the features of the Credit Suisse APPA scheme are in many ways different from those I have seen elsewhere. The plan does seem to have in general the purpose of spreading compensation awards in a manner designed to match awards more closely to future performance through the links with "return on equity" and the possibility of variable calculation metrics leading to upward or downward movement in the notional deferred amounts.
>
> But there is still the fundamental question of whether it is sufficiently different to put the awards completely or partly outside the scope of the tax. Whilst acknowledging that the circumstances are not clear-cut I am not immediately convinced that it does. Since we have agreed to meet to discuss the matter I shall outline what I think are the main technical issues around this conclusion and will aim to expand on this in discussion."

68. Mr Taylor-Gooby then considered the application of paragraph 6(2) and (3) and paragraph 12. On paragraph 6(2) he acknowledged that, on the question of whether a discretion had been exercised, that "this is something that can be considered further but my immediate view is that this falls within the territory outlined at BPTM [HMRC's BPT Manual] 3130 and 3131 and does not lead to the conclusion that the payments are excluded remuneration." He concluded:

> "In conclusion my initial view is that more information is required to come to a firm conclusion regarding the application of paragraph 6 but that if the payments are excluded by this route, paragraph 12 will apply to the appropriate measure of the amounts awarded under the scheme.
>
> I look forward to discussing these issues further."

69. In relation to the application of paragraph 6(3) Mr Taylor-Gooby wrote:

> "Again I think consideration of the surrounding facts might clarify the application here."

70. As regards the application of paragraph 12 of Schedule, Mr Taylor Gooby said:

> "In my view the operation of the scheme does constitute an 'arrangement'. There is a difficulty, of course, in calculating the amount that it would be 'reasonable to assume' will be paid under the APPA but that is something I would be happy to discuss."

71. Mr Driscoll understood that HMRC were expressing an "initial view" that more information was required from the group in order to determine if the paragraph 6 exemptions applied, but that HMRC's view was that paragraph 12 would apply, if not. He appreciated that CS "still had some persuading to do" in order to convince HMRC that CS's analysis was correct. His impression was that the discussion with HMRC remained open, that these

discussions were still on a "real-time" non-enquiry basis and that HMRC were continuing to gather information in relation to their understanding of how BPT would be applied to the APPA. Nonetheless, the CS tax team remain confident that they would be able to explain the reasons for the APPA's exclusion from the scope of BPT to the satisfaction of HMRC and avoid the need for an enquiry. At no time did Mr Driscoll or anyone else in the CS tax team consider that HMRC was giving notice of their intention to enquire into CS's BPT return.

72. On 7 March 2011 Mr Watson replied, in advance of meeting HMRC to discuss the issues, to set out CS's thinking in writing.

> "Thank you for your letter of 15 February 2011, setting out some of the issues relating to the [BPT] treatment of the APPAs which have been awarded by Credit Suisse. Before we meet to discuss these issues, we thought it would be helpful to set out our thinking in writing.

73. Mr Watson then addressed the issues raised by Mr Taylor-Gooby. His letter ended:

> "*Next steps*
>
> We will be in touch to schedule a meeting to discuss these issues. As these points are, largely, questions of law, we would like to bring our legal advisers, Jeanette Zaman and Dominic Robertson of Slaughter and May to the meeting; please let me know if you have any issue with this.
>
> Of course, please also let me know if it would be helpful to have any further information on these points before the meeting.
>
> We look forward to working with you to resolve our BPT position."

74. On 18 May 2011 a meeting took place between Mr Watson and Mr Driscoll for CS and Mr Taylor-Gooby and Mr Goodwin for HMRC. Mr Goodwin's note of the meeting records the opening discussion in relation to BPT**:**

> "AW explained that whilst Credit Suisse has taken advice from Slaughter & May [sic] they had not invited them to attend this meeting as they thought it would be best to explain the company's view and to add further clarity.
>
> RTG [Mr Taylor-Gooby] introduced himself and explained his background and connection with [BPT]. RTG stated that in general terms all BPT had been settled apart from Credit Suisse although this was not a criticism. RTG went on to say that whilst the APPA was a development as a result of the FSA discussions it seemed to go much further than what he has seen and therefore appreciated that there could be some difficulty in arriving at settlement. RTG added that we want to seek settlement and not to rush off to tribunal and apply our litigation strategy.
>
> AW agreed that CS would want to seek settlement and thought it would be useful to explain to RTG what CS had done and why."

75. The note then recorded a discussion of the various technical provisions of Schedule 1 FA 2010. Later in the meeting the note records:

> "RTG made reference to some advice from technical specialists within HMRC. He added that we do not want to proceed to litigation, but the point of the legislation with regard to discretion may be a point that a lawyer may need to look at.
>
> …

> RTG said that we would need to look further at the issue of discretion and its extent, six legal interpretations on the point of Para 12. We would hope to respond quickly and if we disagree we will lay out further our reasoning."

76. CS agreed to provide HMRC with some documentation relevant to the APPA.

77. In relation to the meeting of 18 May 2011, it was not, as I understood it, suggested by HMRC that a notice to open an enquiry had been given in or by that meeting. Although Mr Nawbatt drew my attention to the references made by Mr Taylor-Gooby to possible litigation, it seemed to me that this note is simply recording another stage in the discussions between HMRC and CS.

78. On 20 June 2011 Mr Taylor-Gooby emailed Mr Watson, asking him to clarify some aspects of the discussion at the meeting. Mr Taylor-Gooby's email ended:

> "Please get in touch if you would like to discuss or clarify this in any way…."

79. Mr Watson replied on 6 July 2011 with a detailed clarification and further information. Mr Driscoll said that, at this stage, the CS tax team did not know whether HMRC were going to, or intended to, enquire into CS's BPT return or could satisfy themselves on CS's position with the information provided.

80. On 5 August 2011, Mr Taylor-Gooby emailed Mr Watson to say:

> "I have given the points you raise full consideration but have decided to get a further opinion from our policy advisor before giving you a decision. I don't think it will take long and will get back to you as soon as I can."

81. On 15 August 2011, a CS colleague emailed Mr Watson (and copied Mr Driscoll) to say:

> "I think we should give some thought (and if necessary have a call with Slaughters) as to how we can protect our downside position should the Revenue revert with a notice of enquiry on or very shortly before 31 August 2011.
>
> The point is I think the legislation gives us a deadline of 31 August 2011 for submitting an amended return (paragraph 21 schedule 1). I am slightly concerned that if the Revenue deliver an enquiry notice a couple of days before/on 31 August (with or without an answer on the APPA), we may be in a difficult situation with no room to manoeuvre should they not respond positively to our APPA arguments.
>
> For example perhaps it is worth us spending some time on preparing an amended return (e.g. with new market valuations); hopefully we will not need to submit it but it is there if we need it at short notice?"

82. On 16 August 2011 Mr Watson replied**:**

> "Good point. Could you please discuss with [Mr Driscoll]…as to how much it would take to have a revised return ready to go."

83. I think it is plain from this internal CS email exchange that CS did not believe that HMRC had already given CS notice of its intention to open an enquiry into its BPT return.

84. On 19 August 2011 Mr Taylor-Gooby replied to Mr Watson's email of 6 July 2011. As well as sending Mr Watson a letter, Mr Taylor-Gooby also emailed Mr Watson the text of the letter, saying:

> "I have copied below the text of a letter which I will be sending you shortly. I am sure you will want to discuss this further and I am happy to meet you when convenient."

85. Mr Taylor-Gooby's letter said:

> "I have now been able to consider fully the information provided…I have also discussed my views with our technical specialists to ensure that we have reached a position consistent with that taken in other cases."

86. In relation to the discretionary nature of the awards under the APPA, Mr Taylor Gooby accepted that the amount of the award did not become fixed without the exercise of discretion by the relevant remuneration committee and that therefore paragraph 6. I note that HMRC have now changed their position on this issue and argued before me that paragraph 6 did apply.

87. Mr Taylor-Gooby then set out his view that paragraph 12 applied to the APPA. Nonetheless, as regards determining the final liability to BPT, Mr Taylor-Gooby indicated that it would be necessary to take account of the likely rate of attrition attributable to early leavers and said:

> "We clearly need to consider and agree what measure would be reasonable to take here.
>
> I [am] happy to meet with you and your advisors as necessary to take matters forward – but please note that I am now away until 30 August."

88. Mr Driscoll said that at no point in the period 31 August 2010 to 31 August 2011 did any member of the CS tax team consider that HMRC were intending to enquire into CS's BPT return. Mr Driscoll considered that each time HMRC had raised a query in that period CS's tax team went to significant lengths to answer it (including by providing information and further documentation) and the dialogue simply continued with CS providing such information to HMRC as requested, without HMRC giving notice of their intention to enquire into the return. As at 31 August 2011, Mr Driscoll considered the discussions with HMRC to be "ongoing".

89. I note also that in his witness statement Mr Taylor-Gooby did not claim that the 19 August 2011 letter could be seen as a notice to open an enquiry (in contrast to his claims in relation to the 15 February 2011 letter). He referred to the letter of 19 August 2011 as "a letter that set out our thinking on the technical application of the legislation, including paragraph 12."

90. As already noted, CS submitted its BPT return on 31 August 2010.

74. On 11 October 2011 Mr Taylor-Gooby emailed a senior HMRC colleague (the Deputy Director of LBS (London Financial)) to say:

> "Subject: RESTRICTED; Credit Suisse BPT-no enquiry notice
>
> …
>
> Andrew Watson of CS 'phoned Craig this morning, prompted by S&M's review of the papers, to ask whether we had ever raised a formal enquiry notice and we are now out of the normal enquiry window. The answer is "no"- although it is quite clear from the papers that we were in dispute as to how the law applied to one particular bonus scheme known as the APPA. The discussion here followed on from a pre-filing presentation given by the company in July 2010.

> Until we meet it will not be clear how S&M intend to play this issue. If they do make a stand on this I think we have a number of defensive arguments, most particularly that the "enquiry" started in an informal way following a pre-filing presentation, ongoing correspondence made it clear that we were disputing their views on the application of BPT and CS did not object to the informal enquiries but engaged with the debate.
>
> However I wanted to give you advance warning that this problem may arise – perhaps if you have a few minutes to spare we could discuss this? "

91. This email was forwarded to Mr Norris on the same day. There is no record of his response.

92. In cross-examination, Mr Taylor-Gooby said that, when he first received the news from Mr Norris that no formal enquiry notice had been given, he thought it was "a bit of a body blow really". His assumption had always been that a notice of enquiry had previously been given by Mr Norris. He therefore wanted to inform his line manager:

> "as one would if one thought in error of that nature had occurred. So I assumed it was in error, that it jeopardised the enquiry and that I would therefore need… to take advice on the consequences."

93. Mr Taylor-Gooby said:

> "I did not take over the role as case manager for Credit Suisse; somebody else was actually deputising in that role. And normally in the way we work, these kind of things, like issuing an enquiry notice and so on, would have come under their remit. I was just… a caretaker at that point. I think things changed because I don't think [Mr Norris] spend very much time in the office at all after that and eventually took ill-health retirement. But he definitely told me – I asked him – I sort of interrogated him a bit actually and said, …, 'What's going on?', and he said…'No, I didn't issue it'."

94. Thus, Mr Taylor-Gooby confirmed that he had discussed with Mr Norris whether a notice had already been given. Mr Norris said that he had not issued a "formal" notice. Mr Taylor-Gooby added that he could not recall whether Mr Norris had used the words "formal notice" or whether he had said "I didn't issue a notice."

95. Also on 11 October 2011, Mr Taylor-Gooby emailed HMRC's Tax Administrative Advice - Support Unit asking for their advice. After explaining the background, Mr Taylor-Gooby wrote:

> "In July 2011 I came to a final view on the law and made a submission to PSA who in turn gave advice which was put to the company on August 17[2]. They subsequently asked for a meeting and told us that their advisers, Slaughter and May would be attending. S & M have now reviewed the case and pointed out that no formal enquiry notice has been issued.
>
> This situation has doubtless come about because the "enquiry" was commenced pre-filing and continued with the full involvement of the company who by their actions have accepted that we were conducting an enquiry. However we have concerns that this may not be enough for us to justify amending the assessment or raising a further assessment if the matter goes to Tribunal. There must be other cases where no formal notice was given

[2] In fact, the email text of Mr Taylor-Gooby's letter was sent to CS on 19 August 2010.

> but both sides engaged in an enquiry process informally and by consent. It would naturally help us at the meeting to know what the official line on this is."

96. There is no record of the response to this email.

97. On 17 October 2011 a meeting was held between, amongst others, HMRC (Mr Norris, Mr Taylor-Gooby and Mr Goodwin) and CS (including Mr Watson and Mr Driscoll) and Slaughter and May (Ms Janette Zaman) to discuss the APPA and BPT. HMRC's note of the meeting taken by Mr Goodwin includes the following:

> "[Mr Watson] pointed out that an enquiry notice had not been issued and was the company want to continue to discuss the APPA and explain why they believe Para 12 [sic],… He wanted to raise this point without prejudice.
>
> [Mr Taylor-Gooby] said that we had considered this and do not think that it is a problem, but if the company did HMRC would want to deal with this separately. [Mr Taylor-Gooby] went on to say that we accept that no formal written notice had been issued and although this would be the norm, to make clear what the position was, it has been clear from before submission of the BPT return that the amount to be returned/paid was under discussion that there was an enquiry. The fact that it is not in writing doesn't ultimately inhibit HMRC."

Mr Driscoll's evidence and the "real-time working" issue

98. In his witness statement, which was dated 11 December 2018, Mr Driscoll stated that HMRC's discussions with CS about BPT were an example of "real-time working". This occasioned a great deal of debate at the hearing. Mr Driscoll said:

> "17. By way of context to the BPT-specific discussion with HMRC, it is important to explain that, in or around summer/autumn 2009, I recall that I and my colleagues within the Group's UK tax team perceived the change in HMRC's approach to its interactions and general dealings with the Group when it came to tax matters. Around that time, many banks (including the Group) were requested to adopt the Code of Practice on Taxation and I understood that Chris Davidson of HMRC was explaining to banks that the new approach to what was promoted by HMRC as "real-time working" was an opportunity to engage with and resolve issues informally with HMRC and thereby narrow any issues. I recall from the first meeting solely dealing with BPT with Craig Norris of HMRC (on 29 July 2010) (addressed in further detail at paragraph 23 of this witness statement below), that HMRC's policy was that (consistent with the real-time working basis under the Code of Conduct for Taxation) it was only if issues could not be resolved through bilateral discussions that HMRC would resort to using a notice of enquiry. The message was that, where banks did not engage in this way, HMRC would proceed more directly to issue notices of enquiry, likely on a wider range of points.
>
> 18. HMRC (through Craig Norris) started seeking greater engagement between the Group and HMRC prior to (and then, where appropriate, after) the Group filing its corporate tax returns to discuss and address potential material issues in relation to the same, with notices of enquiry being raised in relation to the issues that were unresolved at the end of the specific period relevant to the issue.

> 19. Historically, in the absence of the specific issue to address, the Group would only meet with HMRC approximately nine months after it submitted its corporate tax returns. At such a meeting, HMRC would raise its concerns and we would work quickly to close the queries HMRC had raised by addressing the points in a series of formal letters. HMRC would then issue formal notices of enquiry in respect of queries against returns which it considered had not been addressed to its satisfaction.
>
> 20. In summary, prior to summer/autumn 2009, the Group's interactions with HMRC (through the Group Tax team) were of a more structured nature. However, from this point onwards, HMRC's approach to interacting with the Group appeared to change, and this was reflected in their communications with the Group in respect of the APPA. This was what the Group Tax team would come to understand as HMRC's real-time working basis, which represented a step change in the Group's dealings with HMRC.
>
> 21. Under the real-time working basis, HMRC and the Group would discuss material issues much earlier in the process. HMRC would then sometimes ask further questions in respect of some of the Group's answers but generally offered no further comment as to the points they chose not to pursue further. This created uncertainty for the Group because the Group could never be sure if HMRC were going to open one of the points further down the line.
>
> 22. The dialogue between the Group Tax team and HMRC in respect of the application of BPT to the APPA … took place over an extensive period of time. I later came to realise that this was effectively the first 'test case' I experienced of HMRC's real-time working basis.
>
> 23. …I also recall that Craig Norris of HMRC mentioned that the idea behind this meeting [on 29 July 2010] and meetings going forwards was for the Group and HMRC to try to agree as many points as possible, so as to gradually narrow the list of issues. As I have already mentioned at paragraph 17 of this witness statement above, I recall that at the meeting Craig Norris indicated that HMRC were looking to have a position where they Group was considered to be "low-risk" on any BPT matters. Further, to the extent any remaining issues could not be resolved by bilateral discussions on BPT (in accordance with HMRC's new real-time working basis), the Group Tax team's expectation was that, as was normal practice, HMRC would submit notices of enquiry."

99. Mr Driscoll accepted that his account in the final two sentences of paragraph 17 of his witness statement was not recorded in HMRC's contemporaneous notes of the meeting and that there was no other record of the statement attributed by Mr Driscoll to Mr Norris. Mr Driscoll also accepted that when, in October 2011, CS raised with HMRC for the first time that no notice of enquiry had been issued by the time the enquiry window had closed, no mention was made of the statement attributed to Mr Norris by Mr Driscoll in paragraphs 17 and 18 i.e. that it was only if the matter was not resolved through bilateral discussions that HMRC would resort to opening an enquiry. Moreover, Mr Driscoll accepted that this point was not raised in any subsequent correspondence or meetings until Mr Driscoll's witness statement was produced in December 2018.

100. Mr Driscoll considered that "real-time working" involved taking issues to HMRC either before and after the tax returns were submitted, taking HMRC through CS's approach in order to agree the tax treatment of particular items in the returns. This typically involved meetings

with HMRC. There were occasions when CS disagreed with HMRC in respect of the treatment of particular items in the return where HMRC. There were occasions when HMRC disagreed with CS's analysis and issued a notice of enquiry. Nonetheless, as a general matter, CS had discussions with HMRC both pre-and post-filing, depending on the particular facts and circumstances. In the case of BPT, pre-filing discussions continued after the return was submitted.

101. In this context, Mr Driscoll referred to discussions concerning the Bank Code of Conduct, which HMRC asked banks to agree to at around this time, where the emphasis was on openness and transparency.

102. Mr Driscoll said that the issue of a notice of enquiry was regarded within CS as a "trigger event". The receipt of a notice of enquiry would then lead to the escalation of the issue within the CS tax group and more generally e.g. in discussions with CS's auditors.

103. In cross-examination, Mr Nawbatt suggested to Mr Driscoll that, eight years after the event, in circumstances where Mr Driscoll had not taken any notes of the meeting, he was not in a position to say whether this was something that Mr Norris had said at the meeting on 29 July 2010. Mr Driscoll disagreed and reaffirmed that this was what had been said at the meeting.

104. Moreover, although Mr Driscoll's statements in paragraph 19 of his witness statement covered periods before Mr Driscoll joined CS, he said that his knowledge came from being a member of the CS tax team and from his understanding the way in which CS were dealing with HMRC.

105. As already mentioned, Mr Driscoll was cross-examined at some length about the final paragraph of the email note of the meeting between HMRC and the BBA of 26 April 2010. Mr Nawbatt suggested to Mr Driscoll that a distinction was being drawn between future enquiries and future queries. Mr Driscoll disagreed.

106. Mr Driscoll stated in cross-examination that he could expect, once HMRC had reached a firm conclusion, that the start of the enquiry process would involve "HMRC setting out their position". CS expected to receive a notice of enquiry by the deadline; as Mr Driscoll agreed in cross-examination: "it was very much the possibility".

Mr Taylor-Gooby's evidence

107. I formed the view that Mr Taylor-Gooby was an entirely honest and straightforward witness. There were, however, a number of statements in his witness statement and in his oral evidence which were either expressions of opinion and/or matters of submission which, in my view, did not constitute admissible evidence and which I have disregarded. For example, in relation to his letter of 15 February 2011, Mr Taylor-Gooby said that he believed "that the letter made quite clear HMRC's intention to enquire into the Appellants' BPT return." By way of another example, a similar expression of opinion was made in relation to the meeting of 2 November 2010, which Mr Taylor-Gooby did not himself attend. These and other similar statements are simply expressions of opinion from a witness of fact who is not an independent expert witness. I have not, however, disregarded Mr Taylor-Gooby's evidence concerning what he understood to be standard HMRC practice as regards discussions with taxpayers (particularly banks) at the relevant time. This seemed to me to be evidence from his direct experience and was, therefore, admissible.

108. Mr Taylor-Gooby had been involved in a number of tax enquiries over the years. If HMRC commenced a corporation tax enquiry, the CRM would typically examine the accounts and tax computations and agree which issues required challenging or to be supported by further information. The questions raised would be set out in a formal letter sent to the bank accompanied by a formal notice stating that HMRC wish to enquire into the return under a particular statutory provision. The enquiry would then progress through a process of formal letters summarising each side's positions and meetings aimed at resolving the matter and finally by formal proceedings if agreement could not be reached.

109. BPT was a "one-off" levy under new legislation and under HMRC's initial consultations with representative bodies it was agreed that HMRC would conduct a program of informal pre-filing discussions with individual banks. The aim of these, Mr Taylor-Gooby said, would be to develop a consistent approach to common issues arising in the preparation of BPT returns. Since there were no precedents this would give the banks greater certainty regarding their liability and minimise the need for formal post-filing enquiries. This was a departure from the usual review process in other taxes such as corporation tax, where the majority of HMRC enquiries would arise following the filing of returns and associated documentation.

110. In his evidence, Mr Taylor-Gooby made it clear that, once he took over as CS's interim CRM (standing in for Mr Norris on account of the latter's illness), he had simply assumed that a notice to enquire into CS's BPT return had already been given by Mr Norris because he thought an enquiry was already underway. He had not checked back on the file to ascertain this and noted, in this context, that he had had difficulty in accessing Mr Norris' emails (which were password protected) in relation to the CS discussions concerning BPT. He had to rely on an assistant in his group to find out what had happened on the case. Similarly, having assumed that a notice to enquire had already been given by Mr Norris, in his meetings and correspondence with CS, Mr Taylor-Gooby said that he had not been intending to give such a notice. He confirmed that there was no occasion prior to and including 31 August 2011 when he thought it was necessary to give a notice of enquiry.

111. There was no doubt, in Mr Taylor-Gooby's view, that in relation to BPT CS's case was "complex and difficult."

112. Mr Taylor-Gooby accepted that where a notice of enquiry had been issued, HMRC would usually have kept a record of that fact. A notice of HMRC's intention to open an enquiry would normally have been included in a letter opening an investigation. He gave an example of such a letter which would say: "Dear Sirs, I would like to give notice of enquiry under paragraph 23". He added that after the filing of a BPT return, if any HMRC inspector wanted to raise an issue or continue the (pre-filing) debate, the inspector "should, if they were following our bank payroll tax guidance, have issued a notice of enquiry."[3] Mr Taylor-Gooby thought that "the norm" would be for a notice of enquiry to be contained in a separate letter, although he did not think that that was a requirement. Mr Taylor-Gooby's cross-examination proceeded as follows:

> "Q… But when you say what the norm is, is it fair to say that the norm would be something that brings home to the taxpayer that under a particular paragraph of a particular schedule or whatever an enquiry is being opened?

[3] Mr Taylor-Gooby clarified this by accepting that this was not in the BPT manual but said that "from first principles" an inspector would not continue an enquiry without a notice of enquiry because it would be a pointless exercise.

> A Well, it should certainly be clear in stating that an enquiry is being opened. It would probably also give the legal background, paragraph 23, Section 9A, whatever, and it should obviously make it clear to the customer that a legally valid enquiries being opened."

113. Mr Taylor-Gooby said that it should be possible to find fairly easily [in HMRC's records] a letter giving notice of an intention to open an enquiry. It might not be on a paper file (because increasingly records were computerised) but there should be a correspondence folder and the notice should be easy to find, labelled "Notice of enquiry" or "Opening letter".

114. Mr Taylor-Gooby's cross-examination continued:

> "Q. You're saying that the guidance was if you wanted to carry on discussing matters [after the submission of a return] you submitted a notice of enquiry?
>
> A Well, if you wanted to carry on a discussion that might result in a change to the amount of tax payable, yes, you would have to [give a] notice – because that kind of discussion you would need to – you should issue a notice of enquiry, for which corporation tax would need to be in writing.
>
> Q So there would be no possibility of trying to settle matters to get the taxpayer's agreement after some discussion that actually you're right and they're wrong and they will amend their return or something like that?
>
> A Well, you could – if the enquiry window was still in operation in the corporate agreed with you, but at the end of the – but if you're doing it without notice, you've got to get to a point where you issue a closure notice and then have the power to compel a change in the submission."

115. In his witness statement Mr Taylor-Gooby said that HMRC had agreed in discussions with representative bodies in relation to BPT that it would conduct a program of informal pre-filing discussions with individual banks. The aim would be to develop a consistent approach to common issues arising in the preparation of BPT returns across the banking sector. This would give banks greater certainty regarding their liability and minimise the need for formal post-filing enquiries. He said that this was a departure from the usual review process in other taxes such as corporation tax, where the majority of HMRC enquiries would arise following the filing of returns and associated documentation. He considered that this BPT process was effective in minimising the number of enquiries arising post-filing. However, where, as in CS's case, the quantum of the return could not be agreed during the informal discussions he considered that "the law required a notice of enquiry to be given to the taxpayer so that a formal enquiry process could commence." Mr Taylor-Gooby explained that if HMRC wanted to challenge a return it would have to issue a formal notice of enquiry before amending the return:

> "A …Once you get to the point where you [HMRC] can see a clear path to adjusting an assessment, he would certainly need an enquiry notice in my view.
>
> Q And this is why you assumed, when you took over [from Mr Norris], that there would be a notice of enquiry?
>
> A Well, I assumed that because there clearly had been a challenge to Credit Suisse's position with regard to the APPA pavements, and Craig Norris had clearly signalled that he thought paragraph 12 is in point and that some sort of determining under paragraph 12 was required, and he was asking for further information, so it had the complete appearance to me of being an enquiry rather than a general discussion.

> Q But… you said earlier on that you made that assumption, but you didn't check it…
>
> A I made that assumption, yeah, and I didn't check….
>
> Q And you didn't change that assumption, did you thereafter?
>
> …
>
> A No, I maintained that assumption right up to the point where I was told there was no enquiry notice.
>
> Q So just to be clear then there was no occasion up to 31 August 2011 when you thought it was necessary to give notice of enquiry?
>
> A No, I mean if I had thought that, I would have done it
>
> Q But you didn't do it?
>
> A I didn't, while I was working the case, think that there was [sic] a notice of enquiry in operation. I mean, to be fair, I didn't give it a lot of thought actually. I probably picked it up assuming that under normal practice in notice of enquiry would have been given and so I just carried on working at and Credit Suisse continued to act as if they thought a notice of enquiry had been given, so it didn't really occur to me that there wasn't an open enquiry."

116. Mr Taylor-Gooby said that he had had some involvement with the Code of Conduct relating to banks. He considered that it was very much targeted at informal discussions pre-filing (e.g. pre-transaction rulings). In Mr Taylor-Gooby's experience "real-time working" was where a company approached HMRC about a proposed transaction. In his view, the present appeal did not involve "real-time working".

117. The normal practice with banks in relation to corporation tax, according to Mr Taylor-Gooby, would be for the banks:

> "to file their accounts and return and computations and for [HMRC] to invite them to give a post-filing presentation, explaining how they had reached those figures, and once they had done that, we would then notify them which areas we wish to enquire into and give them a notice of enquiry."

118. He said that if HMRC were confident that "within a week or two" the discussion would be settled it might not be necessary to issue a notice of enquiry however, where the position was "difficult and going to become entrenched" a notice of enquiry should be issued.

119. Mr Taylor-Gooby did not accept that there could be an "informal enquiry". An enquiry was always a formal matter. He said:

> "There may be an informal discussion about something but I don't think it's an informal enquiry. So I think that the recipient ought to be aware of what it is."

SUBMISSIONS ON THE PROCEDURAL ISSUE – IN OUTLINE

HMRC's submissions

120. Mr Nawbatt summarised the authorities in six propositions:

(1) the focus should be on the statutory language of the notice provision (paragraph 23) and the requirement to give notice of HMRC's intention to enquire into a return. Giving notice means to intimate or to convey HMRC's intention to enquire ((*on the*

application of Spring Salmon and Seafood Ltd V Inland Revenue Commissioners [2004] STC 444) ("*Spring Salmon*") *per* Lady Smith at [32]);

(2) the notice under paragraph 23 did not have to be in writing and there was no prescribed format, specific wording or formality required (*Spring Salmon* at [23] and *Flaxmode v HMRC* [2008] STC (SCD) 666 *per* Special Commissioner Hellier at [27])[4];

(3) the test of whether sufficient notice has been given is objective and involves asking what a reasonable taxpayer in the appellant's position would have understood from HMRC's communications (*Flaxmode* at [30]) and *Wickersham v HMRC* [2016] EWHC 2956 (Ch) [41] *per* HHJ Saffman);

(4) the question is whether HMRC have sufficiently intimated or conveyed their intention so that a reasonable taxpayer in the appellant's position would have understood that HMRC were intending to enquire into the return. The test is an objective one and not one that concerns the subjective intentions of the parties (*HMRC v Mabbutt* [2017] UKUT 289 (TCC) (Judge Bishop and Judge Brannan) at [45];

(5) the notice must be clear (*Raftopoulou v HMRC* [2019] 1 WLR 1528 ("*Raftopoulou*")); and

(6) the context is critical to any consideration whether notice to enquire has been given by HMRC (*Bristol & West plc v HMRC* [2017] 1 WLR 2792 at [26] – cf. *Raftopoulou* where there was, effectively, no relevant context, in Mr Nawbatt's submission).

121. Mr Nawbatt accepted that HMRC's BPT Manual, particularly the statement that a notice of HMRC's intention to enquire into a return would be in writing, was part of the relevant context.

122. However, what the parties' subjectively understood was of limited relevance. The test was an objective one.

123. In relation to Mr Driscoll's evidence concerning the meeting of 29 July 2010, Mr Nawbatt submitted that the statements which Mr Driscoll attributed to Mr Norris should be ignored and he referred to the decision of Leggatt J in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) at [15] to [22] in relation to the unreliability of oral evidence based on events several years ago. Mr Nawbatt noted that the first time that the words attributed to Mr Norris had emerged in evidence was in December 2018 when Mr Driscoll submitted his witness statement.

124. Although Mr Nawbatt accepted that the facts of this case were unusual, because an enquiry was normally started with a standard form letter, that was not relevant to the test was: would the reasonable taxpayer have understood from what was communicated to them that HMRC intended to enquire – in this case, into the treatment of the APPA in CS's BPT return.

125. In Mr Nawbatt's submission, HMRC first intimated to CS that they intended to enquire into the return at the meeting on 2 November 2010.

[4] Cited with approval by Cranston J in *R (Sword Services Ltd v HMRC* [2016] 4 WLR 113 at [44] and [71]). Cranston J said at [71]: "To my mind, the Parliamentary intention behind that provision [s12AC (1)(a) TMA 1970] is to ensure that the taxpayer knows in writing of the enquiry and so has the opportunity to put its case. There is no particular form prescribed for a notice of enquiry as long as the taxpayer knows of HMRC's decision to conduct an enquiry that is sufficient. In this regard, *Flaxmode* is in my view correct."

126. Alternatively, Mr Nawbatt contended that Mr Taylor-Gooby's letter of 15 February 2011 gave CS notice under paragraph 23 of HMRC's intention to enquire into the return. That meeting had to be seen in the context of the earlier discussion at the meeting on 2 November 2010 and the earlier pre-filing meetings, where HMRC had indicated that they thought the APPA was chargeable. CS should have understood that HMRC intended to enquire into the return. CS knew that in December 2010 HMRC told the BBA that HMRC were intending to send out letters to those banks into whose returns HMRC did not intend to enquire. By 15 February 2011, CS knew that they had not got such a letter. Instead, on 2 February 2011, Mr Taylor-Gooby emailed CS saying that he wanted to take forward the open issue regarding the payments under the APPA.

127. HMRC's 15 February 2011 letter made it clear that HMRC were not satisfied with the reasoning in CS's 19 November 2010 letter. Mr Taylor-Gooby set out his initial view and sought further information to reach a firm conclusion. This was exactly the sort of letter that an officer would send if he or she was intending to enquire into a return. It was an intimation of an intention to enquire into the return, when viewed against the background of the earlier contacts between HMRC and CS on this issue. Furthermore, statements in the BPT Manual could not assist CS – the 15 February 2011 letter from Mr Taylor-Gooby was obviously in writing.

128. In relation to the 19 August 2011 letter, Mr Nawbatt submitted further or alternatively that that letter also gave notice of HMRC's intention to enquire into the return. This correspondence made it clear that even if a reasonable taxpayer had not previously understood that HMRC would be enquiring into the return, then it would have been clear to them from this letter that HMRC were now intending to do so. Again, the letter had to be seen against the background of the previous correspondence and meetings in relation to the APPA. Mr Nawbatt noted that Mr Driscoll had said in cross-examination that it was "very much the possibility" that HMRC would issue a notice of enquiry after receiving this letter. It was clear that HMRC, in the letter of 19 August 2011 had intimated its intention to enquire into the return to CS.

129. It was important, said Mr Nawbatt, to recall that the legal test required that the circumstances be looked at objectively from the point of view of the recipient i.e. CS. HMRC's actual intentions in sending the letters of 15 February and 19 August 2011 were not strictly relevant.

130. The course of dealing between HMRC and CS made it clear that the discussions were not simply informal enquiries and that by 2 November 2010, alternatively, 15 February 2011 or, at the latest, 19 August 2011, the threshold set by paragraph 23 had clearly been surpassed.

Credit Suisse's submissions

131. Mr Prosser submitted that nothing in the note of the meeting on 2 November 2010 indicated that HMRC were intending to give notice of its intention to enquire into the BPT return. The note did not record any such notice being given and the words "notice" and "enquire" (and cognate expressions) are not mentioned in the note. There was nothing in subsequent communications to suggest that at that meeting HMRC had started a formal statutory process. For example, HMRC's requests for information were not made pursuant to statutory powers which would be available to them if they had opened an enquiry. The email of 13 December 2010 also indicated that HMRC did not believe that they had opened any BPT enquiries.

132. Nothing was said at the 2 November 2010 meeting, Mr Prosser argued, to indicate the start of a formal process. A reasonable person in CS's position would not have understood that notice had been given. Certainly, there was no evidence that HMRC's and CS's representatives at that meeting thought notice had been given.

133. Furthermore, at the meeting on 29 July 2010, Mr Prosser said that Mr Norris had indicated that the idea behind that and subsequent meetings was for HMRC and CS to discuss and try to agree as many points as possible so as to narrow the issues; HMRC would only open an enquiry if issues could not be resolved through those bilateral discussions. This was consistent with the "real-time working" basis, which HMRC had recently introduced for banks, whereby taxpayers were given an opportunity to engage with HMRC and resolve issues informally. The note of the meeting shows that the meeting consisted of discussions and that it was intended to continue those discussions after the meeting.

134. Furthermore, HMRC's BPT Manual stated that "a notice of enquiry must be in writing to the taxable company." In the light of that statement CS could not reasonably be expected to understand that a verbal notice of enquiry has been given at the meeting.

135. In addition, HMRC were engaging with CS in "informal enquiries" into the APPA and the application of BPT to the APPA was under discussion. This did not mean that HMRC were thereby opening an enquiry into the return (*Raftopoulou* at [43] and [49]).

136. In relation to Mr Taylor-Gooby's letter of 15 February 2011, Mr Prosser submitted that, similarly, this did not constitute a notice of HMRC's intention to enquire into the BPT return, for many of the same reasons that the meeting of 2 November 2010 did not constitute a notice of enquiry. Mr Prosser accepted, of course, that the BPT Manual was of no assistance in relation to the letter. He noted that even Mr Taylor-Gooby did not intend that the letter should be such a notice.

137. In addition, Mr Taylor-Gooby was merely outlining his views on technical issues in advance of the meeting "to discuss the matter." The end of the letter with "I look forward to discussing these issues further." The letter was merely part of the continuing discussions between HMRC and CS. Again, these were "informal enquiries" that were being conducted by HMRC.

138. As regards HMRC's letter of 19 August 2011, it was not initially part of HMRC's case that this letter constituted a notice of enquiry. Indeed, it was only with Mr Nawbatt's opening submissions that it became clear that HMRC were relying on this letter as a notice of enquiry.

139. Mr Taylor-Gooby's intention, as was clear from his evidence, was not to open an enquiry. The 31 August 2011 deadline for serving a notice of enquiry was of no concern to Mr Taylor-Gooby because he was under the mistaken impression that a notice had already been served by Mr Norris. Even in his witness statement, Mr Taylor-Gooby did not contend that the 19 August 2011 letter constituted a notice of enquiry. He described the letter as setting out "our thinking on the technical application of the legislation." Given Mr Taylor-Gooby's mistaken assumption, it was hardly surprising that the letter could not be regarded as a notice of enquiry. Mr Driscoll's evidence was that he did not consider the letter as a notice of enquiry, but only as a continuation of the discussions between HMRC and CS.

140. In addition, the same reasons given in respect of the letter of 15 February 2011, Mr Prosser submitted that the letter dated 19 August 2011 was not a notice of enquiry under paragraph 23.

141. Mr Prosser argued that the words used in the letter were not capable of alerting a reasonable recipient to the fact that a notice of enquiry was being given.

142. Next, Mr Prosser argued that HMRC's failure to give a notice of enquiry appeared to be due to the following principal factors:

> (a) HMRC's relatively new approach of encouraging "informal" cooperation and discussions both pre-and post-filing, in combination with,
>
> (b) an unforeseen change of CRM in February 2011 without there being proper systems in place for Mr Taylor-Gooby to access Mr Norris's records,

143. The result was that Mr Taylor-Gooby (without checking) proceeded on the assumption that notice had already been given by Mr Norris.

144. Mr Driscoll had been adamant that the statements which he attributed to Mr Norris at the 29 July 2010 meeting had in fact been made. He said that Mr Norris had indicated that HMRC "were looking to have a position where the group was considered to be low risk on any BPT matters." In an email dated 17 August 2010, Mr Norris had said: "If you use such a figure, it's likely to be acceptable and abused as low risk." In addition, Mr Norris had also said: "If you adopt the methodology set out in your email of 10 August, I would not regard this as a high-risk issue." Mr Prosser argued that this terminology was consistent with Mr Driscoll's understanding of what Mr Norris had said and corroborated his evidence. The notes of the meeting on 29 July 2010, Mr Prosser observed, were not a verbatim transcript.

145. Thus, Mr Prosser argued that HMRC had encouraged banks to engage in discussions and had indicated that they would only use their formal powers if agreement could not be reached. It was perfectly likely that Mr Norris had made that clear and that Mr Driscoll's recollection of it as accurate. It was unsurprising that Mr Driscoll remembered this, as he said in his evidence, given how important this was to the group. Furthermore, CS's conduct was consistent with Mr Driscoll's recollection. CS engaged in discussions with HMRC both before and after the filing of the BPT return on what they considered to be a voluntary basis. There was no indication that CS were doing so under any form of compulsion.

146. In relation to Mr Taylor-Gooby, Mr Prosser accepted that he was an honest and frank witness but considered that his evidence about HMRC's post-filing practice should be rejected. His memory was plainly at fault.

147. Mr Prosser referred to Mr Nawbatt's reliance on the judgment of Lady Smith in *Spring Salmon* and, in particular, the use of the word "intimate" (in the sense of intimating to CS that HMRC's intention was to open an enquiry). Mr Prosser noted that the verb "intimate" was a Scots law legal expression meaning to "notify". Mr Prosser drew attention to the warning given by David Richards LJ in *Raftopoulou* at [41] about using substitute language for the statutory wording.

148. Mr Prosser also submitted that *Raftopoulou* at [49] had developed the law in the sense that it held that a notice of enquiry alerted a taxpayer to the start of a formal process. *Raftopoulou* also at [43] drew a distinction between "informal enquiries and the opening of an enquiry into a claim under paragraph 5 [the income tax equivalent in that case of paragraph 23 in relation to BPT] with its attendant statutory powers." Thus it was possible to have a time-consuming scrutiny of a return without a formal enquiry having been opened and conducted otherwise than pursuant to statutory powers.

149. That was also, Mr Prosser observed, what HMRC had said in its own skeleton argument prepared for the Court of Appeal in *Raftopoulou*. In its skeleton argument in that appeal, counsel for HMRC argued:

> "68. The UT [in *Raftopoulou*] came to a number of conclusions as to the meaning of enquiry, primarily based on its earlier decision in *Portland Gas v HMRC* [2014] STC 2589 ("*Portland Gas*"). These are recorded… as:
>
> 1. The opening of enquiries and their closure do not require any particular formality.
>
> 2. The term "enquire" as described by the UT in *Portland Gas* bears its natural and ordinary meaning and which includes "scrutinise".
>
> 3. For there to be an enquiry, it must be made clear to the taxpayer that what HMRC have sent to the taxpayer notifies him in substance that an enquiry has been opened.
>
> 69. HMRC takes no issue with the first point set out above. The second and third belie a confusion on the part of the UT between the ability of an HMRC officer to ask questions of the taxpayer (i.e. to "enquire" in the informal sense) and the exercising of formal enquiry powers – here, pursuant to Sch. 1 A, para 5. In so far as the UT appears to have meant "enquiry" in the third subparagraph to refer merely to informal questioning, the UT erred in law.
>
> 70. The giving of a notice of enquiry has important statutory consequences (*f/n 1*). In contrast HMRC regularly conducts informal discussions with taxpayers following receipt of a return or claim and no such statutory consequences flow from these discussions. The distinction between "routine or random checks" of self-assessment returns (which necessarily involves 'scrutiny' of a return) and HMRC's statutory power of enquiry was recognised by Auld LJ at paragraph 31 of *Langham v Veltema* [2004] STC 544.
>
> 71. In this case, the UT erred in law by asking the wrong question at [101]: "*On the facts of this case, if we ask if HMRC scrutinised what the taxpayer sent in, the answer must be yes*". This question ignores a clear statutory language of para 5 which presupposes an intention on the part of the officer specifically to open an enquiry under Schedule 1 A, para 5.
>
> 72. The UTV should instead have asked, "With the taxpayer have reasonably ascertained from the 9 November 2011 letter that HMRC had an intention to enquire into a claim under Sch. 1 A, para 5.
>
> *Footnote 1: Within Schedule 1 A, it starts a time from which HMRC and/or the taxpayer may not make an amendment to the claim for obvious error or mistake (para 3 (2)); and suspends a requirement on HMRC to give effect to the claim or amendment (para 4 (3)). It also enables HMRC to use its powers to obtain information and documents: FA 2008, Sch. 36, para 21*"

150. Mr Prosser noted that Mr Nawbatt stated that HMRC did not resile from anything which HMRC submitted to the Court of Appeal in *Raftopoulou*. Mr Prosser argued that, in fact, HMRC's submissions in the present case were at odds with HMRC's position in their skeleton argument in *Raftopoulou*.

151. Mr Prosser cited *Raftopoulou* at [27] and [49] and *Tinkler v Revenue & Customs* [2019] EWCA Civ 1392 at [43] as authority for the proposition that the giving of a notice of enquiry

was an important step because of the statutory consequences that flowed from the notice. It was the "start of a formal process.

152. Mr Prosser noted that there was an important dispute between the parties as to HMRC's practice in 2010 and 2011 in relation to its dealings with banks for BPT purposes. HMRC did not put forward any of its own evidence on this point and such evidence as there was came out in the cross-examination of Mr Taylor-Gooby. It appeared to be common ground that banks were encouraged by HMRC to adopt a real-time working basis in relation to BPT in the pre-filing period. Mr Prosser, however, submitted that that practice (of real-time working) continued in the post-filing period. In other words, would a reasonable person in CS's position have understood that they were being encouraged to engage in an informal-filing discussion having been encouraged to do so pre-filing?

153. Mr Taylor-Gooby had said in his witness statement: "[W]here, as in the present case, the quantum of the return could not be agreed during the informal discussion the law required a notice of enquiry to be given to the taxpayer so that a formal enquiry process could commence." Mr Prosser submitted that this was plainly wrong. There was no requirement for HMRC to give a notice of enquiry just because matters could not be agreed pre-filing (*Raftopoulou* [43]). Mr Prosser drew attention to an inconsistency in Mr Taylor-Gooby's evidence when he said, in cross-examination: "…you can have some engagement without issuing a formal enquiry notice…." Mr Prosser also noted that Mr Taylor-Gooby, who was the CRM for a number of banks, said that he had had a post-filing continuation of pre-filing "enquiry" with a couple of banks which were concluded fairly quickly. He could not recall whether he had issued a notice of enquiry in those cases. Mr Prosser suggested that Mr Taylor-Gooby was thereby accepting that he might not have done so, which indicated that he did not think that a notice had to be issued.

154. Mr Prosser also criticised Mr Taylor-Gooby's statement "…any request for information is an enquiry." Mr Prosser submitted that it could not be right that any request by HMRC thereby opened an enquiry.

155. Mr Prosser referred to Mr Davidson's email of 13 December 2010. This encouraged banks to engage in pre-filing discussion. It referred to: "Issues identified through pre-filing discussions that have still not been resolved, we will need to complete these discussions." There was no reference to opening an enquiry. That was the course of action which HMRC proposed for banks which did not engage with their CRM. As regards the banks which did engage with their CRM, the clear inference was that pre-filing discussions would be continued and completed post-filing.

156. Mr Prosser referred to his cross-examination of Mr Taylor-Gooby in which he was asked:

> "Q Now, isn't it fair to say that the mere fact that a bank is in category 2 [of Mr Davidson's email of 13 December 2010] where issues have been identified through pre-filing discussions that have still not been resolved doesn't mean that those discussions can only be completed with the giving of a notice of enquiry? There may not be a notice of enquiry because those discussions might be completed eventually with agreement between the parties.
>
> A Mm-hm
>
> Q Isn't that fair?
>
> A Yes, it's fair…"

157. Thus, Mr Prosser submitted that Mr Davidson's email of 13 December 2010 and Mr Taylor-Gooby's own evidence were inconsistent with Mr Taylor-Gooby's statement that it was necessary to open an enquiry if pre-filing discussions were to be continued post-filing.

158. Mr Prosser also submitted that the Code of Conduct in relation to banks emphasised the expectation that banks should cooperate with HMRC and that expectation was not limited to pre-filing matters.

159. CS had submitted information voluntarily on 23 September 2010 (after they had submitted their BPT return). This indicated their understanding that they were continuing to engage in informal discussions with HMRC. The meeting on 2 November 2010 was simply a continuation of the previous informal discussions.

DISCUSSION OF THE PROCEDURAL ISSUE

The authorities

160. The leading authority is the decision of the Court of Appeal in *Raftopoulou*. In that case the taxpayer made a claim for overpayment relief in respect of one tax year. HMRC responded by letter stating that because the claim had been made more than four years after the end of the tax year it was outside the time limit for overpayment relief. The First-tier Tribunal struck out the taxpayer's appeal on the basis that it had no jurisdiction to hear it. On appeal, the Upper Tribunal held: (1) HMRC's letter constituted both a notice of enquiry (under paragraph 5 of Schedule 1A TMA 1970), and (2) a closure notice (under paragraph 7 Schedule1A TMA 1970. Accordingly, the Upper Tribunal concluded that under paragraph 9 of Schedule 1A TMA 1970 the taxpayer had a right of appeal against any conclusion stated in the letter. The Upper Tribunal also concluded that the effect of section 118(2) TMA 1970 was that the taxpayer could put forward a "reasonable excuse" defence. The Court of Appeal allowed HMRC's appeal.

161. Although *Raftopoulou* dealt with different statutory provisions it was common ground that those provisions were sufficiently analogous to those in or incorporated by Schedule 1 FA 2010 that the principles set out by the Court of Appeal were applicable in the present appeal.

162. David Richards LJ (with whom Arden LJ agreed) said:

> "20. It was common ground before the UT, and before us, that there was no prescribed form for an enquiry notice or a closure notice. To be effective, an enquiry notice or a closure notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim or close an enquiry (as the case may be): see the judgment of this court in *HMRC v Bristol and West PLC* [2016] EWCA Civ 397; [2017] 1 WLR 2792, at [26]."

163. David Richards LJ continued:

> "33. In my judgment, the correct starting point for determining whether an enquiry into a claim has been opened is a consideration of the terms, context and purpose of the provisions of schedule 1A.
>
> 34. Those provisions suggest a procedure with some degree of formality and suggest also a procedure with a beginning, a middle and an end. Paragraph 5 empowers, but does not oblige, HMRC to "enquire into" a claim for repayment. This may be contrasted with replying to a claim received from a taxpayer, having first read it and considered its contents. An officer may only enquire into the claim if, within the specified time, "he gives notice in writing

of his intention to do so". Although the contents of the notice are not prescribed, it must be clear from the notice that the officer intends to enquire into the claim. As earlier noted, the opening of an enquiry has significant statutory consequences, including the right of HMRC to call for documents for the purpose of its enquiry.

…

36. The UT said at [103] that it will always be a question of fact whether HMRC have "enquired into" a claim. I do not consider that to be correct. There can be no enquiry into a claim without HMRC giving the notice required by paragraph 5. Whether the letter or other communication in question gave the necessary notice depends on whether it would be read by a reasonable recipient in the position of the taxpayer as doing so. The same is true of any document said to be a closure notice. These are questions of law.

37. In my judgment, the letter dated 9 November 2011 did not demonstrate that HMRC had conducted an enquiry into the taxpayer's claim under schedule 1A, or had ever intended to do so. In terms, all that the letter stated was that HMRC had read the claim and decided, simply by reference to its date and the expiry of the applicable four-year period on 5 April 2011, that it was out of time. Nowhere does the writer of the letter state or indicate that he intends to enquire into the claim or that he has completed his enquiries nor does he state any conclusions resulting from his enquiry or amend the claim. The UT's view at [105] that the "substance of the letter is to be understood as an amendment to the claim so as to eliminate the excess amount of it by reducing it to zero" is, with respect, driven by their view that the letter showed that HMRC had conducted an enquiry, rather than by anything on the face of the letter. In my view, a reasonable person in the position of the taxpayer would not read the letter as stating that her claim had been reduced to zero but that, rather than considering the substance of the claim, it had been rejected as out of time.

…

40. In my judgment, in common with the view of the UT in *Portland Gas*, a rejection by HMRC of a claim on the grounds that it is out of time, by reference to no more than the claim itself and a calculation of the applicable time limit, does not involve any use by HMRC of their statutory powers to enquire into the claim nor does it constitute notice of an intention to do so. On the facts of this case, it is unnecessary to go further and consider what additional actions on the part of HMRC would constitute an enquiry. As earlier mentioned, HMRC does not accept that the UT was right in *Portland Gas* to hold that HMRC's subsequent actions did constitute an enquiry. I express no view on that question.

41. Ms McCarthy [Counsel for HMRC] submitted, and I agree, that the UT in the present case misdirected themselves by treating "enquire into" as denoting no more than "scrutinise" in the widest sense of that word. I doubt the wisdom of searching for a substitute word for the phrase "enquire into" used in the legislation and then testing the facts by reference to the substitute word. Most words have shades, or a spectrum, of meaning and "scrutinise" is no exception. By concluding that HMRC had "scrutinised" the taxpayer's claim in the sense of reading it carefully and paying attention to its date as against the statutory time limit, the UT has moved away from the phrase "enquire into" and disengaged it from its statutory context.

…

> 43. The approach of the UT is also at odds with the position explained by Auld LJ in *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193; [2004] STC 544 at [31] – [32]. A distinction was drawn, in the context of self-assessment returns, between "light monitoring" by HMRC and the exercise of its statutory power of enquiry under section 9A TMA 1970. Reference was further made to "an intermediate and possibly time-consuming scrutiny, *whether or not in the form of an enquiry under s 9A*" (emphasis added). There is a distinction between informal enquiries and the opening of an enquiry into a claim under paragraph 5 with its attendant statutory powers.
>
> …
>
> 48. Paragraph 5 requires an HMRC officer to give "notice in writing *of his intention*" to enquire into a claim. This language envisages that the notice will precede the enquiry and certainly will precede the closure of the enquiry. An enquiry cannot be completed while the officer is still in the position of intending to carry it out. The UT accepted at [99] that the terms of paragraph 5 might suggest that the notice must be prospective but they did not consider that "such a literal construction [was] appropriate". The officer may well have considered and scrutinised the available materials before giving the notice, and therefore the notice is more likely to be retrospective than prospective "in the sense that the officer may already have engaged in elements of enquiry before the notice is given". The UT continued: "There is no requirement that HMRC must give notice before scrutinising or otherwise turning their minds to the claim; the only requirement is that the notice itself must be given within a certain period."
>
> 49. While I agree with much of what the UT said in the passage just quoted, I draw the opposite conclusion from it. It must be right that HMRC does not open an enquiry without considering, even "scrutinising", available materials. Clearly an officer of HMRC must turn his mind to the claim in hand before opening an enquiry. This shows that there can and will be consideration before the decision is taken to open an enquiry, not that the enquiry starts with such consideration. The statute is clear: once a decision is taken to open an enquiry, the HMRC officer must give notice to the taxpayer of *his intention* to enquire into the claim. Under the scheme of these provisions, the notice precedes the enquiry under paragraph 5 and alerts the taxpayer to the start of a formal process with its attendant statutory powers available to HMRC.

164. *Raftopoulou* was followed recently by the Upper Tribunal in *White v HMRC* [2018] UKUT 257 (TCC) (Marcus Smith J and Judge Richards) ("*White*"). The taxpayer he wrote to HMRC seeking to correct his self-assessment returns for three earlier years claiming relief in respect of irrecoverable loans. HMRC rejected the corrections, initially on an informal basis, but subsequently on a more formal basis. The taxpayer appealed unsuccessfully to the First-tier Tribunal ('FTT') and sent HMRC his notice of appeal. In its final letter to the taxpayer, HMRC stated that it was formalising its decision and that it was closing its check of the taxpayer's claim as it had decided to disallow the claim. On the taxpayer's appeal to the Upper Tribunal it was held that the taxpayer clearly considered the communications from HMRC, refusing to accept the correction to his self-assessments, as a formal statement of HMRC's position and one that he could only challenge by way of appeal. By contrast, HMRC saw its communications as merely informal correspondence falling short of an enquiry. HMRC's final

letter was in terms an attempt to formalise what it regarded as an informal process. That was a pragmatic approach that was open to HMRC to take. The consequence was that the same communication both opened and closed the enquiry. Whilst in the ordinary course it would be difficult for the same document to constitute an enquiry notice and a closure notice, HMRC's approach was justified in the present case. The Upper Tribunal said:

> "[19] As we noted… above, to be effective, an enquiry notice must be understood by a reasonable person in the position of the intended recipient (i.e., the taxpayer), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a claim.
>
> [20] The letters of 12 November 2012, 26 November 2012 or 31 January 2013 do not in any way seek to 'enquire' into the Appellant's claim [under para 5 of Sch 1A TMA], and we do not consider that a reasonable person in the position of the Appellant could have understood these letters, whether read individually or collectively, to give notice of the commencement of an enquiry.
>
> [21] Specifically:
>
> (1) These letters contain conclusory statements as regards the Appellant's claim. We consider them to be examples of what an officer does when considering a claim before deciding whether to open an enquiry.16
>
> (2) There is no attempt to investigate the Appellant's claim. We consider that a request for information or an effort to probe the claim to be an indicator of an enquiry. The fact that there was no attempt to consider the underlying facts, in our judgment, again suggests an informal engagement with the Appellant falling short of an enquiry.
>
> (3) There is—with one exception—no hint that this is a formal process. There is no reference to HMRC's enquiry process and no reference to HMRC's statutory powers. Of course, we accept that there is no prescribed form for an enquiry notice and that notice of an enquiry may very well be given without reference to HMRC's enquiry process or to HMRC's statutory powers. But that is not the point: the point is that, in this case, the absence of such statements is an indicator of the informality of the process HMRC was engaged in."

165. Mr Nawbatt drew attention to the Upper Tribunal's words in [20] and [21(2)] and noted that in the present appeal HMRC had both requested information and made an effort to probe CS's position as regards APPA's liability to BPT. I do not, however, think that these words greatly assist Mr Nawbatt. *White* was a similar case to *Raftopoulou*. The letters in question seem simply to be dealing with the taxpayer's claim and did not evidence any form of enquiry or investigation. But that is not to say that a letter which does seek further information or probes a taxpayer's position taken on a return thereby becomes a notice of HMRC's intention to enquire into the return.

166. Next, there is the recent decision of the Court of Appeal in *Tinkler v HMRC* [2019] EWCA Civ 1392. In this case a notice of an intention to enquire into an income tax return under section 9A TMA was sent to the taxpayer's agent and the taxpayer but, although the agent received the notice, the taxpayer did not. In the course of his judgment Hamblen LJ (with whom Sir Bernard Rix and McCombe LJ agreed) at:

> "[43] The giving of a notice of enquiry is an important step with serious and immediate consequences. The tax return can no longer be amended and the

> taxpayer's liability for the year in question will not be settled until the enquiry is closed which may, as in this case, take years. It is also a notice which has to be given within a specified time limit. It is therefore unsurprising that HMRC should refer to it as a 'formal notice of enquiry' and treat it differently to other forms and pursuant to a specific regime agreed with professional bodies.
>
> [44] I accordingly agree with the FTT that Form 64–8 did not give BDO [the taxpayer's agent] apparent authority to receive a notice of enquiry on Mr Tinkler's behalf."

DISCUSSION OF THE PROCEDURAL ISSUE

167. Paragraph 23 (1) and (2) of Schedule 1 FA 2010 provides:

> "(1) HMRC may enquire into a bank payroll tax return if they give notice to the taxable company of their intention to do so within the time allowed.
>
> (2) If the return was delivered on or before 31 August 2010, notice of enquiry may be given at any time on or before 31 August 2011."

168. It is common ground that CS's BPT return was delivered on 31 August 2010. It was, therefore, necessary that any notice of enquiry under paragraph 23(1) be given on or before 31 August 2011.

169. The words used in paragraph 23(1) are virtually identical to the same expressions used in section 9A TMA 1970 (in relation to income tax) and to paragraph 24 of Schedule 18 Finance Act 1998 (in relation to corporation tax) ("FA 1998"). Those words are also used by other statutory provisions but I do not think it is necessary to compile a lengthy list. It is clear, therefore, that Parliament intended these words to cover a wide variety of taxpayers and circumstances. It follows, also, that authorities in relation to those and other similar provisions stand as authorities in relation to paragraph 23 and this was common ground before me.

170. It seems to me that the words in paragraph 23(1) are plain English words which have a straightforward meaning. They do not require over-elaboration nor do they require resort to a dictionary or a thesaurus to find synonyms for the statutory language. Nonetheless, they must, of course, be construed purposively and in their statutory context.

171. At this point I should mention a decision of the Outer House of the Court of Session (Lady Smith) in *R (on the application of Spring Salmon and Seafood Ltd) v Inland Revenue Commissioners* [2004] STC 444 ("*Spring Salmon*") upon which HMRC placed some reliance. This case involved the validity of a notice of the Inland Revenue's (as it then was) intention to enquire into a company's return under paragraph 24(1) Schedule to 18 FA 1998 1998. In that case the taxpayer company had a place of business in Reading and its registered office in Edinburgh. The notice was sent to its place of business in Reading and the company argued that it was therefore invalid. Also, the question arose whether the notice had to be in writing.

172. The court held at [23] that a notice of enquiry under paragraph 24 of Schedule 18 to FA 1998 was not required to be in writing. Had such a requirement been intended, Parliament would have expressly provided for it. There were instances in the tax legislation which expressly required for notices to be in writing, which suggested that it had not been considered necessary for notices of enquiry to be given in writing.[5]

[5] It was common ground before me that a notice of enquiry under paragraph 23 Schedule 1 to FA 2010 did not have to be in writing. Although section 115(2) TMA 1970 was considered in *Spring Salmon* it does not appear to have been observed that that provision begins with the words: "Any notice or other document to be given sent

173. At various points in her judgment, Lady Smith referred to the fact that a notice of an intention to enquire into a return needed to be "intimated" or to the need for "intimation" in relation to such a notice. There are some 20 such references in her judgment. I am satisfied, as Mr Prosser submitted, that Lady Smith was using the expression "intimate" in the Scots law technical sense of giving a notice. Mr Nawbatt in his submissions, however, referred on a number of occasions to the need for HMRC to "intimate" to CS HMRC's intention to enquire into CS's BPT return. I did not understand Mr Nawbatt to be using this expression in its Scots law meaning – there was no reason for him to do so – but rather in its usual meaning of "to make known" or "to announce". However, used in that sense, the word "intimate" carries with it a range of meanings which include (according to the *Oxford Shorter English Dictionary*) to "hint" or to "imply". As David Richards LJ cautioned in *Raftopoulou* at [41], there is a danger in using synonyms, which can have different shades of meaning, instead of the words used in the statute. This is an example of that danger. I see no reason to embark upon a discussion of the various meanings of the words "intimate" or "intimation" or any other cognate words– they are not words used in paragraph 23 and, in my view, their use simply confuses what should be the application of a straightforward statutory expression. To be clear, I do not think that Parliament intended that a notice under paragraph 23 should be something that is conveyed by a hint or by an implication.

174. I draw from the authorities the following propositions which I shall apply in this case:

(1) There is no prescribed form for an enquiry notice. (*Raftopoulou* at [20])

(2) Although the contents of the notice are not prescribed, it must be clear from the notice that HMRC intends to enquire into the return. (*Raftopoulou* at [34])

(3) To be effective, an enquiry notice must be understood by a reasonable person in the position of the intended recipient (the taxpayer in this case), having that person's knowledge of any relevant context, as giving notice of an intention to enquire into a return. This is a question of law. (*Raftopoulou* at [20] and [36])

(4) The correct starting point for determining whether an enquiry into a claim has been opened is a consideration of the terms, context and purpose of the relevant statutory provisions.(*Raftopoulou* at [33])

(5) The [enquiry] provisions suggest a procedure with some degree of formality and also suggest a procedure with a beginning, a middle and an end. Paragraph 23 empowers, but does not oblige, HMRC to "enquire into" a BPT return. HMRC may only enquire into the return if, within the specified time, HMRC give notice of their intention to do so. (*Raftopoulou* at [34])

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served or delivered…." It plainly envisages that a notice is a written document. Paragraph 40(1)(d) Schedule 12 FA 2010 applies section 115 TMA 1970 to Schedule 1 to FA 2010. Although this provision deals with the manner of service of a notice, I do not think it can be simply disregarded on that basis, as Mr Nawbatt appeared to submit. I also, with respect, harbour some doubts as to the correctness of Lady Smith's decision on this point in *Spring Salmon*. Simply because in some contexts (e.g. a notice of appeal) it is expressly required to be in writing it does not mean that, where that requirement is not expressed, the notice – which in the present context has been held to start a formal process with significant statutory consequences – can be given orally. I think a purposive approach to construction, which takes account of the need for clarity and certainty, might suggest otherwise. The decision in *Spring Salmon* on this point was, in any event, *obiter* because it was found that notice had been correctly given in writing. Nonetheless, *dubitante*, but without deciding the point, I shall proceed on the agreed position that a notice under paragraph 23 Schedule 1 to FA 2010 need not be in writing.

(6) The opening of an enquiry has significant statutory consequences, including the right of HMRC to call for information and/or documents for the purpose of its enquiry (see paragraphs 23(5) and 36 of Schedule 1).(*Raftopoulou* at [34])

(7) A Tribunal should not search for a substitute word for the phrase "enquire into" used in the legislation and then test the facts by reference to the substitute word such as "scrutinise". By so doing a Tribunal is in danger of moving away from the phrase "enquire into" and disengaging it from its statutory context.(*Raftopoulou* at [41])

(8) As Auld LJ in *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193; [2004] STC 544 at [31] – [32] explained, there is a distinction between, in the context of self-assessment returns, between "light monitoring" by HMRC and the exercise of its statutory power of enquiry. In that case, reference was further made to "an intermediate and possibly time-consuming scrutiny, *whether or not in the form of an enquiry under s 9A*[6]" (emphasis added). There is a distinction between informal enquiries and the opening of an enquiry into a claim under paragraph 23 with its attendant statutory powers.(*Raftopoulou* at [43])

(9) Paragraph 23 requires an HMRC to give notice of HMRC's intention to enquire into a return. The statutory language envisages that the notice will precede the enquiry and certainly will precede the closure of the enquiry. An enquiry cannot be completed while the officer is still in the position of intending to carry it out. (*Raftopoulou* at [48])

(10) Usually, HMRC will not open an enquiry without considering available materials. HMRC must turn their minds to the return in hand before opening an enquiry. Therefore, there can and will be consideration before the decision is taken to open an enquiry, not that the enquiry starts with such consideration. The statute is clear: once a decision is taken to open an enquiry, the HMRC must give notice to the taxpayer of *their intention* to enquire into the claim. Under the scheme of the legislation, the notice precedes the enquiry under paragraph 23 and alerts the taxpayer to the start of a formal process with its attendant statutory powers available to HMRC. (*Raftopoulou* at [48])

175. I recognise that the facts in *Raftopoulou* were very different from the present case. Nonetheless, the propositions of law put forward by David Richards LJ in that case are not to be limited or distinguished by reference to the facts before the Court of Appeal. On the contrary, it seems to me that David Richards LJ was laying down general principles by reference to which the particular facts of that case had to be determined. I therefore reject Mr Nawbatt's submission that, in some way, *Raftopoulou* should be confined or limited to its particular facts.

176. In the present case, there were pre-filing discussions between CS and HMRC (Mr Norris and Mr Goodwin) in relation to the application of BPT to the APPA. After CS had submitted its BPT return on 31 August 2010 those discussions continued. There was no indication that those post-filing discussions were on a different or more formal basis than those which took place before filing the return. The post-filing discussions seem to me to be an example of the informal enquiries to which David Richards LJ referred in *Raftopoulou* at [43].

177. The meeting on 2 November 2010 does not, in my view, constitute a notice under paragraph 23(1). Even accepting that a notice need not be in writing, it seems to me that the statement in HMRC's BPT Manual that a notice of enquiry would be in writing has the result

[6] The income tax equivalent of paragraph 23 of Schedule 1.

that a reasonable taxpayer in the position of CS would not understand statements made at the meeting as indicating an intention by HMRC to enquire into the BPT return.

178. In any event, nowhere in the note of that meeting does HMRC expressly or clearly indicate its intention to enquire into the BPT return. It seems to me, as David Richards LJ emphasised in *Raftopoulou* at [34], it must be *clear* from the notice that HMRC intends to enquire into the claim. This requirement of clarity is important. There are significant statutory consequences that flow from HMRC giving notice of the intention to enquire into a return. For example, a change to the amount of tax stated in the return does not take effect until after the enquiry ends, statutory powers to obtain information arise and the taxpayer has a right to apply for a closure notice. Moreover, it is plain from paragraph 23(2) that there is a one year window in which an enquiry notice can be given. To my mind, this time limit reinforces the need for clarity – it must be clear from the communication to the taxpayer that notice has been given (and when it has been given) so that it is apparent at any particular point in time whether notice has been given within the specified time limit. The note of the meeting on 2 November 2010 fails this clarity requirement.

179. I think it follows from this requirement of clarity (*Raftopoulou* at [34]), that a notice of the intention to enquire into a return cannot be regarded as validly given to a taxpayer by inference or implication. It is true that no particular form of words is required – there is no "magic formula" set out in the legislation – but the communication must, by whatever form of words used, clearly state that HMRC are intending to open an enquiry into the return.

180. This brings me to the letter of 15 February 2011. In relation to the application of paragraph 6 of Schedule 1, Mr Taylor-Gooby said:

> But there is still the fundamental question of whether it is sufficiently different to put the awards completely or partly outside the scope of the tax. Whilst acknowledging that the circumstances are *not clear-cut I am not immediately convinced* that it does. Since we have agreed to meet to discuss the matter I shall outline what I think are the main technical issues around this conclusion and will aim to expand on this in discussion."

And, in relation to paragraph 6(3):

> "Again *I think consideration of the surrounding facts might clarify the application here*."

And, finally:

> "In conclusion my *initial view is that more information is required* to come to a firm conclusion regarding the application of paragraph 6 but that if the payments are excluded by this route, paragraph 12 will apply to the appropriate measure of the amounts awarded under the scheme.
>
> I look forward to discussing these issues further."

181. The whole tenor of the letter is that it is the preliminary analysis with a view to further discussion. I am unable to find anywhere in that letter a clear notice to CS that HMRC are intending to enquire into their BPT return.

182. I take the same view regardless of whether the 15 February 2011 letter is read on its own or against a background of earlier communications between the parties. In particular, I do not

think that the email from Mr Davidson of HMRC of 13 December 2010 alters that position. In paragraph 2 of that email Mr Davidson wrote:

> "2. Issues identified through pre-filing discussions that have still not been resolved. We'll need to complete these discussions."

183. CS clearly fell within paragraph 2 above (paragraph 1 did not apply because CS had engaged with it CRM). The message from paragraph 2 was that the issues identified in relation to CS's liability to BPT in the pre-filing discussions would need to be completed. CS also appeared to fall within the following category: "a small number of banks we are approaching for further information." But there is no indication that a bank falling within paragraph 2 of this email should understand that HMRC either had opened or were imminently planning to open an enquiry. As to reference to the "small number of banks" it was clear that they would not be getting a confirmation that no enquiry will be opened, but equally there is no statement to the effect that a notice will be issued. The thrust of the email was that issues that were outstanding from pre-filing discussions were ongoing – in other words, they were work in progress.

184. Finally, this brings me to Mr Taylor-Gooby's letter of 19 August 2011 (taken together with its covering email). Again, I do not think that this letter constitutes a notice that HMRC are intending to enquire into CS's BPT return. It is true that HMRC were expressing a more concluded view in this letter, having taken advice. Nonetheless, it was not clear from this letter what course of action – other than further discussions – HMRC were proposing to take. Nowhere is it suggested plainly that HMRC are intending or are giving notice of its intention to enquire into the return. It is possible that a reasonable taxpayer in the position of CS might have anticipated that HMRC's next step might be to deliver such a notice but I do not think that the 19 August 2011 letter itself constitute such a notice. In any event, Mr Taylor-Gooby indicated that he was away until 30 August 2011 making it unlikely that a notice of enquiry would be served before the 31 August 2011 deadline.

185. I do not think the position is altered by viewing the 17 August 2011 letter from HMRC either alone or against the background of all the previous interactions between HMRC and CS. It is simply not clear that HMRC are intending to open an enquiry and nowhere in the letter do they make it clear that they are doing so by means of the letter. Indeed, it was only on the opening morning of the hearing that HMRC first made plain that they intended to argue the 19 August letter (when taken together with the previous meetings and letters) constituted a notice of enquiry.

186. What happened in the present case was that there were pre-filing discussions concerning the application of BPT (an entirely new tax) between HMRC and various banks, including CS. Those discussions simply continued after CS filed its BPT return on 31 August 2010. At some time towards the end of 2010 the beginning of 2011, Mr Norris was taken ill and Mr Taylor-Gooby took up the reins from Mr Norris. Mr Taylor-Gooby did not take over the role of CRM for CS – he was, at this stage, simply standing in for Mr Norris while the latter was on sick leave. Mr Taylor-Gooby assumed that Mr Norris had previously opened an enquiry by giving notice of his intention to enquire into CS's BPT return. But Mr Norris had not done so and, as I have found, the meeting on 2 November 2010 did not constitute such notice. Mr Taylor-Gooby had difficulties in accessing Mr Norris' correspondence and this no doubt contributed to his failure to check that a notice of enquiry had indeed been delivered. The upshot was that the same pattern of discussions that occurred pre-filing and at the meeting on 2 November 2010 simply continued until the expiry of the period in which a notice of enquiry could be delivered

(i.e. on 31 August 2011). Mr Taylor-Gooby, during this period, was under the mistaken belief that he was already carrying out an existing enquiry (which he incorrectly believed had been opened by Mr Norris) but CS were under the impression that no such enquiry had been commenced.

187. In the circumstances, it is hardly surprising a reasonable person in CS's position, with knowledge of the relevant context, would not have understood that HMRC had given notice of its intention to enquire into CS's BPT return.

188. The test of whether an effective notice has been delivered is, as I have said, an objective one. The subject of knowledge or intentions of the parties, whilst not irrelevant, cannot be determinative. Nonetheless, it is clear that Mr Taylor-Gooby was not intending at any stage to serve a notice under paragraph 23. Similarly, from the internal email exchanges within CS of 15 and 16 August 2011 it is apparent that CS did not believe that a notice of enquiry had been served. The subjective understanding of the parties, although not determinative, was consistent with my view of the objective reality.

189. It will be apparent that Mr Nawbatt's argument (viz that a reasonable person in CS's position should have understood that HMRC were giving notice of their intention to enquire into CS's return) is based on two premises. First, it assumes that Mr Taylor-Gooby inadvertently gave CS a notice of enquiry, without intending to do so. Secondly, it assumes that although a "formal" notice of enquiry had not been given, CS should have inferred, from the fact that HMRC was disagreeing with CS's view of the application of BPT to the APPA and requesting information, that HMRC was actually giving notice of enquiry.

190. In the first place, I would simply observe that paragraph 23 contains no reference to a "formal" or "informal" notice of enquiry. A notice of enquiry is either effective or ineffective in accordance with the principles explained by the Court of Appeal in *Raftopoulou*.

191. Secondly, as I have already indicated, I do not think that a valid notice of enquiry under paragraph 23 can be given as a matter of inference. It is not for the taxpayer to infer that a notice of enquiry is being given; it is for HMRC to give an effective notice in accordance with the principles set out in *Raftopoulou*. Most relevant in the present context, is the principle that the notice must be *clear*. I think that what Parliament intended by paragraph 23(1) was that, if a taxpayer is served with the notice of enquiry, then the taxpayer, in consequence, should know where he or she stands i.e. it should be clear from the notice that HMRC intends to undertake an enquiry. The reasonable taxpayer should now know that the discussions about the return are on a different and more formal basis. It therefore cannot be correct that a taxpayer should be expected to "read between the lines", to draw inferences or guess what might be implied by HMRC's actions. That is why a notice of enquiry must be "clear".

192. In this context, I think it is relevant to observe that after the letter of 19 August 2011, CS may very well have thought it possible or even likely that a notice of enquiry would be given by HMRC. That is not, however, the same thing as understanding that a notice of enquiry had been or was being given.

193. Thirdly, I asked Mr Nawbatt whether, once a return had been submitted, if HMRC indicated their disagreement with the contents of the return that *ipso facto* constituted a notice of enquiry. It seemed to me that Mr Nawbatt's argument came very close to this proposition. It was a major plank of his argument that in the meeting of 2 November 2010, the letter of 15 February 2011 and the letter of 19 August 2011, HMRC were disagreeing with CS's treatment of the APPA in its return (albeit that the disagreement became more refined or pronounced as

time went by[7]). From that, so the argument went, CS should have realised that HMRC were intending to enquire into the return. Mr Nawbatt gave a guarded reply to my question, indicating that such a disagreement was very likely to be a notice of enquiry but that it was necessary to look at the context. While such a disagreement might, Mr Nawbatt said, be an "indicator" of the notice of enquiry it would depend upon the facts. In the present case, Mr Nawbatt considered that HMRC's expressions of disagreement in respect of CS's treatment of the APPA taken together with the request for information constituted a notice of enquiry "because that's what an enquiry is."

194. To my mind, in the present case, HMRC's disagreement with the position taken by CS on its BPT return was simply part of the ongoing informal discussions which commenced prior to the filing of the return. It cannot be regarded as giving a notice of an intention to enquire into the return. It is common that in discussions with HMRC disagreements may be expressed, matters debated and arguments refined. Sometimes, HMRC will maintain its disagreement but on other occasions HMRC may eventually concede an argument.[8]

195. Fourthly, Mr Nawbatt's argument is inconsistent with the scheme of the legislation. As David Richards LJ explains in *Raftopoulou*, a notice of enquiry is intended to precede an enquiry, giving the taxpayer clear notice that a formal process has begun. In this case, everything was backwards. HMRC began to carry out (what Mr Nawbatt described as) an "enquiry" before giving the required notice. HMRC's argument amounts in short to the proposition that that if an officer merely proceeds to carry out an "enquiry" (engaging in a technical debate and requesting information), without giving the usual notice, a taxpayer ought in many cases to be able infer from this "enquiry" process that in some manner a notice has been or is thereby being given. That is emphatically not what the statutory scheme envisages. Indeed, if HMRC's argument is correct it makes the requirement for a notice under paragraph 23(1) to be given almost redundant or allows it to be easily side-stepped – on HMRC's case the "enquiry" becomes the notice. That cannot be correct.

196. It seems to me that this is exactly the type of uncertainty that Parliament intended to avoid in relation to the giving of notice of an intention to enquire into a return under paragraph 23(1). I think Parliament would be surprised that the simple words used in paragraph 23(1) should have occasioned the best part of five days of argument between leading Counsel. In my view, this cannot have been what Parliament intended. Indeed, the muddle and uncertainty in this case is precisely what Parliament would have intended to avoid.

197. As Mr Yates pointed out, in the course of this appeal, even HMRC seemed uncertain as to when they had given notice of their intention to enquire into CS's return. Writing to CS on 3 July 2013, Mr Taylor-Gooby indicated that HMRC had given a valid notice of enquiry at the meeting on 2 November 2010. If that was wrong, Mr Taylor-Gooby considered that notice had been given by his letter of 15 February 2011. HMRC's statutory review letters of 3 July 2017, HMRC indicated that a valid verbal notice of enquiry was given at the meeting on 2 November 2010 or alternatively in Mr Taylor-Gooby's letter of 15 February 2011. In HMRC's Amended Statement of Case of 9 May 2018, it was argued that notice was given at the meeting on 2 November 2010 or alternatively in Mr Taylor-Gooby's letter of 15 February 2011. As a further alternative, the Amended Statement of Case suggested that the whole of HMRC's correspondence and communications with CS "should be taken as a whole, so far as giving

[7] Although Mr Taylor-Gooby in his letter of 19 August 2011 did concede the paragraph 6 issue.
[8] See footnote 7 above.

notice is concerned." On the first day of the hearing, HMRC argued for the first time that Mr Taylor-Gooby's letter of 19 August 2011 constituted a valid notice. It is worth noting that at no stage did it occur to Mr Taylor-Gooby that his letter of 19 August 2011 constituted such a notice. In addition, the HMRC officer who carried out the statutory of review did not, apparently, consider the letter of 19 August 2011 to be a notice of enquiry.

198. Fifthly, I should also draw attention to Mr Taylor-Gooby's evidence that the usual practice of HMRC was to send its questions/queries about a return to a bank accompanied by a formal notice (by which I understood him to mean a written notice) stating that HMRC wished to enquire into a return under a particular statutory provision. Although it may constitute best practice, I do not think it is necessary for a valid notice of enquiry to refer to the statutory provision under which it is given. Paragraph 23 contains no such requirement. I observe, however, that HMRC's usual practice (i.e. the provision of an explicit statement that gives notice of HMRC's intention to enquire into the return) is a relevant factor in deciding whether a reasonable taxpayer would have understood HMRC to be giving notice of its intention to enquire into a return. If HMRC depart from their usual practice (and Mr Taylor-Gooby's evidence in this respect was not challenged), they must be very clear as to what they are doing, not leaving it to inference or implication that they intend to enquire into a return. In this case, HMRC did not, in my judgment, make it clear.

199. A great deal of time was spent at the hearing on the question whether "real-time working" would have led CS to believe that post-filing discussions would not necessarily result in a notice of enquiry. I do not think that the "real-time working" issue, such as it was, sheds a great deal of light on the matter which I have to decide. I should say, however, that I was not satisfied that CS had established that "real-time working" was understood as being something that would continue post-filing. It seemed to me more likely than not that this was a practice which occurred pre-filing (e.g. pre-transaction rulings) than post-filing. In this respect, I do not think that Mr Driscoll's recollection of what he alleged was said to him by Mr Norris at the meeting on 29 July 2010 was reliable.

200. I have borne in mind the comments of Leggatt J in *Gestmin v Credit Suisse* [2013] EWHC 3560 (Comm) at [15] to [23], which have been followed with approval in a number of other cases[9]:

> "15. An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.
>
> 16. While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

[9] See also the well-known comments of Lord Goff in *Grace Shipping v. Sharp*, [1987] 1 Lloyd's Rep 207 at 215 regarding the relative importance of witnesses' recollections when compared with contemporary documents.

17. Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

18. Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.

19. The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20. Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.

21. It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between

> recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.
>
> 22. In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth. ”

201. More recently, the Court of Appeal has cautioned against too rigid an application of Leggatt J’s observations. In *Kogan v Martin & Ors (Rev 1)* [2019] EWCA Civ 1645 Floyd LJ said at [88]:

> “We start by recalling that the judge read Leggatt J's statements in *Gestmin v Credit Suisse* and *Blue v Ashley* as an "admonition" against placing any reliance at all on the recollections of witnesses. We consider that to have been a serious error in the present case for a number of reasons. First, as has very recently been noted by HHJ Gore QC in *CBX v North West Anglia NHS Trust* [2019] 7 WLUK 57, *Gestmin* is not to be taken as laying down any general principle for the assessment of evidence. It is one of a line of distinguished judicial observations that emphasise the fallibility of human memory and the need to assess witness evidence in its proper place alongside contemporaneous documentary evidence and evidence upon which undoubted or probable reliance can be placed. Earlier statements of this kind are discussed by Lord Bingham in his well-known essay *The Judge as Juror: The Judicial Determination of Factual Issues* (from *The Business of Judging*, Oxford 2000). But a proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence. Heuristics or mental short cuts are no substitute for this essential judicial function. In particular, where a party's sworn evidence is disbelieved, the court must say why that is; it cannot simply ignore the evidence.”

202. It seemed to me that the references in contemporaneous documents to “real-time working” did not clearly indicate that it related to post-filing periods. Mr Taylor-Gooby’s evidence was clear that it did not and I prefer his evidence on this point. Also, I think it is strange that Mr Driscoll did not refer to the statements which he believes Mr Norris made when, at the meeting on 17 October 2011, HMRC claimed that notice of intention to enquire had been given at meetings and in correspondence. Indeed the first time that these statements were

attributed to Mr Norris was when Mr Driscoll filed his witness statement in December 2018. I think it is odd that Mr Driscoll's recollection of events did not emerge earlier.

203. All that said, I think it was a fair inference for CS to draw from Mr Davidson's email of 13 December 2010 that pre-filing discussions on outstanding issues would simply continue and that there was no clear implication that an enquiry would be commenced.

204. For the reasons given above, I have concluded that HMRC did not give a valid notice of enquiry under paragraph 23(1) of Schedule 1 to FA 2010. It follows, therefore, that CS's appeal must be allowed.

FACTS RELATING TO THE SUBSTANTIVE ISSUE

205. The following description of the APPA is largely drawn from a statement of facts and issues agreed between the parties and from Mr Halliday's evidence.

APPA – General Description

206. The APPA was a deferred variable award forming part of the remuneration of eligible employees (managing directors and directors) for 2009, comprising a notional cash amount, vesting in 3 equal tranches on the first, second and third anniversaries of the 21 January 2010 Grant Date (i.e. in 2011, 2012 and 2013), but subject to variation by reference to certain "metrics". That is, outstanding tranches of the notional cash amount of the award could vary either upwards (by a "Positive Adjustment Percentage" based on a "Positive Adjustment Methodology") dependent on the performance ("Return on Equity" or "RoE") of the Credit Suisse Group, or downwards (by a "Negative Adjustment Percentage" based on a "Negative Adjustment Methodology") dependent on the performance of the employee's "Business Area" as measured against the relevant "Adjustment Threshold".

APPA Design (February 2009 to October 2009)

207. In February 2009, CS set up a senior design working group (the "Compensation Design Initiative" or "CDI" team) to carry out an extensive review and redesign of its Group compensation structures.

208. One aspect of the remit of the CDI team was to align compensation more closely with the principles of best practice emerging from publications by public bodies such as the Financial Stability Board and the Committee of European Banking Supervisors and subsequently endorsed at two meetings of the G-20 in 2009. The scope and mandate of the CDI team also derived in part from the initial recommendations of the Swiss Financial Market Supervisory Authority ("FINMA") following their audit of CS's compensation approach in October/November 2008. These recommendations included introducing a bank-wide clawback, taking account of risk-adjusted performance when determining bonus pools and strengthening the role of risk management in the compensation process.

209. The focus of the CDI team was to develop compensation design alternatives to address structural elements including the measurement of performance of recipients of variable compensation over a multi-year period using "Performance Metrics", with a particular focus on quantitative and qualitative Performance Metrics and divisional versus Group performance over the multi-year performance horizon.

210. Following a series of meetings, the wider CS Compensation Committee ("CompCo"), settled on the principles and direction of the proposed new compensation programme. The proposed deferred cash variable compensation award was, from 15 April 2009, referred to as

the “Subject to Adjustment” award or “S2A”. The S2A proposal would provide the design foundations and guiding principles for what would become the APPA.

211. The S2A was designed as a compensation scheme running to calendar year end. This meant that the S2A was structured so that the initial total value of the award would be based on the performance of Business Areas in the 2009 calendar year. The S2A was designed so that, subject to adjustments (and subject to forfeiture provisions such as on resignation of the employee), one-third of the value of the award would vest in respect of each of the 2010, 2011 and 2012 calendar years. The initial total value of the award would be communicated in Q1 of 2010 and any adjustments to unvested value announced later in the 2010, 2011 and 2012 calendar years (so as to account for the performance of Business Areas for those calendar years). Subject to such adjustments, the one-third of the award to vest at the end of each calendar year (2010, 2011 and 2012) would then be paid to eligible employees within those Business Areas in April of the following calendar year.

212. Further work was undertaken by the CDI team in reviewing and honing the mechanics of the proposed deferred variable compensation award between May and September 2009.

213. In June 2009 the proposed direction and strategy of S2A (later called the APPA) was reviewed and approved by CompCo. The methodology and metrics have been set down by CompCo for each business area (subject to a discretion to alter). The Adjustment Thresholds were established; the Performance Metric was set down for each business area; the Negative Adjustment percentage was set down for each business area; the Positive Adjustment Percentage was set down (this was to be the CS group’s RoE performance). The adjustment thresholds for two out of four divisions were marked “under review”, to be finalised by CompCo in October 2009. As Mr Halliday stated in his witness statement, by June 2009 “the basic details of the APPA design were settled.” There were no material changes to the methodology agreed in June by CompCo.

214. On 10 September 2009, a design update was presented to CompCo. During the course of September 2009, the APPA label was adopted and the S2A label abandoned.

215. On 8 October 2009, CompCo approved the compensation plan design principles, structures and communication plan (which included the proposed APPA) subject to certain amendments.

216. As at 8 October 2009, the core terms of the APPA, as approved by CompCo, provided that the APPA would:

> (a) apply to all Managing Directors and Directors included in the plan (“APPA Eligible Employees”);
>
> (b) be subject to downward adjustment should a Business Area fail to achieve its annual pre-set financial target;
>
> (c) be subject to upward adjustment using CS’s RoE in the respective year as a multiplier should the pre-set financial target be achieved;
>
> (d) have a notional cash value that adjusted annually, based on the financial performance of an employee’s Business Area, as measured against a previously determined financial target; and

(e) contain financial targets for Business Areas based on each Business Area's financial contribution, with targets for Shared Services based on the financial contribution of the CS Group.

217. The presentation to CompCo on 8 October 2009 further clarified that, under the APPA, in a given performance year for a given individual:

(a) where a Business Area made a positive contribution and Group RoE was also positive, a positive adjustment would be made to the unvested portion of the APPA based on the Group RoE;

(b) where a Business Area made a negative contribution, a negative adjustment would be made to the unvested portion of the APPA regardless of whether Group RoE was positive or negative; and

(c) where a Business Area made a positive contribution but Group RoE was negative, no adjustment would be made to the unvested portion of the APPA.

218. The presentation to CompCo on 8 October 2009 also detailed proposed Adjustment Threshold figures and Negative Adjustment Percentages for each Business Area (excluding those Business Areas within Investment Banking) in the event of a negative adjustment being triggered. As regards the Business Areas within Investment Banking, Mr Dougan was given latitude to finalise the performance adjustment metrics and percentages and it appears that he did so or before 20 October 2009.

219. There were, however, adjustments to the metrics between June and October 2009. By the end of the design phase in October 2009, the APPA metrics were settled in principle but was still subject to CS's ability to adjust them. Mr Halliday described the design of the APPA as being of unprecedented complexity.

APPA Announcement Date (20 October 2009)

Press release

220. On 20 October 2009 (the "Announcement Date"), CS issued a public press release announcing significant changes to its remuneration policy. Among the changes announced was the introduction of two new deferred awards, the Scaled Incentive Share Units (SISU) (a deferred equity based award which is not part of the present appeals) and the APPA. The APPA was to be awarded to employees of Managing Director and Director level and members of the Executive Board ("APPA Eligible Employees").

221. The press release stated:

> "The changes announced today will be effective from January 1, 2010 and will apply to compensation awarded for the year 2009. The most important features of the structure are:
>
> 1….
>
> 2. The introduction of two new instruments for deferred variable compensation awarded to Managing Directors and Directors…
>
> ….
>
> APPA is a cash-based award which will have a notional value that adjusts upward annually based on Credit Suisse's RoE over three years. A mechanism will adjust the outstanding awards downwards, should the business area of the employee be loss-making."

The Appendix to the press release included the following:

> "Adjustable Performance Plan Awards
>
> Adjustable Performance Plan Awards (APPA) will have a notional cash value subject to a three-year, pro-rata vesting schedule. Awards adjust upwards on an annual basis using Credit Suisse's RoE in the respective year as a multiplier. However, should a business area be loss-making, outstanding APP awards held by employees of that business area will be adjusted downwards. The metrics within the revenue divisions will be based on each business area's financial contribution. The metrics for Shared Services, Regional Management and embedded support functions within the division will be based on the financial performance of Credit Suisse Group."

Global conference call with CEO

222. On the Announcement Date there was a global conference call by the CEO (Mr Dougan), to the CS global Director and Managing Director population to brief staff on the compensation changes, including an overview of the APPA.

CEO email to APPA Eligible Employees

223. On the Announcement Date, the CEO also sent an email to APPA Eligible Employees (as well as a separate email to all other employees) providing further information with regard to the new compensation model.

Sample APPA Term Sheet and Frequently Asked Questions

224. Between 19 and 27 October 2009, sample 'APPA Term Sheets' and 'Frequently Asked Questions' ("FAQs") documents were made available to relevant employees in respect of each of the various compensation plans on CS's intranet portal, this included versions in respect of the APPA for APPA Eligible Employees. APPA Eligible Employees were provided with the link to this webpage. Both the sample APPA Term Sheet and APPA FAQs set out the mechanics of the APPAs in high level terms (including the Business Areas, Performance Metrics and how negative and positive adjustments may be made); however, they were not Business Area specific and did not contain Adjustment Threshold figures or Positive/Negative Adjustment Percentages. Such Business Area and employee-specific information would not be provided to employees until 1 November 2010 (as detailed below: "APPA Memos (1 November 2010)"). Each of the FAQs, Term Sheet and the earlier press releases made it clear that for Managing Directors and Directors earning more than US $100,000, 50% of their variable compensation would be in the form of the APPA. CS did not share with employees of full details of the metrics at this time because of the sensitivity of the information. They were not shared with managing directors and directors and this information was confined to a very limited number of people within the bank.

225. In October and November 2009 presentations were made to eligible employees about the APPA.

Contracts of employment

226. For those CS employees who were eligible for the APPA, the standard form CS employment contract wording in respect of a discretionary bonus was as follows:

> "Your eligibility for an annual discretionary Incentive Performance Bonus and, in the event that you are awarded a bonus, the amount of that bonus shall be determined on the basis of factors determined by the Company in its

> absolute discretion. Such factors may include: the profitability of the Company and its affiliates, your division and your department; your individual performance, conduct and contribution; and the strategic needs of the Company and its affiliates.
>
> … Any Incentive Performance Bonus paid to you may at the discretion of the Company, include one or more of the following items:
>
> a) a cash payment to you, net of any applicable statutory withholdings; and/or
>
> b) a deferred cash award, or an award under the Credit Suisse Group Master Share Plan, in accordance with the terms of the relevant plan or program generally applicable to employees at your level, and subject investing, forfeiture and other terms of the applicable plan or program and any other applicable rules as amended from time to time…
>
> … To be eligible to receive discretionary Incentive Performance Bonus awards, you must still be actively employed by the Company on the payment date and you must not have, at the payment date, either given or received notice of termination of employment for any reason whatsoever. Furthermore, if at any time before the payment date, your employment terminates for any reason, or you have given or received notice of termination, you will not be entitled to any pro-rated bonus."

APPA Grant Date (21 January 2010)

227. The grant date of the APPA was 21 January 2010 (the "Grant Date"). At or around this time there were further internal communications within CS regarding the APPA and its terms.

228. On or around the Grant Date, second published versions of the APPA Term Sheet and FAQs were made available to APPA Eligible Employees on the CS intranet portal. APPA Eligible Employees were again provided with the link to the webpage. Both documents were largely identical to the first published versions circulated around Announcement Date.

229. Compensation Sheets were provided to CS employees (including APPA Eligible Employees) on 27 January 2010. Compensation Sheets were employee-specific and contained details of any salary increase for the 2010 calendar year and the amount of any discretionary variable compensation, showing both cash components and deferred components (APPA and Scaled Incentive Share Unit ("SISU") Awards). In respect of the APPA, the Compensation Sheet provided the total initial notional value of the APPA for that APPA Eligible Employee. Although the Compensation Sheets showed the notional cash amount of each employee's APPA, they did not show any of the metrics. The sheets stated:

> "The 2009 compensation referred to above may include equity and/or cash-based awards granted under certain plans or programs including… the CSG AG Master Share Plan…and shall be subject to the terms and conditions of the governing documents and award certificates associated with such plans or programs. In addition, the 2009 compensation referred to above is discretionary and is not a contractual right to payment, and until such time as the financial statements of the Credit Suisse Group (CSG) have been finalised, CSG reserves the right to amend any such compensation. There may be circumstances where all or a portion of the 2009 compensation referred to above may not be delivered, including, but not limited to, voluntary termination or violation of certain other conditions to settlement."

Publication of financial results

230. On 11 February 2010 the financial results of the CS group for 2009 were finalised. On 25 March 2010 the annual consolidated results of the CS group for 2009 were published.

APPA Memos (1 November 2010)

231. On 1 November 2010, APPA Eligible Employees were provided with 'APPA Memos' which confirmed, amongst other things, the total value of their APPA (subject to upward or downward adjustments) and the terms and conditions which applied in respect of the APPA. The payment in respect of performance in the 2010 calendar year (the "First Tranche") would not be approved (and then paid) until after the 2010 calendar year financial results (including RoE) were available (i.e. the first quarter of 2011). The APPA Memo included a Notice of Group Master Share Plan Awards, an APPA Master Certificate, an APPA Notice, a Master Share Plan and a 2010 International Supplement. Prior to 1 November 2010, APPA Eligible Employees had been informed of the total initial value of their APPA on or around the Grant Date (21 January 2010).

232. For the purpose of the APPA, the APPA Master Certificate (the "APPA Certificate") and APPA Notice are relevant. Broadly, the APPA Notice set out terms and conditions applicable to the APPA, including confirmation of the Grant Date of the awards that had been notified to employees in January 2010 and specification of the business area and other details relevant to the APPA Eligible Employee. The APPA Certificate contained the detailed terms and conditions of the awards.

233. Following the finalisation of the APPA Notices and Certificates and the circulation of the same to the APPA Eligible Employees, the only further adjustment that could be made to the figures in relation to the First Tranche of the APPA was the RoE figure.

234. It was only in March 2011 that the performance figures and RoE for the 2010 performance year had been calculated, audited and approved, and so it was not possible to finalise the First Tranche figures for APPA Eligible Employees any earlier than then. This applied to all performance years: i.e. it was only in March of the year following a performance year that those performance figures (and therefore, RoE) were finalised. The first tranche of the 2009 APPA was finalised and paid in March 2011.

235. APPA Eligible Employees from each of the nine different Business Areas received APPA Notices (within the APPA Memos distributed on 1 November 2010) which were unique to their respective Business Areas. The core mechanics of the APPA (including the Performance Metric, Adjustment Threshold, Positive Adjustment Percentage and Negative Adjustment Percentage) for the First Tranche, as provided in the APPA Notices, are summarised in respect of each Business Area at Appendix A. Mr Halliday also stated that CompCo could "theoretically" have amended the information contained in the APPA Memos at any time prior to 1 November 2010.

The Second and Third Tranches

236. The second and third tranches in respect of the APPA (i.e. the payments in respect of performance in the 2011 and 2012 calendar years) (the "Second and Third Tranches") were approved and paid in the subsequent years (in Q1 of 2012 and 2013 respectively). The metrics for the second and third tranches remained unchanged.

Mr Halliday's evidence

237. Mr Halliday said that whilst CompCo and Mr Dougan had approved the performance metrics by 20 October 2009, CS retained the discretion to change them further.

238. Mr Halliday also accepted, in examination in chief, that the definition of RoE of the CS group in the metrics changed from one which gave CS some discretion (according to drafts produced in the chargeable period) to one which contained a more precise definition after the chargeable period had ended (in a draft dated 10 May 2010, which Mr Halliday confirmed was the version eventually communicated to employees on 1November 2010).

239. Furthermore, Mr Halliday said, and I accept, that HMRC were incorrect to say, in their Skeleton Argument, that the 2010 metrics were determined by CS in June 2009. He said that although CS had determined in 2009 what the metrics were likely to be, the level of the metrics (i.e. the actual negative adjustment percentage that would apply to each division) had not then been determined. Furthermore, Mr Halliday's unchallenged evidence was that he believed that the metrics would have only been inputted into CS's IT system in 2011 after the 2010 RoE had been ascertained[10].

240. Mr Halliday, in cross-examination, agreed that CS had not exercised its discretion to alter the metrics in respect of the 2009 APPA (i.e. the award that was granted in January 2010) or, indeed, for any of the three tranches (but see paragraph 241 below)[11]. However, Mr Halliday did not accept that CompCo were determining the metrics for all three tranches in 2009 – they were determining the metrics for the first tranche, subject to their discretion, although he seemed somewhat uncertain on this point. He accepted that CompCo's general approach to multi-year performance awards was to change the metrics as little as possible on a year by year basis unless there was some good reason for doing so and that, in the event, the metrics for the second and third tranches remained unchanged. Nonetheless, Mr Halliday was not sure that CompCo would necessarily have had that general approach specifically in mind.

241. Mr Halliday also accepted in re-examination that certain changes to the metrics appeared to have been made between October 2009 and the date of communication of the APPA to employees on 1 November 2010.

242. Also in re-examination, Mr Halliday was referred to an email from Mr Watson to Mr Taylor-Gooby of 6 July 2011. In that email Mr Watson referred to a conversation he had had with Mr Halliday. The email states:

> "[Mr Halliday] has confirmed to us that the compensation design [of the APPA] was discussed at various meetings of the Credit Suisse Group Executive Board… during 2010. At meetings on 18 October 2010 and 7 December 2010, a member of the Executive Board specifically raised the point of whether Credit Suisse should change the terms of the 2009 APPA. The outcome of these discussions at the Executive Board meetings was that the more restrictive metrics in the terms of the 2010 APPA should be confined to those awards only and not reflected in amendment to the 2009 APPA."

[10] Mr Halliday disagreed with the statement at paragraph 74 of HMRC's skeleton argument that CS inputted the metrics into their IT system after they were determined in June 2009. The IT system that was constructed to calculate the positive and negative adjustments was not completed at that time.

[11] I note, however, that the definition of RoE used in the metrics was changed by CS on 29 April and 10 May 2010, i.e. outside the chargeable period.

243. Mr Halliday confirmed that this was correct.

244. Mr Halliday's evidence was that no updated APPA memos or notices were sent to employees for the second and third tranches.

SUBMISSIONS ON THE SUBSTANTIVE ISSUE – IN OUTLINE

HMRC's submissions

245. HMRC's primary case was that the whole of the APPA was chargeable to BPT under paragraph 12. Paragraph 12 brings into the charge to BPT the making of arrangements which are to be "regarded as the awarding of relevant remuneration" even where the making of those arrangements would not otherwise constitute the "awarding" of remuneration under paragraph 6.

246. Mr Nawbatt submitted that the three conditions in paragraph 12(1)(a)-(c) were satisfied.

247. As regards paragraph 12(1)(a), CS made arrangements within the chargeable period in relation to all three tranches of the APPA. The word "arrangement" was non-exhaustively defined in paragraph 49(1). Just because paragraph 49(1) included non-legally binding arrangements, it did not preclude legally binding arrangements from being "arrangements".

248. Furthermore, Mr Nawbatt argued that it was not necessary that all of the events constituting arrangements needed to be made in the chargeable period. In the present case, the arrangements constituted a series of events, including events which occurred during the chargeable period and was not limited to the making of the initial announcement of the APPA on 20 October 2009. It was not necessary that the making of arrangements could only occur at one point in time; but even if this was wrong that point in time would be the date on which employees were granted APPA's i.e. 21 January 2010.

249. In relation to paragraph 12(1)(b), the payment had to be "to or in respect of the relevant banking employee". This required some specificity in relation to the employees concerned. Therefore, general arrangements made prior to the chargeable period would not satisfy this paragraph.

250. Mr Nawbatt argued that Parliament intended BPT to tax arrangements which began, or constituted a series of events beginning, before the chargeable period. Most banks would have had pre-existing bonus scheme structures in place and Parliament cannot have intended to exclude all such schemes and the wording of paragraph 12 did not support such a contention.

251. Moreover, paragraph 12(1)(b) was satisfied because the APPA was a cash-based incentive scheme which did make provision under which money will be paid (or money's worth provided) to employees.

252. As regards the requirement in paragraph 12(1)(c) this was met because if the money paid under the APPA had been provided during the chargeable period it would have been relevant remuneration 'awarded' (paragraph 6(1)(a) or 6(1)(b)) to or in respect of an employee during the chargeable period. It was necessary to "re-run" the paragraph 6 test on the assumed fact that the remuneration had been paid in the chargeable period. On this basis, paragraph 12 would automatically deem the remuneration to have been paid during the chargeable period, satisfying paragraph 6(1)(b), even if no contractual obligation had arisen under paragraph 6(1)(a).

253. Thus, Mr Nawbatt submitted that the fact that a contractual obligation to pay all or part of the APPA arose during the chargeable period did not exclude the application of paragraph 12 – HMRC did not accept that paragraphs 6 and 12 were mutually exclusive. Moreover, Mr

Nawbatt rejected CS's argument that paragraph 6 was a "special provision" and that paragraph 12 was a "general provision".

254. Next, Mr Nawbatt contended that the first tranche of the APPA was chargeable to BPT under paragraph 6. CS accepted in its Notice of Appeal that a contractual obligation arose in relation to that tranche during the chargeable period pursuant to paragraph 6(1)(a). HMRC did not, however, accept that paragraph 6(1) did not apply by reason of paragraph 5(3)(a), as incorporated by paragraph 6(2). Mr Nawbatt emphasised the word "capable" in paragraph 5(3).

255. CS had an element of hypothetical discretion in relation to the scheme, meaning that they could theoretically have altered the agreed metrics, but HMRC considered that they would not realistically have done so and there was no genuine possibility of CS not awarding any bonuses.

256. HMRC's main submission was that even if amounts paid under the first tranche were not in fact fixed, they were capable of being fixed without the exercise of discretion by any person as late as 2009. That did not require asking whether CS could in theory have exercised their discretion to alter the scheme but, rather, whether the amounts under the first tranche were *capable* of being fixed had no person exercise their discretion in relation to the scheme.

257. Mr Nawbatt further submitted that the 2010 metrics were determined by CS in June 2009. Those metrics would have enabled the amount of the first tranche to be calculated once the 2010 RoE or deficit was known. Therefore, the amount of the first tranche of the APPA payments to each employee was *capable* of being fixed. There was no requirement from October 2009 onwards for anyone at CS to exercise their discretion in order that the first tranche of the APPA bonus amounts could be capable of being fixed. CS would not realistically (and did not) alter the metrics and thus the bonus amounts would simply have become fixed in line with the set metrics in CS's IT system.

258. Paragraph 5(3)(a) did not require the employee to be made aware that the sums in question were fixed or capable of being fixed but simply that they were so fixed or capable of being fixed.

259. Mr Nawbatt also disagreed with CS's assertion that paragraph 6(3) applied to exclude the payments from BPT. The payments were not to be paid or provided in respect of performance *only* after the end of the chargeable period under paragraph 6(3)(b) – the awards related, at least in part, to the employee's performance during the chargeable period.

260. There was no need for any apportionment under paragraph 6(3), which required that the award was paid or provided only after the end of the chargeable period.

261. In relation to the second and third tranches, Mr Halliday's witness statement indicated that the metrics for all three tranches were set and agreed prior to the grant of the APPA awards in January 2010. On that basis, at the time the eligible employees were notified of the part of their bonus reward under the APPA (i.e. 21 January 2010), it was possible for the amount to be paid or to become fixed in the absence of the exercise of discretion. The formula (based on the metrics) existed at 21 January 2010. Absent any exercise of discretion, the extant formula would apply in respect of all three tranches i.e. they were *capable* of being fixed as late as 2009 without the necessary exercise of discretion by any person thereafter. Thus, if the metrics for all three tranches were determined and set prior to the end of the chargeable period, then the second and third tranches fell within the scope of paragraph 6.

Credit Suisse's submissions

262. In summary, Mr Prosser submitted that paragraph 6(1)(a) did not apply to the first tranche of the APPA because: (1) a contractual obligation to pay the APPA (not just the first tranche) arose in the chargeable period, but (2) the amount to be paid was neither fixed nor capable of becoming fixed without the exercise of discretion by any person, and therefore (3) paragraph 6(1)(a) was dis-applied by paragraph 6 (2).

263. Alternatively, paragraph 6(1)(a) applied only to 15% of the 2009 APPA because paragraph 6(3) dis-applied paragraph 6(1)(a) in relation to the remaining 85%.

264. As regards paragraph 12, Mr Prosser submitted that it did not apply to the APPA either (1) because the arrangements were made before the beginning of the chargeable period, or (2) because paragraph 12 could not apply to arrangements such as the APPA which were contractual arrangements to which paragraph 6(1)(a) would apply but for paragraphs 6(2) or 6(3).

265. In more detail, as regards paragraph 6(1)(a), Mr Prosser argued that a contractual obligation to pay each eligible employee arose during the chargeable period. The APPA was granted to eligible employees, eligible employees were provided with communication sheets which informed them the notional cash amount of their APPA and the financial results of the Credit Suisse Group for 2009 were finalised on 11 February 2010 and published on 25 March 2010.

266. By 25 March 2010 at the latest, CS was under a contractual obligation to eligible employees to pay an APPA of an amount based on the stated notional cash amount subject to upwards or downwards adjustment in accordance with metrics to be specified by CS in its discretion. Although the Compensation Sheets stated "the 2009 compensation referred to above is discretionary and is not a contractual right to payment", Mr Prosser submitted that the statement referred to the amount of the APPA, not whether the APPA was payable at all. CS had a discretion only in relation to the metrics. The notional amount was not a "contractual right" only insofar as the employee did not have a contractual right to be paid that amount. Although CS did not inform employees of the metrics until 1 November 2010 (when they were informed of the metrics in relation to the first tranche) CS nonetheless were under a contractual obligation to pay the APPA before that time – the discretion related only to the metrics.

267. Therefore, paragraph 6(1)(a) applied to the APPA, subject to being dis-applied by paragraph 6(2).

268. In relation to paragraph 6(2), Mr Prosser submitted that paragraph 6(1)(a) was dis-applied by paragraph 6(2), because the amount paid was not fixed or capable of becoming fixed without the exercise of discretion by any person and, in particular, without CS exercising its discretion by communicating the metrics to the employees (which only occurred on 1 November 2010 i.e. after the end of the chargeable period).

269. It did not matter, according to Mr Prosser, that CS decided in principle on the metrics for the first tranche of the APPA before 1 November 2010. This was because the question whether the amount "to be paid" i.e. which CS was contractually obliged to pay, was fixed or capable of becoming fixed, and therefore the reference to the "exercise of discretion" must be to an exercise of discretion having contractual effect (i.e. in this case on, communication).

270. As regards paragraph 6(3), Mr Prosser submitted that 85% of the value of the APPA fell within paragraph 6(3)(a). The APPA awards were dependent on the performance of the CS

Group and the relevant employee's business area for the period 1 January 2010 to 31 December 2012. Only a small proportion of this period fell within the BPT chargeable period. Therefore, Mr Prosser submitted that a time apportionment approach was appropriate in order to avoid absurdity (*Pollen Estate Trustee Co Ltd v HMRC* [2013] 1 WLR 3785).

271. In relation to paragraph 12, Mr Prosser's primary submission was that it had no application if arrangements which "make provision" as mentioned in paragraph 12(1)(b) have already been made before the beginning of the chargeable period

272. First, as a matter of ordinary language it was not possible for arrangements to be made during the chargeable period if arrangements made before the beginning of the chargeable period have already made such provision.

273. Secondly, the chargeable period began when BPT was announced and one of the objects of BPT was to deter banks from providing excessive bonuses. That objective could not be achieved if arrangements to provide those bonuses had already been made before the beginning of the period.

274. In this context, Mr Prosser argued that Parliament could not have intended to enact legislation which was in substance retrospective i.e. impose tax on conduct taking place before BPT was announced. Mr Prosser referred to the judgment of Falk J in *Credit Suisse Securities (Europe) Limited v HMRC* [2019] EWHC 1922 (Ch) at [15]-[16] in which it was explained that the reason for the BPT start date being no earlier than 9 December was because of concerns about retrospective legislation and fairness considerations and because the objective was to encourage a change in behaviour.

275. In the present case, the arrangements which made provision for the APPA had, in Mr Prosser's submission, already been made before the beginning of the chargeable period. The APPA had been designed, announced to the public and to eligible employees, the Frequently Asked Questions and Term Sheets had been made available and presentations made to the eligible employees.

276. Secondly, that the steps which were taken during the chargeable period, consisting of providing eligible employees with Communication Sheets did not themselves "make provision" for the payment of the APPA. Those steps simply involve the implementation of arrangements made before the beginning of the chargeable period.

277. Mr Prosser's secondary argument in relation to paragraph 12 was that the provision did not apply to arrangements made during the chargeable period which were contractual arrangements to which paragraph 6(1)(a) would apply but for paragraphs 6(2) or 6(3).

278. It was necessary, Mr Prosser said, to understand paragraph 12 in the context of Schedule 1 as a whole. Paragraph 6(1) provided that relevant remuneration was "awarded" during the chargeable period if a contractual obligation to pay or provide it arose during the period. This was subject to paragraph 6(2) (which dis-applied paragraph 6(1) where the contractual obligation is subject to a discretion which prevents the amount of the remuneration being fixed or capable of becoming fixed) and paragraph 6(3) (which dis-applied paragraph 6(1) where the remuneration was required to be paid or provided at intervals, for performance only for times after the end of the chargeable period, and there was no main purpose of avoiding BPT). In other words, no charge to BPT arose by reason of the fact that a contractual obligation to pay relevant remuneration arose in the chargeable period.

279. Therefore, Mr Prosser submitted that paragraph 12 should not be construed as applying to contractual arrangements made during the chargeable period. Where paragraph 6(1) applied, there was no need for paragraph 12 to apply as well. Furthermore, where paragraph 6(1) was dis-applied by paragraph 6(2) and (3), Parliament could not be supposed to have intended to play "cat and mouse" with the taxpayer by then nullifying the effect of the paragraph 6(2) and (3) this application by charging BPT under paragraph 12 in any event.

280. There was a general principle of construction that special provisions override general ones and, therefore, paragraph 12 should be construed as not applying to arrangements to which paragraph 6 (1) applied, or would apply but for paragraph 6(2) and (3).

DISCUSSION OF THE SUBSTANTIVE ISSUE

281. In the light of my conclusion on the procedural issue, it is not strictly necessary for me to reach a conclusion on the substantive issue. Nonetheless, as the matter was fully argued, I will deal with this point, albeit more briefly than might otherwise have been appropriate if the issue were to be decisive of these appeals.

282. Paragraph 1(2) charges BPT on:

> "the aggregate of the amounts of chargeable relevant remuneration *awarded during the chargeable period* to or in respect of relevant banking employees of a taxable company by reason of their employment as relevant banking employees." (Emphasis added)

283. The issue between the parties is whether the remuneration awarded pursuant to the APPA was "awarded during the chargeable period". As already noted, "the chargeable period" is defined by paragraph 8 to mean the period beginning at 12:30 p.m. on 9 December 2009 and ending with 5 April 2010. Remuneration, for these purposes is chargeable only if and to the extent that its amount exceeds £25,000 (paragraph 1(3)). Again, there is no dispute between the parties that the remuneration in question is "chargeable" for these purposes.

284. To determine whether relevant remuneration is "awarded during the chargeable period" it is necessary to consider the provisions of paragraph 6(1), when read with paragraph (5)(3)(a), and paragraph 6(2).

285. Before considering these provisions, I should note paragraph 5(1)(b) which defines as "excluded remuneration" (i.e. remuneration that is not relevant remuneration: paragraph 4(3)) as:

> "anything in the case of which a contractual obligation to pay or provide it to or in respect of the employee concerned arose before the beginning of the chargeable period."

286. This makes it clear that BPT was not intended to apply to pre-existing contractual entitlements.

287. Turning now to paragraph 6, paragraph 6(1) and (2) provide as follows:

> "(1) Relevant remuneration is "awarded" during the chargeable period if—
>
> (a) *a contractual obligation to pay or provide it arises during the chargeable period,* or
>
> (b) the relevant remuneration is paid or provided during the chargeable period without any such obligation having arisen during the chargeable period,
>
> but subject to sub-paragraph (3).

> (2) *Sub-paragraph (3)(a) of paragraph 5 applies for the purposes of sub-paragraph (1) as for the purposes of sub-paragraph (1)(b) of that paragraph*." (Emphasis added)

288. Paragraph 6(1)(b) is not, as I understood it, at issue in the present dispute because, payments under the APPA were not made or provided during the chargeable period. Instead, the dispute is focused upon paragraph 6(1)(a) and its application.

289. As directed by paragraph 6(2), it is necessary next to consider the terms of paragraph 5(3)(a) which provides:

> "(3) For the purposes of sub- paragraph (1) (b) a contractual obligation to pay or provide something to or in respect of the employee does not arise until –
>
> (a) *the amount to be paid or provided is fixed or is capable of becoming fixed without the exercise of discretion by any person*, or
>
> (b) the total amount of things to be paid or provided to or in respect of a number of employees including the employee is fixed or is capable of becoming fixed without the exercise of discretion by any person."

290. In my view, the retention of a residual discretion by CS to vary the metrics up to the 1 November 2010 means that the amount to be paid or provided was not fixed nor was it capable of becoming fixed without the exercise of discretion by CS.

291. Reading paragraph 6(1)(a) and paragraph 5(3)(a) together, I have to focus, first, on *the amount* to be paid or provided pursuant to *a contractual obligation* which has arisen during the chargeable period. Secondly, I have to decide whether *that* amount *is fixed or is capable of becoming fixed without the exercise of discretion of any person*.

292. I reject Mr Nawbatt's submissions to the effect that because CS had a theoretical ability to alter the metrics but could not realistically have done so. It seems to me that, although it was unlikely that CS would *substantially* alter the metrics, they did have the right (i.e. the discretion) to do so. Moreover, I note that CS made changes to the RoE definition in April and May 2010. Until the definitions of the metrics were finalised by CS, the final amount of payments under the APPA to individual employees could not be calculated.

293. It seems to me that, in the context of identifying the amount of a contractual entitlement (paragraph 6(1)(a)), paragraph 5(3)(a) is seeking to establish whether the amount to be paid to an employee has become finalised or is capable of being finalised and is no longer the subject of the employing bank's discretion. The words "or is capable of becoming fixed", upon which Mr Nawbatt place so much reliance, envisages a situation in which the amount may vary by reference to unchangeable objective tests (e.g. the performance of the individual's business area or of the bank as a whole) but may not be varied by the exercise of the bank's discretion. In my judgment, the bank retained a discretion to vary the amount of each individual's contractual entitlement (by virtue of its ability to change the metrics) until 1 November 2010, on which date employees were provided with APPA Memos.

294. Accordingly, I have concluded that paragraph 6(1)(a) is dis-applied by paragraph 6(2) and paragraph 5(3)(a).

295. In the light of this conclusion, I do not think it is necessary to deal with CS's argument that an apportionment should be made to give effect to paragraph 6(3). I would note, however, that I see no justification in the statutory language for such an apportionment.

296. Finally, I must now consider the application of paragraph 12. Although it includes contractual arrangements, its scope is wider and non-contractual arrangements also fall within its provisions. Paragraph 49 provides:

> ""arrangements" includes any agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable)"

297. The application of paragraph 12 is subject to an important qualification. Paragraph 12 (1)(a) requires that the "arrangements are made during the chargeable period". I think it is important to appreciate that this is distinctive wording in relation to the taxation of companies. Paragraph 12 addresses the question whether arrangements "are made" during the chargeable period. In corporate tax legislation there are many provisions dealing with "arrangements". In contrast to the wording used in paragraph 12, a very large number of provisions in, for example, the Corporation Tax Act 2010 ("CTA") refer to arrangements that are "in place" or "in existence" in a particular period.[12] These provisions make it clear that arrangements made before the period in question are caught by the provisions if they continue in existence or are in place during the relevant period. Paragraph 12 (1)(a) is quite different, however, and in my view looks solely at arrangements made during the chargeable period and not at pre-existing arrangements.

298. I therefore reject Mr Nawbatt's general submission that the expression "arrangements made during the chargeable period" can be stretched to extend to pre-existing arrangements which were in existence before the start of the chargeable period. Mr Nawbatt's argument was that there was nothing in the legislation to require that all of the events constituting arrangements needed to be made in the chargeable period. Had the wording of paragraph 12(1)(a) referred to "arrangements in existence" or "arrangements in place" I think the matter would be different. Parliament, however, deliberately used the expression "arrangements are made during the chargeable period." This, therefore, seems to exclude pre-existing arrangements from the scope of paragraph 12. I agree with Mr Prosser's analysis that the ordinary meaning of those words suggests that the arrangements have to be made, in the sense of concluded or finalised, in the chargeable period.

299. However, I agree with Mr Nawbatt's alternative submission that the provisions of paragraph 12(1)(a)-(c) focus on the individual employee. On this approach, "arrangements" were entered into between CS and the individual employees during the chargeable period i.e. on 27 January 2010 when employees, a few days after the Grant Date, were provided with Compensation Sheets, which were employee-specific. It seems to me that on that date arrangements were made between CS and the individual employee within the meaning of paragraph 12(1).

300. I accept that it may seem to be a paradox, as Mr Prosser pointed out, that the provisions of the APPA should fall outside paragraph 6 by virtue of the specific exemption in paragraph 5(3)(a) yet still fall within paragraph 12. Nonetheless, paragraph 12 is plainly intended to be widely construed and I see no reason artificially to constrict its meaning. Moreover, whilst paragraph 6 deals specifically with contractual arrangements, paragraph 12 comprehends non-contractual arrangements and I do not think that on 27 January 2010 a contractual obligation

[12] See for example, the following provisions of the CTA as originally enacted: "arrangements are in place" section 53(1)(d), "no arrangements must be in existence" section 81(1)(b) (see also section 85 (1) (b)-(c)), "arrangements… are in place" section 154(2)(b), and section 155(2)(b), see also, sections 171, 173, 174, 958, 960, 1013, 1047(4). There are many further relevant provisions that have been added to the CTA since its enactment.

on the part of CS to pay specific amounts to its employees under the APPA existed. That contractual obligation crystallised in either in March or November 2010.

301. Accordingly, had it been necessary for me to do so, I would have held that the APPA was chargeable to BPT under paragraph 12.

CONCLUSION

302. I have decided the procedural issue in favour of the CS and, accordingly, I allow their appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 11 FEBRUARY 2020

Appendix A:
APPA Notices for the First Tranche –
Summary of core mechanics for the 2010 performance year

Business Area	**Investment Banking - IB Equities**
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	25%

Business Area	**Investment Banking - Fixed Income**
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	25%

Business Area	Investment Banking – Investment Banking Department
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	5% (Divisional Results)

Business Area	Private Banking – Corporate and Institutional Banking
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	14.5%

Business Area	Alternative Investments
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses) before investment-related losses and investment-related gains, as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	60%

Business Area	Asset Management - Traditional Asset Management
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	14%

Business Area	Private Banking – Neue Aagauer Bank
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	14.5%

Business Area	Private Banking – Wealth Management
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG

Negative Adjustment Percentage	14.5%

Business Area	CSG (for Shared Services)
Performance Metric	The Business Area's pre-tax, pre-discretionary variable incentive award contribution (including allocated expenses), as determined in accordance with CSG's accounting policies.
Adjustment Threshold	0
Positive Adjustment Percentage	RoE of CSG
Negative Adjustment Percentage	Determined based on the Deficit. Any Deficit between CHF 0 and CHF 10,000,000,000 will be interpolated to determine a Negative Adjustment Percentage ranging from 0% to a maximum of 50% consistent with the table below. In no event will a Negative Adjustment Percentage exceed 50%.

Deficit (in CHF)	**Negative Adjustment Percentage**
Greater than 10,000,000,000	50%
8,000,000,001-10,000,000,000	30% - 40%
4,000,000,001-8,000,000,000	20% - 30%
2,000,000,001-4,000,000,000	10% - 20%
1,000,000,001-2,000,000,000	5% - 10%
0-1,000,000,000	0% - 5%